

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

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

OSSE
Office of Dispute Resolution
May 12, 2018

<i>Student</i> , ¹)	Case No.: 2018-0048 (Expedited)
through <i>Parent</i> ,)	
<i>Petitioner</i> ,)	Date Issued: 5/12/18
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates: 4/30/18 & 5/1/18
("DCPS"),)	ODR Hearing Room: 111
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because Student had not been comprehensively evaluated and provided a sufficiently restrictive Individualized Education Program (“IEP”) and placement. DCPS responded that it had evaluated Student and provided an appropriate IEP and placement.

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 2/27/18, the case was assigned to the undersigned on 2/28/18. An issue was withdrawn by Petitioner and dismissed without prejudice by the undersigned on 3/16/18. An amended due process complaint was filed on 3/23/18 reasserting all issues, which was expedited as a disciplinary matter. DCPS filed a

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

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

timely response on 3/7/18, and a supplemental response on 3/13/18, which did not challenge jurisdiction. The resolution session meeting occurred on 3/13/18 without success. Pursuant to 34 C.F.R. 300.532(c), the due process hearing on disciplinary matters must be completed within 20 school days from filing, which required the hearing to be completed by 5/1/18. Based on the scheduled dates of the hearing and the requirement in the above cited section that a determination must be made within 10 school days after the hearing, the Hearing Officer Determination (“HOD”) would ordinarily have been due no later than 5/15/18. However, pursuant to 34 C.F.R. 300.508(d)(4), in the discretion of the undersigned the timeline for the final decision will not be extended beyond the date for the non-expedited issues in the original complaint and the HOD in this case shall remain due no later than 5/13/18.

The due process hearing took place on 4/30/18 and 5/1/18 (with overflow closing arguments focusing on non-disciplinary issues held by teleconference on 5/3/18) and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in the entire hearing.

Petitioner’s Disclosures, submitted on 4/23/18, contained documents P1 through P45, which were admitted into evidence without objection. Respondent’s Disclosures, submitted on 4/23/18, contained documents R1 through R63, which were also admitted into evidence without objection.²

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

1. *Educational Advocate A* (qualified over objection as an expert in Psychology, Neuropsychology and Special Education Programming)
2. *Educational Advocate B* (qualified over objection as an expert in Special Education Programming and IEP Development)
3. Parent

Respondent’s counsel presented 3 witness in Respondent’s case (*see* Appendix A):

1. *Educational Administrator at Public School* (qualified without objection as an expert in Appropriate Special Education Programming)
2. *School Psychologist at Public School* (qualified without objection as an expert in School Psychology)

² References herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, a hyphen, and the exhibit page (or pages separated by commas). By contrast, Respondent’s documents are consecutively Bates numbered throughout, so are referenced by an “R” followed by the exhibit number, followed immediately by a “p” (for page) and the Bates number without leading zeros.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

3. *Social Worker* at Public School (qualified without objection as an expert in School Social Work)

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

Issue 1: Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP/LRE or placement during 2016/17³ and/or 2017/18, where (a) Student was receiving only 15 hours/week of inclusion support and 60 minutes/month of Behavioral Support Services (“BSS”), (b) there was a lack of baseline data, (c) goals were not individualized, (d) Student needed a placement that could address behavior and academic concerns and cognitive failings, and/or (e) the IEPs were not based on comprehensive evaluations. *Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by failing to comprehensively and timely evaluate or reevaluate Student due to Student’s pattern of behavior concerns and academic functioning, as well as very low cognitive performance; Student was not comprehensively reevaluated at any point in the last 2 years which was needed based on Student’s cognitive levels and academic failures, including at the time of Student’s triennial reevaluation in November 2017, and needs (a) a neuropsychological evaluation, (b) an adaptive assessment, (c) a speech and language evaluation, (d) an occupational evaluation, (e) an updated Functional Behavioral Assessment (“FBA”), and (f) a vocational evaluation. *Petitioner has the burden of persuasion on this issue.*

Issue 3: Whether DCPS denied Student a FAPE by failing to timely develop, implement and/or update a Behavior Intervention Plan (“BIP”) during the last 2 years as behaviors continued to escalate, and/or otherwise address Student’s attendance issues that are linked to Student’s disability. *Petitioner has the burden of persuasion on this issue.*

Issue 4: Whether DCPS denied Student a FAPE by failing to fully implement Student’s IEP by providing all of Student’s BSS from 3/1/16 to present, with only 10.5 hours of BSS during that time period. *Petitioner has the burden of persuasion on this issue.*

Issue 5: Whether DCPS denied Student a FAPE on disciplinary issues by (a) failing to hold a Manifestation Determination Review (“MDR”) and/or determine that the behavior resulting in Student’s long term suspension on 11/17/17 was a manifestation of disability; (b) excluding Student from school for 45 or more days when the behaviors were clearly a manifestation of disability; and/or (c) failing to conduct an updated FBA and revise Student’s BIP. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that DCPS denied Student a FAPE.

