

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

<i>Student,</i> ¹)	Case No.: 2019-0306
through <i>Parent,</i>)	
<i>Petitioner,</i>)	Date Issued: 3/17/20
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (Room): 3/4/20 (423) &
(“DCPS”),)	3/5/20 (423)
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student's Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") due to lack of appropriate Individualized Education Programs ("IEPs") to address behavior and academic needs, lack of IEP implementation, and failure to provide appropriate placement. DCPS responded that the IEPs and placement were reasonable and properly implemented, so there was no denial of FAPE.

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 12/23/19, the case was assigned to the undersigned on 12/24/19. On 1/6/20, Respondent filed a response and did not challenge jurisdiction apart from objecting to any claims falling outside the statute of

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

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limitations. The resolution meeting occurred on 1/6/20, but neither resolved the case nor shortened the 30-day resolution period, which ended on 1/22/20. A final decision in this matter must be reached no later than 45 days following the end of the resolution period as extended by a 10-day continuance, which requires a Hearing Officer Determination (“HOD”) by 3/17/20.

Following the prehearing conference on 2/12/20 and issuance of the Prehearing Order that same day, the due process hearing took place on 3/4/20 and 3/5/20 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present in person for the entire hearing.

Petitioner’s Disclosures, submitted on 2/25/20, contained documents P1 through P63, which were admitted into evidence without objection. Respondent submitted Disclosures and Supplemental Disclosures on 2/26/20, along with an additional IEP at the hearing to which Petitioner’s counsel did not object, submitting in total documents R1 through R40, which were all admitted into evidence without objection.

Petitioner’s counsel presented 5 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. Parent
2. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology)
3. *Treating Psychologist*
4. *Director* of DCPS Student Support Services
5. *Educational Advocate* (qualified without objection as an expert in Special Education and IEP Programming)

Respondent’s counsel presented 4 witnesses in Respondent’s case (*see* Appendix A):

1. *Case Manager* and LEA Representative at Prior Public School (qualified without objection as an expert in Special Education, Specifically IEP Development and Placement)
2. *School Social Worker* at Public School (qualified without objection as an expert in School Social Work)
3. *LEA Representative* at Public School (qualified without objection as an expert in Special Education, Specifically in Specialized Instruction)
4. *HHIP Coordinator* (qualified without objection as an expert in Home/Hospital Instruction Program (“HHIP”))

Petitioner’s counsel recalled Parent as the sole rebuttal witnesses.

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

Issue 1: Whether DCPS denied Student a FAPE by failing to develop or provide an appropriate IEP and/or placement and/or location of services for 2017/18² to the present due to severe behavioral and academic needs, as Student needed additional specialized instruction, a more restrictive environment, a change in disability classification to add learning disability, modification of goals, and much more Behavioral Support Services (“BSS”), and now requires placement in a nonpublic, therapeutic day school. (*Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*)

Issue 2: Whether DCPS denied Student a FAPE by failing to implement Student’s IEP (a) from 2018 to present, where Student did not receive all required BSS, missing 960 minutes during 2018 and over 480 minutes in 2019/20, and (b) when Student could not attend school during 2019/20 due to rapid decline in social-emotional functioning, but has not been provided any schoolwork or instruction. (*Petitioner has the burden of persuasion on this issue.*)

Issue 3: Whether DCPS denied Student a FAPE by failing to comprehensively evaluate when Student regressed psychologically in 2019 and Parent requested evaluations; Student needed a Comprehensive Psychological Evaluation and a new Functional Behavioral Assessment (“FBA”) followed by a Behavior Intervention Plan (“BIP”). (*Petitioner has the burden of persuasion on this issue.*)

Issue 4: Whether DCPS denied Student a FAPE by failing to adequately address behavioral concerns when it put an inappropriate BIP in place in December 2018 and failed to revise the plan despite academic and behavioral failures and attendance problems. (*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. DCPS shall develop an appropriate IEP for Student, including (a) placing Student in a nonpublic therapeutic day school, (b) at least 20 hours/week of specialized instruction outside general education, and (c) at least 240 minutes/month of BSS.
3. DCPS shall authorize Independent Educational Evaluations (“IEEs”) for (a) an FBA, and (b) a Comprehensive Psychological Evaluation.
4. DCPS shall provide or fund compensatory education for any denial of FAPE.³

² All dates in the format “2017/18” refer to school years.

³ 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

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5. Any other just and reasonable relief.

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁴ are as follows:

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is Age, Gender and repeating Grade at Public School.⁶ Student is a gregarious young person with a history of academic disengagement, emotional dysregulation and defiance.⁷ Student is small and often taken for being years younger.⁸ STs has refused to go to school at all in 2019/20.⁹ In 27 years as a social worker, School Social Worker has seen only one other comparable case of school refusal.¹⁰

2. Student is anxious and afraid to go outside due to fear of getting shot.¹¹ Student had a problem with another student late in 2018/19 and was confronted by the other student's father, which shook Student.¹² Student has suffered a range of traumas, including sister being shot while in high school, a cousin being shot, and a great deal of violence, including shootings, in Student's neighborhood; Parent's car was "shot up" on 11/26/19.¹³ Student was hit by a car and lost personal belongings in a flood in the fall of 2018.¹⁴ Student had problems with certain schools due to the neighborhoods in which they were located and the

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 at the prehearing conference to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE was found.

⁴ 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.

⁵ Parent.

⁶ Parent; School Social Worker.

⁷ P25-5; P8-11.

⁸ Parent; P23-1 (doctor estimated 55" tall and 90 pounds).

⁹ Parent; Treating Psychologist (Student is not able to go into school).