³ All dates in the format “2016/17” refer to school years.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

2. DCPS shall (a) fund an independent neuropsychological evaluation, and (b) fund or conduct within 45 days a speech and language evaluation, an occupational therapy evaluation, a vocational evaluation, and an adaptive assessment.⁴
3. Within 10 business days, DCPS shall convene the IEP team and revise Student's IEP with (a) an increase in BSS, and (b) placement in a full-time therapeutic setting for students with both behavior and learning challenges or fund a private day school with transportation.
4. Upon completion of the evaluations in paragraph 2, DCPS shall reconvene the IEP team to review the evaluation reports and revise Student's IEP as appropriate.
5. Compensatory education for denials of FAPE going back 2 years prior to the date of the complaint shall be reserved pending completion of the evaluations in paragraph 2. In the meantime, DCPS shall provide interim independent tutoring and counseling and fund an independent compensatory education evaluation.
6. Any other relief that is just and reasonable.

Findings of Fact

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

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁶ Student is *Age*, *Gender* and failing *Grade* for the second time.⁷ Student transferred to Public School in October 2017 due to a family loss; Student previously attended *Prior Public School* and other DCPS schools where Student repeated an earlier grade.⁸

2. Background. Student is classified as a student with Multiple Disabilities ("MD"), with both Emotional Disturbance ("ED") and Other Health Impairment ("OHI") due to Attention Deficit Hyperactivity Disorder ("ADHD"); Student has behavior concerns, but at

⁴ At the beginning of the due process hearing, Petitioner expressly withdrew her request for "a functional behavior assessment" from this paragraph.

⁵ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁶ Parent.

⁷ Parent; TP; P43-1.

⁸ Parent; Educational Advocate A; P11-4; R5p11.

Hearing Officer Determination
Case No. 2018-0048 (Expedited)

times presents as capable of doing academic tasks.⁹ Student's academic skills are below grade level; lack of school attendance and work completion negatively impact Student's ability to make progress.¹⁰

3. Student has been eligible for special education and related services for many years; as of June 2014, Student received 8 hours/week of specialized instruction inside general education and 120 minutes/month of BSS.¹¹ Student's specialized instruction hours were increased in a 11/6/14 IEP to 10 hours/week inside general education and 10 hours/week outside general education.¹² On 2/23/15, the MDT requested a more restrictive environment for Student.¹³ Student's recent IEPs have each contained 15 hours/week of specialized instruction inside general education and BSS outside general education which declined from 120 minutes/month in the 10/26/15 IEP (the "2015 IEP") to 60 minutes/month in both the 10/20/16 IEP (the "2016 IEP") and the 10/18/17 IEP (the "2017 IEP").¹⁴ A draft IEP dated 4/18/18 would maintain 15 hours/week of specialized instruction inside general education and 60 minutes/month of BSS outside general education.¹⁵

4. Student's 2015 and 2016 IEPs indicated that Student academic abilities varied widely, with i-Ready scores from 2015 showing that Student was both on grade level and 7 years below grade level in the area of measurement and data, was 4 years below grade level in algebra, and 7 years below grade level in geometry and numbers and operations.¹⁶ The 2015 IEP stated that the discrepancies suggested Student's academic performance reflected Student's will rather than actual capabilities.¹⁷ Student can be an engaged student, but the biggest hindrance to classroom performance was behavior.¹⁸ Educational Advocate A testified that considering all information about how Student is doing, 15 hours/week of specialized instruction inside general education is not enough; Student is getting worse but not receiving help.¹⁹

5. A measurement of reading comprehension provided by Student's SRI score on 9/20/12 was 684, while in October 2016 was 848.²⁰ In between, Student's SRI was 304 on 1/23/14, and reported as 316 in the 2015 and 2016 IEPs.²¹ In written expression, Student

⁹ R26p133; P4-1; P6-1; P7-1.

¹⁰ P9-4; School Psychologist.

¹¹ R63p329; P11-1.

¹² P15-2.

¹³ P15; P9-2.

¹⁴ P7-1,9; P6-1,9; P4-1,10.

¹⁵ R21p90,98.

¹⁶ P7-3; P6-4.

¹⁷ P7-3.

¹⁸ P7-3,4.

¹⁹ Educational Advocate A.

²⁰ P11-3; P9-2; School Psychologist (SRI of 848 is 6th grade level).

²¹ P25-3; P7-4; P6-5; School Psychologist.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

was 4 or more years below grade level (based on a Woodcock-Johnson III (“WJ-III”)) in 2015 and 2016.²²

6. Based on the WJ-III on 10/26/14, Student’s cluster standard scores ranged from 70 in Math Calculation Skills to 91 in Brief Reading.²³ From teachers and staff, the evaluator concluded that Student is a bright young person who is capable of working on grade level, but whose behavior significantly impacts academic achievement.²⁴

7. Student has received poor grades in recent years.²⁵ When transferring from Prior Public School to Public School in October 2017, all of Student’s grades were “Fs” except one.²⁶ In the 2017/18 Term 2 Progress Report, Student received all “Fs” and all had comments related to excessive absences or tardiness.²⁷

8. Attendance Issues. Student enrolled at Public School on 10/10/17 and was immediately absent nearly every day, with only 2 days present and on time prior to a long term suspension on 11/16/17; 4 other days Student was present but tardy; Student was at school on some days marked absent, including the day of the 11/15/17 incident, but missed 2 or more class periods and was marked absent.²⁸

9. Student was not attending school on a regular basis, so making no academic progress in 2017/18.²⁹ In 2017/18, Student had 27 unexcused absences by 10/18/17.³⁰ By 2/22/18, Student had 69 absences in 2017/18, of which 34 were unexcused and 33 of the remaining 35 absences were excused because of the long term suspension.³¹ In 2017/18, Student had 92 unexcused absences as of 3/21/18; Student now has over 100 absences; Social Worker recommended an updated attendance plan.³²

10. Due to excessive absences, Student was not making progress toward any IEP goals in 2016/17.³³ Student was failing all classes but one at the time of the 2016 IEP due to lack

²² P7-6; P6-6.

²³ P11-11.

²⁴ P11-15.

²⁵ P25-1,2 (2013/14); P24-1,2 (2014/15); P23-1,2 (2015/16); P18-1 (Public School transcript for 2016/17); P9-3 (majority of 2016/17 grades were “Fs”).

²⁶ P9-3; P4-4.

²⁷ P21-1,2,3; P22-1,2,3 (2017/18 Term 3).

²⁸ P26; Educational Administrator; School Psychologist (counted absent for the day if miss 2 class periods); Social Worker.

²⁹ R23 (2017/18 Term 3); R30 (2017/18 Term 2).

³⁰ P9-2.

³¹ P22-1; P26.

³² R5p11; Social Worker.

³³ R8 (2016/17 Term 4); R10 (2016/17 Term 2); R23; P9-4.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

of attendance.³⁴ In 2016/17 Student missed 32 days of school by 10/16/16.³⁵

11. A student receiving 30 or more unexcused absences in a course receives a failing final grade in the course, known as “FA” (Failure due to Absence); Student saw no point in attending school after accumulating more than 30 absences and having “already failed.”³⁶ Suspensions are excused absences, but if Student did not attend [REDACTED] as required during a long term suspension those days would count toward FA.³⁷

12. School Efforts. In January 2016 a Behavior Support Services data sheet (alignment plan) was completed, noting Student’s chronic attendance issues and the school’s focus on Student’s attendance.³⁸ No efforts by Prior Public School to reach out to Student’s family are recorded in the contact log from 12/16/15 to 10/13/17, apart from the annual IEP meeting.³⁹ Educational Advocate B testified that an FBA should have been conducted to determine areas of concern and targeted behavior and then a BIP or attendance plan developed to overcome the identified barriers.⁴⁰

13. Student’s teachers noted excessive absences and the need to go to class at the October 2017 IEP team meeting.⁴¹ The triennial psychological evaluation on 10/19/17 recommended that Student be supported by the school attendance team, family and other community based supports that could address truant behaviors and encourage school attendance; and that Public School consider an incentive-based program that targeted attending school and completing assignments, among other things.⁴² The 10/19/17 evaluation concluded by again suggesting incentives to encourage school attendance.⁴³

14. Social Worker spoke with Parent at least 4 times in the months Student was at Public School and attempted to reach Parent about 10 times, including 2/26/18, several times in March 2018, and in April concerning Student’s absences.⁴⁴ In response to Parent’s request for grievance support for Student, Social Worker provided the number for the Access Help Line.⁴⁵

15. Parent stated that she wakes Student up in the morning and tries to get Student to school, but Student generally goes back to bed rather than to school.⁴⁶ A 9/8/15

³⁴ P6-13.

³⁵ P6-5,13.

³⁶ P1-2; School Psychologist; Parent.

³⁷ School Psychologist.

³⁸ R7p22; P9-2.

³⁹ R57p306.

⁴⁰ Educational Advocate B.

⁴¹ P5-5.

⁴² P9-5.

⁴³ P9-6.

⁴⁴ Social Worker; R57p312,313.

⁴⁵ R45p213,214.

⁴⁶ R57p312,313; Parent.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

neurological report on Student listed “Cannabis Abuse.”⁴⁷ A 2/8/17 report on Student referred to “Drug abuse (marijuana)” and stated that Student uses marijuana 1-2 times a week, has never tried to stop and would not like to stop.⁴⁸ Student’s CBI worker confirmed on 2/15/18 that Student was still using marijuana.⁴⁹

16. Evaluations. School Psychologist testified that the purpose of school evaluations is to get enough information to program for the child and if there is sufficient data on a student a formal assessment is not needed unless there is concern about the child’s classification or whether special education services should be terminated.⁵⁰ Student’s most recent comprehensive psychological evaluation was completed in October 2014 when the team determined that Student met the criteria for ED classification.⁵¹ Student’s general cognitive abilities were found to be in the borderline range with a Full Scale IQ (“FSIQ”) of 73 (erroneously reported as 64 by Petitioner’s advocates), based on a Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”) on 10/26/14, with variability in Student’s profile.⁵² The evaluator noted that Student’s scores should be interpreted with caution because of Student’s motivational level and reluctance to fully participate in the assessment, so Student’s actual FSIQ may well be higher than 73.⁵³ An unsuccessful attempt had been made to evaluate Student in June 2014, but Student did not attend any of the scheduled testing sessions.⁵⁴