¹⁰ School Social Worker.

¹¹ Parent; HHIP Coordinator.

¹² Parent.

¹³ Parent ("My neighborhood is a battlefield"); P51-1; R2-4 (frequent shootouts).

¹⁴ P25-4.

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potential risks to Student.¹⁵ After the first couple of days, Student didn't attend summer school in 2019 for fear of being attacked after witnessing a fight at the Metro and perceiving that another student was following Student.¹⁶

3. IEPs. Student was first identified for special education services in May 2016 when found eligible as a student with an Emotional Disturbance ("ED").¹⁷ All of the IEPs at issue reflect Student's disability classification of Emotional Disturbance.¹⁸ Student's 9/18/17 IEP developed at Prior Public Charter School when Student was in Grade-1 provided for 5 hours/week of specialized instruction inside general education and 3 hours/week of specialized instruction outside general education, along with 360 minutes/month of BSS.¹⁹

4. Student's 3/6/18 IEP, developed at Prior Public School after Student transferred there in December 2017 and continued in Grade-1, provided for 5 hours/week of specialized instruction inside general education (divided between reading, written instruction and math) and 3 hours/week of specialized instruction outside general education, along with a reduction in BSS from 360 to 60 minutes/month.²⁰ Student's socio-emotional goals were reduced from 8 to 2 in the 3/6/18 IEP.²¹ Case Manager testified that the goals in the 3/6/18 IEP were similar to the 2017 IEP and were appropriate for Student based on the present levels of performance ("PLOPs").²²

5. Student's 1/30/19 IEP provided for a total of 10 hours/week of specialized instruction outside general education (divided between reading, written instruction and math), along with an increase in BSS from 60 to 120 minutes/month.²³ The 1/30/19 IEP goals for math, reading and written expression were appropriate based on the PLOPs and diagnostics of Student.²⁴

6. Student's 1/6/20 IEP, developed at Public School after this due process complaint was filed, provided a total of 13 hours/week of specialized instruction outside general education (divided between reading, written instruction, math, and unspecified specialized instruction), along with 120 minutes/month of BSS.²⁵

7. Evaluations. A 12/13/18 psychological triennial reevaluation was conducted to see if Student continued to meet the eligibility criteria for ED; the reevaluation did not include

¹⁵ P49-1; P51-1.

¹⁶ P51-1.

¹⁷ P22-1.

¹⁸ P4-1; P5-1; P6-1; P7-1; P8-1.

¹⁹ P4-10.

²⁰ P5-10; Parent.

²¹ P4-7,8; P5-9; Educational Advocate.

²² Case Manager.

²³ P6-12.

²⁴ Case Manager.

²⁵ P8-13.

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socio-emotional testing of Student, which had not been conducted since 2016.²⁶ The 12/13/18 reevaluation needed socio-emotional testing to determine eligibility for ED.²⁷ The reevaluation noted that a BIP was being developed due to escalation of Student's behavioral difficulties.²⁸ Cognitively, Student's Full Scale IQ ("FSIQ") was 83, in the Low Average range, according to a Wechsler Intelligence Scale for Children – Fifth Edition ("WISC-V") assessment in 2016; the reevaluation needed but did not include an update.²⁹

8. The 12/13/18 psychological reevaluation contained inaccuracies, with a chart of Woodcock-Johnson IV ("WJ-IV") results showing incorrect percentile ranks (for instance, the last raw score of 81 was reported as the 13th percentile, while the raw score of 81 right above it was reported as the 91st percentile); the report also included the name of a different student multiple times in 2 different areas.³⁰

9. On 7/22/19, Petitioner's counsel emailed Public School that she believed Student needed a psychological reevaluation, although stating that she did not yet have access to all records.³¹ On 12/20/19, DCPS denied an IEE request for a comprehensive psychological evaluation.³² Educational Advocate testified about the need for a comprehensive psychological evaluation, in part to consider other disability classifications, such as specific learning disability or other health impairment.³³

10. FBA/BIPs. Student's social worker completed an FBA-II on 11/14/18 noting academic disengagement and disruptive behavior having a negative impact on academic performance, but not school refusal.³⁴ Student's noncompliant behavior could occur during 80-90% of class time.³⁵ School Social Worker noted that Student disengaged in 2018.³⁶ Student did not respond well to 1:1 support, considering it a stigma in front of peers; Student was noted as currently at risk for academic failure on 11/14/18.³⁷ A new FBA was requested on 9/27/19; to conduct an FBA a student needs to have been in school for 30 days to collect data and give teachers time to know the student, otherwise there is no data on needs and triggers.³⁸

²⁶ P22; P22-1; P54-3 (no socio-emotional testing since 2016); Case Manager; Clinical Psychologist.

²⁷ P22-1; Clinical Psychologist.

²⁸ P22-9,14.

²⁹ Clinical Psychologist; P22-3,16.

³⁰ P22-4,12,18.

³¹ P43-1.

³² P53-1.

³³ Educational Advocate.

³⁴ P25-1; R12-2.

³⁵ P25-2.

³⁶ R2-3.

³⁷ P25-1.

³⁸ School Social Worker.