17. For the October 2017 triennial, a Woodcock-Johnson IV (“WJ-IV”) could not be completed to obtain recent achievement scores due to Student’s chronic absences.⁵⁵ School Psychologist unsuccessfully attempted classroom observations of Student on 10/16/17, 10/17/17, and 10/19/17 and a student interview could not be completed as Student was absent; attempts to contact Parent were also unsuccessful; the 10/19/17 triennial psychological evaluation was limited to a review of records.⁵⁶

18. Parent signed the DCPS form giving her consent on 10/25/17 for additional unspecified evaluations of Student.⁵⁷ Petitioner has been seeking the following assessments: neuropsychological, speech, OT, adaptive and vocational.⁵⁸ At the 2/15/18 meeting, DCPS only agreed to conduct an FBA.⁵⁹ On 2/21/18, DCPS offered to conduct a comprehensive psychological evaluation (including an adaptive), vocational assessment and OT screening

⁴⁷ P10-1; P12-3 (smoked marijuana for a year; smokes twice a week).

⁴⁸ P10-8,6.

⁴⁹ P2-1.

⁵⁰ School Psychologist.

⁵¹ P9-1,2.

⁵² P11-9,10; P9-1,2,3.

⁵³ P11-15; P9-3; School Psychologist.

⁵⁴ P9-1; P11-1.

⁵⁵ P9-2.

⁵⁶ P9-3; Educational Advocate A; School Psychologist.

⁵⁷ R47p223.

⁵⁸ P35-1.

⁵⁹ Educational Advocate B.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

(apart from any settlement negotiations).⁶⁰ Educational Advocate A testified that Student does not like being evaluated.⁶¹

19. Neuropsychological. A 9/8/15 neurological report suggested formal neuropsychological testing that the report stated could be facilitated by the court.⁶² At the 2/15/18 meeting, Petitioner's counsel told Public School that a court-ordered neurological report recommended a neuropsychological evaluation and promised to send the report on 2/15/18 because Public School had not seen it; Public School staff did not receive the report prior to the 5-day disclosures for this due process hearing.⁶³ A psychiatric evaluation on 6/4/15 recommended a neurological evaluation to rule out a central nervous system lesion.⁶⁴

20. Adaptive. Adaptive testing is needed to rule out Intellectual Disability ("ID") if the student's FSIQ is 70 or less.⁶⁵ In addition to Student's cognitive score, Student's academic scores are largely in the average range indicating to School Psychologist that Student does not need an adaptive assessment.⁶⁶

21. OT. An OT (or neuropsychological) evaluation is needed to check on motor components; Student had very low PSI scores in the 2014 psychological evaluation and Student's difficulties with sensory responses and hand-eye coordination.⁶⁷ The 10/26/14 comprehensive psychological reevaluation found that Student's handwriting was "typical."⁶⁸

22. Transition. Student took the O*NET Interest Profiler on 10/16/17, followed minutes later by the Casey Life Skills Assessment.⁶⁹ Student's IEP transition plan was not implemented in 2017/18 due to Student's frequent and chronic absences.⁷⁰

23. FBA. Parent gave her consent to conduct an FBA of Student on 2/8/18 during a home visit.⁷¹ Student's advocates pressed on 2/15/18 for the FBA to begin immediately; Social Worker was concerned about Student refusing to participate, as the student should be present if at all possible.⁷² Direct observations of Student were attempted for the FBA without success on 2/22/18, 2/26/18, 3/8/18, 3/14/18, 3/15/18, 3/16/18 and 3/20/18.⁷³ A

⁶⁰ P37-1.

⁶¹ Educational Advocate A.

⁶² P10-1,3.

⁶³ P2-1; P40-1; School Psychologist; Social Worker.

⁶⁴ P12-1,7; Educational Advocate A.

⁶⁵ School Psychologist; Educational Advocate A (less than 70 and sometimes considered necessary if less than 75).

⁶⁶ School Psychologist.

⁶⁷ Educational Advocate A; P38-1.

⁶⁸ P11-2.

⁶⁹ P13-2,4.

⁷⁰ R30p146,147; R23p123,124.

⁷¹ R53p241; R57p310.

⁷² P2-2; Social Worker.