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11. A BIP was developed on 12/2/18 and noted that Student was consistently unavailable for instruction due to lack of motivation and resistance to receiving assistance.³⁹ The BIP was not effective as Student's unexcused absences greatly increased.⁴⁰ On 2/15/19, Parent's prior counsel noted that Student was really struggling with school refusal/avoidance, so the BIP should be updated; on 2/22/19, Case Manager proposed going over the BIP (or revised BIP) in March 2019.⁴¹ The 1/6/20 IEP acknowledged that the 2018 BIP indicated that Student was regularly unavailable for instruction while at Prior Public School since the beginning of 2018; Student's academic disengagement deteriorated even further into school refusal.⁴² A 1/6/20 BIP focused on school refusal.⁴³

12. Placement/Location of Services. Based on Student's longstanding behavioral and emotional difficulties, a self-contained environment would have been better for Student; a BES program would have been the appropriate setting for Student earlier, but not now.⁴⁴ Student's IEP team should have met to determine appropriate placement when Student was not accessing the curriculum and was regressing.⁴⁵

13. DCPS will transfer children who were victims of crimes to a different school, but Student has not been shown to be a victim and Student's safety concerns occurred in the community, not at school.⁴⁶

14. From this point, Student should be evaluated to assess emotional functioning to inform recommendations and offer necessary support so that Student does not deteriorate further.⁴⁷ Someone needs to sit with Student to reassess and get an understanding of what is going on with Student.⁴⁸

15. Student needs interventions to assist in taking small steps to reintegrate into school based on Student's emotional functions.⁴⁹ Treating Psychologist is concerned about Student's level of anxiety; Student is not amenable to treatment now but will continue to meet weekly with Treating Psychologist.⁵⁰ Student is not currently taking medication but needs medication management for anxiety symptoms and to allow daily life.⁵¹

³⁹ P26-1.

⁴⁰ Educational Advocate.

⁴¹ P40-2,3.

⁴² P8-11.

⁴³ P30-1.

⁴⁴ Clinical Psychologist; Educational Advocate.

⁴⁵ Educational Advocate.

⁴⁶ Director.

⁴⁷ Clinical Psychologist.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Treating Psychologist.

⁵¹ Treating Psychologist; Parent.

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16. Academics. The PLOPs in Student's 9/18/17 IEP stated that while at Prior Public Charter School in Grade-1, Student was at the 23rd percentile in math on the NWEA MAP assessment; Student was reportedly functioning on grade level with a current grade of "A-" in math, despite struggles.⁵² The reading PLOPs in the 9/18/17 IEP indicated that Student had declined on the NWEA MAP assessment and was 2-3 years below grade level.⁵³

17. The PLOPs in Student's 3/6/18 IEP indicated that based on the Middle of Year ("MOY") iReady assessment Student was 5 grades behind in math, but was on grade level in math calculation.⁵⁴ The reading PLOPs in the 3/6/18 IEP indicated that Student was up to 2 years below grade level in reading, while in written expression Student was at the below basic level, significantly below grade level, with a "strong resistance to writing tasks."⁵⁵

18. Student's 3/6/18 IEP noted that Student's ED "expresses itself in a lack of motivation to do academic work" and the work turned in "may not reflect [Student's] actual knowledge and skills."⁵⁶ Student had a tendency to shut down and stop communicating when asked to do something Student did not want to do.⁵⁷

19. Student's 1/30/19 IEP noted that Student refused to complete the Beginning of Year ("BOY") online math assessment; a December 2018 WJ-IV assessment indicated a broad math score of 88, which was in the Low range.⁵⁸ Student's 2017/18 PARCC results in math were level 1.⁵⁹ According to PARCC in April 2018, Student scored level 1 in reading; Student increased from a lexile level of 50 on 8/22/18 to 295 on 1/8/19; WJ-IV scores for broad reading were in the Low Average range.⁶⁰ Student's written expression PLOPs indicated that Student could write simple sentences but "has some struggle" with compound and complex sentences; written work production was a concern in all classes.⁶¹

20. Student's iReady in math on 2/5/19 and 5/31/19 indicated that Student was 4 years below grade in math and made no progress between MOY and End of Year ("EOY") diagnostics.⁶² Student's SRI lexile level on 1/8/19 indicated that Student was reading 7 years below grade level.⁶³ Student's SRI lexile level on 5/30/19 indicated that Student was reading 6 years below grade level.⁶⁴

⁵² P4-3.

⁵³ P4-5.

⁵⁴ P5-3.

⁵⁵ P5-5,6,7.

⁵⁶ P5-3,5; P6-4,7.

⁵⁷ *Id.*

⁵⁸ P6-3.

⁵⁹ P22-1.

⁶⁰ P6-6; P22-1.

⁶¹ P6-8,9.

⁶² R27-1.

⁶³ P35-4.

⁶⁴ P32-4; P31-4.

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21. Case Manager testified that Student's capabilities were much higher than testing suggested and that Student can access grade level subjects with supports.⁶⁵

22. Grades. For 2017/18, Student's term 2 grades included 4 "Fs" out of 8 classes on the report card.⁶⁶ Student's final grades in 2017/18 were: 1 "B-" in Health/PE; 5 "Cs" or "C-s"; 1 "D"; and 3 "Fs."⁶⁷

23. For 2018/19, Student's report card for term 1 included 6 "Fs" out of 8 classes; term 2 included 3 "Fs" out of 8 classes; term 3 included 6 "Fs" out of 8 classes; and term 4 included 4 "Fs" out of 8 classes.⁶⁸

24. Behavior. Student's 3/6/18 IEP indicated that Student had "very good rapport" with the Prior Public School social worker who completed the relevant PLOPs but got Student's name (and possibly Strengths and Difficulties Questionnaire ("SDQ") data) wrong 4 times in 7 lines of text.⁶⁹ Student was "frequently" disengaged during instruction in the classroom; when shut down Student was unavailable for instruction; Student had difficulty staying on task in class, completing assignments, and turning in work; Student was "at risk for academic failure."⁷⁰

25. A 10/26/18 SDQ indicated that Student was at "high risk" for a behavioral disorder.⁷¹ The 12/13/18 psychological reevaluation noted from teacher interviews that Student "routinely" demonstrated difficulty regulating emotions and behavior, as Student was aggressive towards peers and defiant toward adults; one teacher's "biggest concern" was the escalation of defiant, disrespectful and compulsive behaviors observed in the classroom that had a negative impact on academic progress.⁷² During an observation, Student ignored teacher instructions to the point that a security guard had to be called for Student to go to the proper classroom.⁷³

26. By the 1/30/19 IEP, Student was reported to be "non-responsive" to write-ups in the educators handbook and to home contacts; Student was given excessive reminders and prompts to stay on task and completed work less than 20% of the time.⁷⁴ Student's behaviors interfered with Student's ability to progress in the general education curriculum.⁷⁵ Student had not had any out-of-school suspensions in 2018/19 as of 1/30/19.⁷⁶ In the last

⁶⁵ Case Manager.

⁶⁶ P31-1,2.

⁶⁷ P31-1,2,3.

⁶⁸ P32-1,2,3; P35-1,2,3; P36-1,2,3.

⁶⁹ P5-8; Case Manager.

⁷⁰ P5-9; P6-10,11.

⁷¹ P6-10; P25-3.

⁷² P22-8.

⁷³ P22-10.

⁷⁴ P6-3.

⁷⁵ P5-3; P6-4.

⁷⁶ P6-10; P25-4.

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half of April 2019, the Assistant Principal at Prior Public School had to escort Student to math support group, as Student was engaging in playful and reckless behavior; Student continued to refuse to report to math group in May 2019.⁷⁷ Student's negative behaviors steadily increased while at DCPS.⁷⁸

27. Attendance. In 2017/18, Student was absent 25 days, of which 21 were unexcused.⁷⁹

28. A 12/12/18 Student Support Plan noted that Student had not completed 75% of assignments and was disengaged from the process of finding solutions.⁸⁰ A 12/12/18 Student Attendance Support Plan noted that Student had 18 absences, of which 15 were unexcused, and 19 tardies.⁸¹ Student's team considered whether transportation was needed to assist Student's attendance, despite Student living just a block from school.⁸² Student was excused from the 12/12/18 meeting; a teacher attempted to engage Student 1:1, but Student refused.⁸³

29. By the 1/30/19 IEP, Student had 24 unexcused absences and 20 unexcused tardies in 2018/19.⁸⁴ By 4/11/19, Student had 65 absences, of which 58 were unexcused.⁸⁵ By the end of 2018/19, Student had been absent 76 days of which 66 days were unexcused, including 12 days absent (all unexcused) in January, 9 days (unexcused) in February, and 19 days (unexcused) in March; Student was tardy on 31 additional days.⁸⁶ DCPS stated in the 1/6/20 IEP that Student attended school "regularly" in 2018/19 and only had minor problems with tardiness.⁸⁷

30. Student persistently refused to attend school in 2019/20 due to not feeling safe in newly-assigned Public School, despite apparently not experiencing bullying, threats, or intimidation at school; Student never attended Public School.⁸⁸ Student was frustrated and angry without being able to state the cause.⁸⁹

31. All efforts to get Student to attend Public School were unsuccessful; when Student first reported to school, Student had to be coaxed to go inside the building, but still refused to attend any classes, despite Parent's willingness to sit with Student.⁹⁰ On several

⁷⁷ P41-1; P42-1.

⁷⁸ P54-3.

⁷⁹ R32-1.

⁸⁰ P27-1; R12-4 (Student Support Plan discussed at 1/30/19 IEP team meeting).

⁸¹ P28-1.

⁸² P28-3.

⁸³ P28-5.

⁸⁴ P6-3,10; R13-2 (absent 26 of an estimated 90 days enrolled).

⁸⁵ P35-1.

⁸⁶ R26-2,3; R25-1.

⁸⁷ P8-10.

⁸⁸ *Id.*

⁸⁹ P23-1 (12/27/19 Child/Youth Clinical Diagnostic).

⁹⁰ P8-10.

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occasions Student was accompanied by Parent to Public School but refused to leave the lobby area and unwilling to go to any classes.⁹¹ Many other students in Public School, which is an accelerated program, were older and bigger than Student; Public School students are typically “over age and under credit.”⁹²

32. Petitioner’s counsel emailed Public School on 9/3/19 about Student feeling unsafe at Public School and Parent conveyed updates to School Social Worker; Petitioner’s counsel emailed Public School on 9/13/19 about not having any response from Public School, as Student’s fears were escalating school avoidance; Student’s outside counseling was to begin the week of 9/16/19.⁹³ LEA Representative responded on 9/13/19, explaining that Public School was developing a Student Entry Plan and that increasing BSS hours would not help if Student would not enter the school building.⁹⁴

33. Parent offered at least 4 times to sit in Public School to encourage Student’s attendance.⁹⁵ On 9/13/19, Parent emailed that she was looking into a tutor for Student to assist with completing assignments.⁹⁶ On 9/13/19, LEA Representative emailed that if Student were not available for the traditional instructional delivery she was not sure how Public School could send home work for Student.⁹⁷ LEA Representative asserted that Parent had refused assistance at home, but Parent was credible in responding that she’d just been referring to her efforts to obtain a tutor so she might not need assistance.⁹⁸

34. On 9/11/19 a Student Success Plan was created to assist Student with school re-entry due to persistent reluctance to attend school; short term goals included a medical evaluation and referral for HHIP; Parent was given a HHIP packet.⁹⁹ School Social Worker developed a transition plan for gradual re-entry to school with numerous steps.¹⁰⁰

35. The 1/6/20 IEP acknowledged that Student had a history of academic disengagement, emotional dysregulation and defiance dating back to 2018; teachers reported that Student was at risk of academic failure.¹⁰¹

36. HHIP. Parent completed the HHIP paperwork, got the physician portion completed, and brought it to a 9/27/19 meeting; School Social Worker made the referral to the HHIP coordinator on 9/27/19.¹⁰² The HHIP physician verification form was completed on

⁹¹ *Id.*

⁹² P45-4; P38-1; Educational Advocate.