⁷³ R5p12.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

student interview could not be completed for the FBA due to Student's absences, nor could Parent be reached for a parent interview and calls were not returned.⁷⁴ The MDT reviewed the FBA and proposed BIP on 4/20/18.⁷⁵ The 2018 FBA concluded that Student's maladaptive behaviors are related to feeling behind in classes due to absences from school; interventions to help are a challenge due to Student's absences.⁷⁶

24. Behavior Intervention Plans. A BIP was developed on 11/10/14.⁷⁷ Student did not have a BIP or attendance plan that was being implemented when Student began at Public School.⁷⁸ Student's 10/18/17 IEP referred to Student's BIP, repeating language from the 2016 IEP, which repeated language from the 2015 IEP.⁷⁹ As of 10/19/17, Student's BIP was said to include a daily behavior tracker, weekly incentives, daily check-ins with the social worker and compliance with medication.⁸⁰ A new BIP was developed on 3/23/18.⁸¹

25. Baselines. Student's 2017 IEP at Public School did not include baselines for goals, which were sometimes noted to be due to Student's absences or the lack of academic data on Student at Public School.⁸² Student's teachers indicated they did not have sufficient information to fairly assess Student's present levels of performance.⁸³ If Student had poor attendance, the IEP baselines, present levels and goals have to rely on record review and reference to prior IEPs from earlier school years.⁸⁴

26. Behavioral Support Services. According to Student's 2015, 2016 and 2017 IEPs, Student is unable to make progress without "intensive behavioral support" in multiple areas of concern.⁸⁵ Student's 2017 IEP provided BSS to improve social-emotional development and specifically self-regulation.⁸⁶ Student's 10/19/17 triennial psychological evaluation recommended BSS to improve appropriate social interactions.⁸⁷ BSS for Student is to include counseling, behavior management and consultation with teachers and parent.⁸⁸

27. In 2016, the team decided to increase Student's level of behavioral support to include direct and consultative services.⁸⁹ Student's BSS is very low and was reduced in the

⁷⁴ R5p13,14.

⁷⁵ Educational Advocate A.

⁷⁶ R5p14.

⁷⁷ P15-3; P9-2.

⁷⁸ Educational Advocate B.

⁷⁹ P4-3; P6-3; P7-2.

⁸⁰ P9-4.

⁸¹ P30-1.

⁸² P4-4,5,6,7.

⁸³ R45p216.

⁸⁴ Educational Administrator.

⁸⁵ P7-3,5,6; P6-4,5,7; P4-4,5,6.

⁸⁶ P4-8.

⁸⁷ P9-5.

⁸⁸ P4-8.

⁸⁹ P9-2.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

2016 and 2017 IEPs despite lack of progress.⁹⁰ Educational Advocate B testified that increasing the level of BSS to 240 minutes/month would not be sufficient.⁹¹ The 10/19/17 triennial noted that Student must be willing to receive the supports offered in order to make progress.⁹²

28. For the first half of 2016, Service Trackers indicate that in January 2016 Student received 60 minutes of direct BSS services and was “unavailable” for another 60 minutes; in February 2016, Student received 90 minutes of BSS and was unavailable for 30; in March 2016, Student was absent and missed 30 minutes of BSS and missed another 30 due to school closure; in April 2016, Student received 30 minutes of BSS, was absent for 30 minutes, and unavailable for another 30 minutes; in May 2016, Student received 90 minutes of BSS, was absent for 60 minutes, and unavailable for 30 minutes; and in June 2016, Student received 90 minutes and was absent for 60 minutes.⁹³ For the rest of 2016, there were no Service Trackers in the record for July (Student was not in ESY), August or September; in October 2016, Student received 210 minutes of BSS; in November 2016, Student received 60 minutes; in December 2016, Student received 60 minutes.⁹⁴

29. The following year Service Trackers indicate that in January 2017 Student received 60 minutes of BSS; in February 2017, Student received 60 minutes; in March 2017, Student received 120 minutes; in April 2017, Student received 60 minutes; the record lacks Service Trackers for May, June, July (Student was not in ESY), August or September 2017; in October 2017, Student was absent for 90 minutes; in November 2017, Student was absent for 30 minutes and missed 60 minutes due to school closure; in December 2017, Student was absent for 90 minutes.⁹⁵

30. Service Trackers for the beginning of the next year indicate that in January 2018 Student was absent for 60 minutes of BSS, missed 30 minutes due to school closure, and was the subject of 30 minutes of consultation; in February 2018, Student received 50 minutes of BSS and missed 30 minutes due to school closure; in March 2018, Student was absent for 90 minutes.⁹⁶ Student has done well in BSS interactions when present.⁹⁷

31. Behavior. Student’s impulsivity and hyperactive behavior prevented completion of tasks and remaining in class, as Student was often excused from class due to behavior disruption.⁹⁸ Student’s impulsivity sometimes led to physical aggression.⁹⁹ Student was transferred to Choice Academy for long term suspensions from 1/15/14 to 2/4/14 and 5/9/14

⁹⁰ Educational Advocate A.

⁹¹ Educational Advocate B.

⁹² P9-5.

⁹³ P29-11,9; R55p251; P29-7.

⁹⁴ Administrative Notice; P7-12 (ESY not required); P29-5,4; P29-16.

⁹⁵ R11p38; P29-3,2,1; Administrative Notice; P6-12 (ESY not required); R31p149,148.

⁹⁶ R29p140; R24p126,125.

⁹⁷ R23p123.

⁹⁸ P6-8; P7-8.