⁹³ P44-2,3.

⁹⁴ P44-1.

⁹⁵ P39-3.

⁹⁶ P45-5.

⁹⁷ P45-4.

⁹⁸ P45-3,4 (Parent “NEVER said” didn’t need help).

⁹⁹ P8-10; R39-1.

¹⁰⁰ R39-1; P29-1; School Social Worker.

¹⁰¹ P8-11.

¹⁰² P45-1; P48-1.

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9/25/19, noting Student's anxiety disorder and possible PTSD.¹⁰³ Student's doctor was not comfortable having a conversation with DCPS HHIP staff and suggested Student's therapist be contacted instead.¹⁰⁴ Student's psychiatrist on 12/27/19 diagnosed Student with Unspecified Anxiety Disorder; HHIP personnel at DCPS did not reach out to the psychiatrist.¹⁰⁵

37. Petitioner's counsel repeatedly followed up with DCPS on the HHIP application, and also sought to move things forward with an alternative school location, with messages to DCPS on 10/4/16, 10/7/16, 10/10/19, 10/15/19, 10/16/19, 10/18/19, 10/22/19, 10/24/19, 10/25/19, 10/28/19, 10/30/19, 10/31/19, 11/1/19, 11/5/19, 11/8/19 and 11/13/19.¹⁰⁶ DCPS's HHIP Handbook states that determination of eligibility for HHIP is to be completed within 5 business days.¹⁰⁷ Student was never provided any HHIP services.¹⁰⁸ Treating Psychologist would recommend HHIP "right now" to educate Student at home until Student is able to go back to school, as not being in school is harmful.¹⁰⁹

38. HHIP Coordinator suggested evening and weekend support for Student, when regular teachers could assist to reconnect Student to school.¹¹⁰ On 1/6/20, HHIP Coordinator stated that she had been speaking with the placement office about finding another school for Student and providing some evening support to get Student caught up; HHIP Coordinator did not deny that Student was experiencing anxiety.¹¹¹

39. DCPS had trouble making a safety transfer work due to "weak" evidence and could not substantiate mental health issues due to Student's reluctance to speak with the psychiatrist.¹¹² HHIP Coordinator was trying to identify another school for Student and ensure a good fit.¹¹³ Since the start of 2019/20, DCPS has provided no school work for Student and has sent no instructors or social workers to see Student.¹¹⁴

40. BSS Services. Petitioner's chart listing the BSS required by Student's IEPs totaled 1920 minutes from the beginning of the claim in January 2018 through June 2019; the undersigned reduced the total by 90 minutes for the partial months of June.¹¹⁵ Petitioner's claims included at least another 480 minutes due for 2019/20 when no services were

¹⁰³ P57-7.

¹⁰⁴ P50-11.

¹⁰⁵ P23-1,4; HHIP Coordinator.

¹⁰⁶ P50-1,2,3,4,5,6,7,8,9,10,13,15; P49-1.

¹⁰⁷ P58-1,8.

¹⁰⁸ P39-1; HHIP Coordinator.

¹⁰⁹ Treating Psychologist.

¹¹⁰ P39-2.

¹¹¹ R2-2.

¹¹² R2-2; HHIP Coordinator.

¹¹³ HHIP Coordinator.

¹¹⁴ Parent.

¹¹⁵ P13-1; R20; R29.

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provided to Student.¹¹⁶ Petitioner's chart showing BSS provided totaled 960 minutes; the number was increased by 330 minutes for times Student was absent prior to 2019/20, refused to accept services, or was being administered PARCC testing.¹¹⁷

41. Compensatory Education. Petitioner's Compensatory Education Proposal seeks 300 hours of tutoring, 200 hours of mentoring and 150 hours of counseling to make up for the denials of FAPE asserted and provide communication skills; services should be authorized for use over a 2-year period.¹¹⁸ Parent believes tutoring would benefit Student being out of sight of peers and that a mentor of the same gender as Student would help Student open up.¹¹⁹ Student has gone all of 2019/20 without any academic or behavior supports; DCPS did not provide any HHIP services and Public School said it could not send home school work.¹²⁰

42. Student was reluctant to go inside to see Proposed Nonpublic School, but finally did so with Parent and other support.¹²¹ Student was nervous and refused to go into a second nonpublic school that Parent liked.¹²² Student was accepted by Proposed Nonpublic School, but placed on a waitlist as there is not currently a spot open for Student.¹²³ Student would need a lot of coaxing to go into a nonpublic school, but Parent might be able to coax Student, if Student saw it as a safe space.¹²⁴ HHIP Coordinator credibly testified that a therapeutic day school could potentially be helpful to "reset" Student going to school, but thought DCPS could do the job.¹²⁵

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").

¹¹⁶ P3-2; R4.

¹¹⁷ P13-1; R20; R29.

¹¹⁸ P63-4,5; Educational Advocate.

¹¹⁹ Parent.

¹²⁰ P54-3; HHIP Coordinator.

¹²¹ Parent.

¹²² *Id.*

¹²³ Educational Advocate.

¹²⁴ Treating Psychologist.

¹²⁵ HHIP Coordinator.

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“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 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*

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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 DCPS denied Student a FAPE by failing to develop or provide an appropriate IEP and/or placement and/or location of services for 2017/18 to the present due to severe behavioral and academic needs, as Student needed additional specialized instruction, a more restrictive environment, a change in disability classification to add learning disability, modification of goals, and much more BSS, and now requires placement in a nonpublic, therapeutic day school. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Through expert testimony and documents, Petitioner established a prima facie case on this issue generally, although not each subpart, shifting the burden to Respondent which generally failed to meet its burden of persuasion, particularly on specialized instruction and BSS, 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.¹²⁶ *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

¹²⁶ 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 are discussed herein, but were not specifically alleged in this matter.

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Specialized Instruction. Petitioner first challenges whether Student's IEPs provided insufficient specialized instruction to meet Student's needs. The initial 3/6/18 IEP at issue at Prior Public School did not change the level of specialized instruction from the prior IEP, maintaining it at 8 hours/week, despite the new PLOPs' notable MOY iReady assessment that Student was 5 grades behind in math compared to being on grade level in the prior PLOP in the 9/18/17 IEP. The reading PLOPs in the 3/6/18 IEP indicated that Student was up to 2 years below grade level, while in written expression Student was significantly below grade level, with a "strong resistance to writing tasks." Grades should also have been a concern when determining specialized instruction, for Student's term 2 grades included 4 "Fs" out of 8 classes at the time when the IEP team decided to leave specialized instruction unchanged.

Specialized instruction did not fare much better in Student's 1/30/19 IEP, which noted that Student's most recent PARCC results were level 1 in both math and reading, while Student could only write simple sentences so that written work was a concern in all classes. Further, the grades available prior to the 1/30/19 IEP were term 1 grades with 6 "Fs" out of 8 classes and possibly term 2 with 3 "Fs" out of 8 classes. Moreover, the 11/14/18 FBA noted academic disengagement and disruptive behavior having a negative impact on Student's academic performance, and even that Student was at risk for academic failure. Yet just a short time later the 1/30/19 IEP only increased specialized instruction by 2 hours, from 8 to 10 hours/week. The undersigned does not consider either the 8 hours/week in the 3/8/18 IEP or the 10 hours/week in the 1/30/19 IEP to be sufficient specialized instruction for Student's deepening needs.

Disability Classification. Petitioner did not establish a prima facie case that Student's disability classification should have been modified to include learning disability, for there was only passing reference in the documents and little testimony on the issue. Moreover, LEAs are not required to classify children by their disability as long as they have been found eligible to receive the special education and related services they need. *See* 20 U.S.C. § 1412(a)(3)(B); 34 C.F.R. § 300.111(d). It is a student's identified needs, not the disability category, that determine the services that must be provided to the child. 34 C.F.R. § 300.320(a)(2)(i); *Letter to Anonymous*, 48 IDELR 16 (OSEP 2006); *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997) (the "IDEA charges the school with the responsibility of developing an appropriate education, not with coming up with a proper label"). Here, Petitioner does not urge the addition of the learning disability classification as the foundation for seeking a new or different type of special education service, but is seeking additional services based on Student's existing ED classification.

Modification of Goals. Petitioner did provide evidence that Student's IEP goals were overly challenging, but DCPS's expert testimony in response convincingly showed that the goals in the challenged IEPs were reasonable and appropriate for Student based on the PLOPs and were similar to goals in Student's earlier IEP that Petitioner viewed favorably. Indeed, the Supreme Court has emphasized that students' programs – including goals – are to be appropriately ambitious. *Endrew F.*, 137 S. Ct. at 1000.

BSS. "Related services" must be provided if required to assist a student with a disability to benefit from special education. *See* 34 C.F.R. § 300.34(a); *Irving Independent*

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Sch. Dist. v. Tatro, 468 U.S. 883, 890, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984). In this case there is no doubt that Student needed BSS. The only question was the quantity, as DCPS reduced Student's 360 minutes/month of BSS at Prior Public Charter School to only 60 minutes/month of BSS within just a couple of months after Student transferred to Prior Public School in the middle of the school year. DCPS returned Student to 120 minutes/month in the 1/30/19 IEP, which was still only one-third of the support that Student had received before Prior Public School.

Student faced challenges coming into Prior Public School, had severe communication challenges, exhibited school avoidance that was becoming increasingly serious, and was recognized by DCPS as being at risk of academic failure. Thus, the undersigned determines that it was unreasonable for Student's BSS to be reduced so abruptly in the 3/6/18 IEP to one-sixth of what it had been and not more fully restored in the 1/30/19 IEP. Student's BSS levels were not reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances, and Student was not able to access the curriculum to advance toward meeting Student's annual goals pursuant to 34 C.F.R. § 300.320(a)(4). *See Damarcus S.*, 190 F. Supp. 3d 35; *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013).

Placement in More Restrictive Environment. The applicable legal standard for educational placement/location of services is that the IDEA requires "school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student's IEP." *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 143 (D.D.C. 2018), *citing O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). *See also Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013) (DCPS "must place the student in a setting that is capable of fulfilling the student's IEP"). Here it is quite clear that DCPS did not meet that standard and place Student in a setting that could fulfill Student's IEP, for Student has been able to attend school and has not received any educational services in 2019/20. This is clearly insufficient. A more restrictive setting in which Student could participate is required.