⁹⁹ P4-7.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

to 6/16/14.¹⁰⁰ On 9/19/14 Student received a 25-day off-site suspension for pushing and shoving an assistant principal and security guard while absconding from class.¹⁰¹

32. Due to an incident on 11/15/17, Student received a suspension of 33 school days during which Student was to attend [REDACTED] but did not do so.¹⁰² The incident occurred when Student ran up behind a Public School teacher Student did not know in a hallway at Public School, slapped the teacher on the back of the head causing minor injury, and ran off; Student admitted to the action, saying that Student was “just playing.”¹⁰³ The teacher wanted to press charges so the Metropolitan Police Department was called.¹⁰⁴ DCPS held an MDR meeting on 11/22/17 and determined that Student’s behavior was not a manifestation of Student’s disability.¹⁰⁵

33. The psychological evaluation on 6/26/14 found Student to be impulsive, disruptive, aggressive, defiant, and having rule-breaking behaviors.¹⁰⁶ In determining Student’s OHI and ED classification in 2014, the IEP team concluded that Student displayed “inappropriate behaviors under normal circumstances.”¹⁰⁷ The current FBA and BIP noted that Student has significant difficulty with interpersonal relationships with both adults and peers.¹⁰⁸ Student’s teachers completed a Problem Behavior Questionnaire and identified Student’s impulsive and non-compliant behaviors as problem areas.¹⁰⁹ Educational Advocate A credibly testified that impulsivity and not considering the long term consequences are related to Student’s disabilities.¹¹⁰

34. Ongoing Education. The 2016 and 2017 IEPs stated that Student “requires a small classroom setting” with support services that will assist Student in decreasing disruptive behavior and making academic gains.¹¹¹ The 2016 IEP stated that a “small learning environment” is most beneficial for Student to be successful.¹¹² Public School agreed that Student needed a more restrictive setting and proposed a Behavior & Education Support (“BES”) self-contained class.¹¹³ Student may need a program with flexibility in scheduling courses, very low student to teacher ratios, and an option for evening courses if that

¹⁰⁰ P11-4; R63p330 (listing longer periods).

¹⁰¹ P11-1,2.

¹⁰² Parent; P2-1; P26; P27-2.

¹⁰³ R1p4; R2p7.

¹⁰⁴ R2p7.

¹⁰⁵ R3p8; R1p3.

¹⁰⁶ P11-15.

¹⁰⁷ P9-2.

¹⁰⁸ R6p16; R5p11.

¹⁰⁹ R5p14.

¹¹⁰ Educational Advocate A.

¹¹¹ P4-7; P6-8.

¹¹² P6-5.

¹¹³ P2-1.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

improves attendance.¹¹⁴ Student wants a vocational program.¹¹⁵ Parent testified that Student might be willing to attend a couple hours a day of outside tutoring.¹¹⁶

Conclusions of Law

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

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

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

Once a child who may need special education services is identified and found eligible, DCPS must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010). The IDEA sets forth evaluation procedures to determine what services an eligible child should receive and the burden is on DCPS to ensure that the child is assessed in all areas of suspected disability. *Z.B. v. Dist. of Columbia*, 2018 WL 2011461, at *2 (D.C. Cir. May 1, 2018); 20 U.S.C. § 1414(a)-(b).

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

¹¹⁴ P9-5.

¹¹⁵ Educational Advocate A.

¹¹⁶ Parent.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

Supreme Court made very clear that the standard is well above *de minimis*, however, stating that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Andrew F.*, 137 S. Ct. at 1001.

In addition, Respondent must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114; *Andrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible).

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

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B.*, 2018 WL 2011461, at *6 (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. West*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). “Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3.

Issue 1: *Whether DCPS denied Student a FAPE by failing to provide an appropriate IEP/LRE or placement during 2016/17 and/or 2017/18, where (a) Student was receiving only 15 hours/week of inclusion support and 60 minutes/month of BSS, (b) there was a lack of baseline data, (c) goals were not individualized, (d) Student needed a placement that could address behavior and academic concerns and cognitive failings, and/or (e) the IEPs were not based on comprehensive evaluations. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a prima facie case on this issue, shifting the burden to Respondent which did not meet its burden of persuasion on the IEP claims involving specialized instruction and BSS.

The applicable legal standard for analyzing the appropriateness of the 3 IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

whether it is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F.*, 137 S. Ct. at 1001. As the U.S. Court of Appeals for the District of Columbia Circuit very recently emphasized in *Z.B. v. Dist. of Columbia*, 2018 WL 2011461, at *1 (D.C. Cir. May 1, 2018), *Andrew F.* “raised the bar on what counts as an adequate education under the IDEA” compared to the decision under review in *Z.B.* by requiring more than “merely some” educational benefits. *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 the IEP are determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See, e.g., Z.B.*, 2018 WL 2011461, at *7; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEP is analyzed by considering the specific concerns raised by Petitioner, which are considered below in turn.¹¹⁷ *See* 34 C.F.R. 300.320(a)(4),(5); *Honig*, 484 U.S. at 311. It should further be noted as a preliminary matter that Student’s poor school attendance is a critical element in this case, which is discussed in detail in Issue 3 below.