FAPE. In carefully considering the concerns raised above individually and as a group, the undersigned is cognizant of the fact that the analysis is not about achieving perfection. Instead, an IEP and placement simply need to be reasonably calculated to enable Student to make appropriate progress in the circumstances. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (IDEA "stops short of requiring public schools to provide the best possible education"). *See also Hill v. Dist. of Columbia*, No. 14-cv-1893, 2016 WL 4506972, at *21 (D.D.C. 2016), *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015).

On balance, this Hearing Officer concludes that DCPS failed to meet its burden of persuasion on the level of specialized instruction and BSS, and on placement in a more restrictive environment, which is a denial of FAPE, even though Petitioner did not prevail on the issues of disability classification and IEP goals. This Hearing Officer concludes that overall Student's challenged IEPs were not reasonably calculated to enable Student to make

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appropriate progress in Student's circumstances, which contributes to the compensatory education ordered below.

Issue 2: *Whether DCPS denied Student a FAPE by failing to implement Student's IEP (a) from 2018 to present, where Student did not receive all required BSS, missing 960 minutes during 2018 and over 480 minutes in 2019/20, and (b) when Student could not attend school during 2019/20 due to rapid decline in social-emotional functioning, but has not been provided any schoolwork or instruction. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on the implementation issue, both for BSS services from 2018 on and for all services in 2019/20. 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).

(a) BSS. Beginning with BSS, Student's IEPs required (i) 360 minutes/month of BSS during January and February 2018, (ii) 60 minutes/month from March 2018 through January 2019, and (ii) 120 minutes/month from February 2019 through the filing of the due process complaint late in December 2019 (with no services in July and partial services in June), which totaled 2310 minutes, which is comprised of the 1920 minutes in Petitioner's chart (at P13-1) increased by 480 minutes for 4 months' of BSS in 2019/20 and reduced by 90 minutes due to partial months in June.

As for provision of services, the law is clear that a student refusing services, missing services by being absent, and at least the first 4 hours of unavailability due to school testing are not to be held against DCPS, which boosts the BSS minutes provided from the 960 calculated by Petitioner (in P13-1) to 1290 minutes. Specifically, in *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007), the court held that related services sessions missed due to "snow days, holidays, [student's] absence from school, and the like" were not counted toward failure to implement the IEP, while *Joaquin v. Friendship Pub. Charter Sch.*, Civ. No. 14-01119, 2015 WL 5175885, at *8 (D.D.C. 2015), makes clear that services simply need to be offered to a student, even if the student "would not have been present to receive any" of them. *See also Letter to Balkman*, 23 IDELR 646 (OSEP

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4/10/95) (does not require missed services due to student absences to be made up, but does require provider or student unavailability for school functions to be made up).

These cases are generally in line with DCPS's *Missed Related Services and Untimely Assessment Guidelines* (August 2019), which makes clear at page 5 that missed related service sessions due to student absence or refusal need not be made up. Sessions missed due to provider unavailability must be made up, but student unavailability due to school-related activities does not need to be made up until such activities exceed 4 hours. *Id.* at 4. Finally, related service sessions missed because of planned school holidays and breaks must be made up, while sessions missed due to unplanned school closures due to weather and the like need not be made up. *Id.* at 8.

Here, based on the principles above and DCPS's available service trackers for Student, 1290 minutes of BSS were provided to Student during this period and the remainder was missed. This amounted to failure to provide 44% of the required BSS during the relevant period. Student's inability to attend school at all in 2019/20 was clearly a part of Student's ED disability, so the absences are not attributed to Student by the undersigned. But even considering the data without the complete lack of service in 2019/20 results in 29% of the required BSS that was not provided.

Based on relevant cases in this jurisdiction, the failure to provide 29% of services – much less 44% – clearly amounts to a material deviation from Student's IEPs and a denial of FAPE. *See Middleton*, 312 F. Supp. 3d at 145 (20% deviation from IEP requirements was material and could not be excused as *de minimis*); *Wade v. Dist. of Columbia*, 322 F. Supp. 3d 123, 133 (D.D.C. 2018) (27% deviation was material). This denial of FAPE is addressed in the award of compensatory education below.

(b) 2019/20 IEP. As for the alleged failure to implement Student's 2019/20 IEP at all, there is no doubt that DCPS took numerous steps to try to get Student into Public School, beginning on the first day when Student arrived and numerous adults at Public School sought to persuade Student to go into the building and begin classes. Later, ongoing and substantial efforts were taken to develop plans and methods to encourage Student to attend, including efforts to find another school that would work for Student or to provide evening and weekend services for Student at home by teachers to help Student connect with school and get engaged. Much fruitless effort was spent from the earliest days of 2019/20 in trying to qualify Student for HHIP. But nothing worked, either because services could not be offered or Student could not be engaged.

The unfortunate bottom line is that DCPS failed to provide any services to Student for many months when Student was unable to go to Public School. 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.

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Supp. 2d at 268. DCPS needed to take action to provide a FAPE to Student and failed to do so, which contributes largely to the compensatory education awarded below.

Issue 3: *Whether DCPS denied Student a FAPE by failing to comprehensively evaluate when Student regressed psychologically in 2019 and Parent requested evaluations; Student needed a Comprehensive Psychological Evaluation and a new FBA followed by a BIP. (Petitioner has the burden of persuasion on this issue.)*

Issue 4: *Whether DCPS denied Student a FAPE by failing to adequately address behavioral concerns when it put an inappropriate BIP in place in December 2018 and failed to revise the plan despite academic and behavioral failures and attendance problems. (Petitioner has the burden of persuasion on this issue.)*

Due to an overlap in claims, Issues 3 and 4 are considered together. Petitioner met her burden of persuasion on the need to conduct a comprehensive psychological evaluation and provide a new FBA/BIP for Student.