(a) Specialized Instruction and Behavioral Support Services. Student is doing very poorly at school, having received poor grades for years and now failing Grade for the second time. A majority of Student’s 2016/17 grades were “Fs” and at the time of transferring from Prior Public School to Public School in October 2017, all of Student’s grades were “Fs” except one. In the 2017/18 Term 2 Progress Report, Student received all “Fs.” Despite this, Student’s special education support has not increased, but actually declined over the years.

Student’s specialized instruction hours were increased in the 11/6/14 IEP to 10 hours/week inside general education and 10 hours/week outside general education, which were not viewed as sufficient. On 2/23/15, Student’s MDT requested a more restrictive environment, yet Student’s next IEP contained 15 hours/week of specialized instruction inside general education and none outside general education, which is where specialized instruction has remained in Student’s 2016 and 2017 IEPs and even on a draft 4/18/18 IEP. DCPS did not provide a cogent explanation during the hearing for decreasing specialized instruction hours when the MDT sought to increase them and for maintaining all specialized instruction hours inside general education even as Student has struggled and failed class after class. DCPS did not meet its burden on specialized instruction, which the undersigned finds should be increased to at least 20 hours/week outside general education.

As for BSS, according to Student’s 2015, 2016 and 2017 IEPs, Student is unable to make progress without “intensive behavioral support” in multiple areas of concern. BSS is needed to improve Student’s social-emotional development and self-regulation specifically.

¹¹⁷ As an initial matter, a Hearing Officer must 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. No specific procedural violations were alleged in this case.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

Student's BSS is to include counseling, behavior management and consultation with teachers and parent, but recent IEPs provided only some 15 minutes/week (60 minutes/month) for all such efforts, which clearly is not sufficient.

Indeed, in 2016 Student's team decided to increase Student's level of behavioral support and include both direct and consultative services, yet Student's BSS was instead reduced from 120 minutes/month to only half that for reasons DCPS did not justify at the hearing. The 10/20/16 IEP dropped Student's BSS from 120 minutes/month to 60 minutes/month, where Student's BSS has remained in the 2017 IEP and even in a draft 4/18/18 IEP. Given the behavioral issues discussed herein and Student's urgent attendance problems, DCPS did not meet its burden of persuasion that this level of BSS in the IEPs is adequate and this Hearing Officer concludes that lack of BSS impacted Student's education. Educational Advocate B testified that Student's BSS was unreasonably low and that even 240 minutes/month is not enough. The undersigned considers a quadrupling of services to be significant and is concerned that Student not be pulled from academics more than is necessary and accordingly orders 240 minutes/month of BSS below.

(b) Baseline Data. Unlike the prior IEPs, Student's 2017 IEP at Public School did not include baselines for goals, which were sometimes noted as missing due to Student's absences or lack of academic data on Student at Public School. In these circumstances the undersigned does not find a violation of IDEA or a deprivation of educational benefit sufficient to amount to a denial of FAPE. *See Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (parent cited no case where lack of a measurable baseline was found to be a denial of FAPE); 34 C.F.R. 300.513(a).

(c) Individualized Goals. Petitioner challenged Student's goals for not being individualized, but Educational Administrator described how the goals were selected for Student's particular needs, even if drawn from a manual of goals. Educational Administrator further explained that if a student has poor attendance, the IEP goals may need to reference prior IEPs from earlier school years. The undersigned finds no violation here.

(d) Placement. The legal standard under the IDEA is that DCPS "must place the student in a setting that is capable of fulfilling the student's IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013). *See also O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (placement must be in a school that can fulfill the student's IEP requirements). Here, DCPS did not fail in its burden of showing that Public School and Prior Public School were capable of fulfilling Student's IEPs.

(e) Comprehensive Evaluations. IEPs based on sufficient evaluations are critical, as the D.C. Court of Appeals recently emphasized, for without the requisite assessment of a student's needs as of the time IEPs were drafted it is not possible to determine what services were needed to provide an appropriate education. *Z.B.*, 2018 WL 2011461, at *7. However, as discussed in more detail in the next issue below, the evaluations for Student were not so deficient as to be a denial of FAPE given the difficulties in assessing Student due to absences and Student's dislike of evaluations.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

Denial of FAPE. In considering the concerns above, the undersigned is cognizant of the fact that the analysis is not about achieving perfect IEPs, but IEPs reasonably calculated to enable Student to make appropriate progress. *Andrew F.*, 137 S. Ct. at 1001; *Z.B.*, 2018 WL 2011461, at *3 (IDEA “stops short of requiring public schools to provide the best possible education”). *See also Hill v. Dist. of Columbia*, 2016 WL 4506972, at *21 (D.D.C. 2016), *quoting Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015). This is especially true in the circumstances here in which the 2017 IEP and likely others were developed in less than optimal circumstances due to Student’s ongoing attendance problems. Yet, on balance and given that DCPS bears the burden of persuasion, the undersigned concludes that the limited specialized instruction and BSS hours did deny Student a FAPE, as the 2015, 2016 and 2017 IEPs were not reasonably calculated to enable Student to make appropriate progress under the circumstances during the last 2 years, which results in the remedy set forth below.