The IDEA requires reevaluation of each student with a disability at least once every 3 years, or sooner if the student's parent or teacher requests a reevaluation, or if DCPS determines 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; Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006). Indeed, evaluations of children by experts are central to the determination of what special education and related services are needed for most eligible children. *See Z.B.*, 888 F.3d at 518; *Hill*, 2016 WL 4506972, at *18 ("evaluation's primary role is to contribute to the development of a sound IEP," *quoting Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60 (D.D.C. 2011)).

Here, a psychological triennial reevaluation was conducted with a report dated 12/13/18, but it failed to include a socio-emotional component, which was clearly needed by Student. Indeed the purpose of the reevaluation was to determine if Student continued to be eligible for special education services based on ED, so it certainly needed to include socio-emotional testing. The reevaluation also noted that a BIP was being developed at that time due to escalation of Student's behavioral difficulties, making socio-emotional analysis necessary as well. In addition, the worsening of Student's school avoidance since the time of the reevaluation, culminating in Student's inability to go to any classes at Public School convinces this Hearing Officer that an IEE for a comprehensive psychological evaluation is required promptly, yet DCPS refused Parent's request.

As for FBAs and BIPs, the IDEA requires in the case of a student whose behavior impedes the student's own learning, as here, 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). *See Middleton*, 312 F. Supp. 3d at 146 (failing to address attendance can be a denial of FAPE). Here, an FBA was developed on 11/14/18 noting that Student's academic disengagement and disruptive behavior were having a negative impact on Student's academic performance, but it did not note school refusal, which worsened in

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the following months. A BIP was developed on 12/2/18 which noted that Student was consistently unavailable for instruction due to lack of motivation and resistance to receiving assistance. The BIP failed to address attendance even though the school team had acknowledged the problem with an attendance support plan on 12/12/18. The BIP was not effective as Student's unexcused absences greatly increased.

Indeed, by 4/11/19, Student had 65 absences (58 unexcused) and by the end of 2018/19 Student had been absent 76 days (66 unexcused), including 12 days absent (all unexcused) in January, 9 unexcused days in February, and 19 unexcused days in March. Student was tardy on 31 additional days in 2018/19. Remarkably, DCPS stated in the 1/6/20 IEP that Student attended school "regularly" in 2018/19 and only had minor problems with tardiness, which might have some connection with DCPS's failure to conduct new FBAs or update Student's BIPs.

The lack of timely FBA and BIP updates and revisions may have reduced the efforts DCPS took and contributed to Student's total school refusal in 2019/20. *See Long*, 780 F. Supp. 2d at 61 (an FBA is "essential" in addressing behavioral difficulties, so plays an integral role in the development of an IEP); 34 C.F.R. § 300.324(a)(2)(i); *Middleton*, 312 F. Supp. 3d at 146. Here, the failure to update both the FBA and BIP caused a deprivation of educational benefit to Student by not providing as much support as appropriate for Student's behavioral and attendance needs. 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, along with requiring a new FBA/BIP to be provided promptly once Student is back in school.

Remedies

DCPS is ordered below to authorize an IEE for a comprehensive psychological evaluation and to convene an IEP team meeting within 10 business days following completion to review the report and update Student's IEP, which shall include determination of appropriate placement and school location and a detailed transition plan to help Student reengage at school. Determination of a suitable placement for Student shall include consideration of nonpublic schools if necessary for Student to receive a FAPE. The placement/location decision should also give weight to whether Student would be willing to attend the school(s) being considered. Further, within 30 days after returning to school, DCPS shall conduct or fund (at Parent's option) an FBA and develop a BIP. A claim for future compensatory education is reserved concerning the completion of the comprehensive psychological evaluation and FBA.

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

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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, Petitioner’s Compensatory Education Proposal seeks an award of 300 hours of tutoring, 200 hours of mentoring, and 150 hours of counseling to make up for the denials of FAPE asserted in this case. While the undersigned did not agree with all of the details of missed BSS, Petitioner did very substantially prevail on the implementation and other issues. Based on the evidence and the impact of Student’s various difficulties discussed above, the undersigned concludes that the number of compensatory education hours sought by Petitioner’s experts 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 concurs in Parent’s view that a mentor and counselor of the same gender as Student may be helpful, but authorizes the selection to be made by Parent as desired in the circumstances.

The full award of all compensatory education hours sought also recognizes that placement at a nonpublic school has not been ordered due to Student’s circumstances. Moreover, schools have now been closed due to the covid-19 pandemic and it sounds increasingly likely that schools may not reopen during the current school year. Thus, compensatory education hours are awarded in the hope and expectation that Student may be able to obtain 1:1 services in some manner during this time that schools are closed and may be ready to reengage at school once that becomes a possibility again.

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 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 in this case, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Within 10 business days, DCPS shall authorize an IEE for a comprehensive psychological evaluation and shall convene an IEP team meeting within 10 business days from the completion of the comprehensive psychological evaluation report to review the report and update Student’s IEP as appropriate, which shall include determination of appropriate placement and school location and a detailed transition plan to help Student reengage at school. Determination

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of a suitable placement for Student shall include consideration of nonpublic schools if necessary for Student to receive a FAPE.

- (2) Within 30 days after returning to school, DCPS shall conduct or fund (at Petitioner's option) an FBA and development of a BIP.
- (3) As compensatory education for the denials of FAPE found herein, DCPS shall provide a letter(s) of authorization for (a) 300 hours of academic tutoring, (b) 200 hours of mentoring, and (c) 150 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) A claim for compensatory education due to the future completion of the comprehensive psychological evaluation and FBA shall be reserved for subsequent resolution.

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)

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