Issue 2: *Whether DCPS denied Student a FAPE by failing to comprehensively and timely evaluate or reevaluate Student due to Student’s pattern of behavior concerns and academic functioning, as well as very low cognitive performance; Student was not comprehensively reevaluated at any point in the last 2 years which was needed based on Student’s cognitive levels and academic failures, including at the time of Student’s triennial reevaluation in November 2017, and needs (a) a neuropsychological evaluation, (b) an adaptive assessment, (c) a speech and language evaluation, (d) an occupational evaluation, (e) an updated FBA, and (f) a vocational evaluation. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on this evaluation issue, despite the recent *Z.B.* decision by the D.C. Court of Appeals emphasizing the burden on schools to ensure that children are assessed in all areas of suspected disability. *Z.B.*, 2018 WL 2011461, at *2, *quoting* 20 U.S.C. § 1414(b)(3)(B).

The Court of Appeals explained in *Z.B.*, 2018 WL 2011461, at *7, that failing to conduct adequate assessments, such as an FBA, was a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student’s behaviors, leading to them being addressed in the IEP inadequately or not at all. *See also Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) (“in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student’s unique needs and reasonably calculated to enable [the student] to receive educational benefits” (citation omitted)); *Hill*, 2016 WL 4506972, at *18; 34 C.F.R. 300.304(c)(4). The IDEA requires a reevaluation of each student with a disability at least once every three 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. 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.*, 2018 WL 2011461, at *2; Office of Special Education and Rehabilitative Services, U.S. Department of Education, *Analysis of Comments and Changes*, 71 Fed. Reg. 46643 (2006). However, the IDEA does not require a public agency to administer every test requested by a parent or recommended in an evaluation, as the public agency has the prerogative to choose assessment tools and strategies to gather relevant information. *Cf.*

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

James v. Dist. of Columbia, 194 F. Supp. 3d 131, 143 (D.D.C. 2016).

As an initial matter, the undersigned holds that the 10/19/17 triennial psychological evaluation in this case was adequate even though limited to a thorough review of records, since efforts to test, observe and interview Student were not successful due to Student's absence, and even efforts to obtain input from Parent were stymied. The specific evaluations sought by Petitioner are considered in turn.

(a) Neuropsychological Evaluation. Petitioner's request for a neuropsychological evaluation was based on a 2015 neurological report that suggested formal neuropsychological testing which could be facilitated by the court. DCPS apparently learned about the 2015 report during a 2/15/18 meeting in which Petitioner's counsel promised to send the report that day, but DCPS did not see it until disclosures were made for this hearing. A 6/4/15 psychiatric evaluation recommended a neurological evaluation – which is a medical assessment – to rule out a central nervous system lesion, separate from the requested neuropsychological evaluation. Petitioner did not demonstrate why the years-old recommendation was compelling enough to be followed now. Certainly DCPS cannot be faulted for not carrying out a recommendation it had not seen.

(b) Adaptive Assessment. Much advocacy in this case focused on the issue of whether an adaptive assessment was needed based on Student's FSIQ level. Adaptive measures are routinely employed when an FSIQ is 70 or below. Petitioner's advocates argued that even at 75 an adaptive assessment should be conducted, which DCPS disputed. In any case, Student's FSIQ was 73 but the evaluator noted that the score should be interpreted with caution because of Student's low motivational level, which suggests that Student's actual FSIQ may well be higher than 73 and thus out of the range for an adaptive by everyone's definition. The undersigned found persuasive School Psychologist's expert testimony that Student does not need adaptive assessment.

(c) Speech-Language Evaluation. Petitioner put on very little evidence relating to the need for a speech-language evaluation and did not meet her burden of persuasion.

(d) Occupational Therapy Evaluation. Although Student had very low PSI scores in the 2014 psychological evaluation, and difficulties with sensory responses and hand-eye coordination were raised, the undersigned was not persuaded that an OT evaluation was required where the 10/26/14 comprehensive psychological reevaluation found that Student's handwriting was "typical" and Student was very rarely available for testing.

(e) Functional Behavioral Assessment. Petitioner withdrew her request for an FBA to be ordered in this case, because an FBA was conducted earlier this calendar year. The timing impact in conducting the FBA is discussed in the next issue below.

(f) Vocational Evaluation. Student took the O*NET Interest Profiler on 10/16/17, immediately followed by the Casey Life Skills Assessment. Student's IEP transition plan was not implemented due to frequent and chronic absences, which would also have impeded further vocational evaluation, so the undersigned finds no violation here.

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

In sum, this Hearing Officer concludes that Petitioner did not meet her burden of demonstrating a denial of FAPE due to DCPS failing to conduct any of the evaluations sought. Student was difficult to evaluate due to frequent absences and because Student does not like to be evaluated (according to Petitioner's advocate). However, DCPS offered in February 2018 to complete a comprehensive psychological evaluation (including an adaptive assessment), vocational assessment and an OT screening, apart from settlement negotiations. The undersigned expects those evaluations to be carried out if Petitioner provides her consent, so they are not required by order below.

Issue 3: *Whether DCPS denied Student a FAPE by failing to timely develop, implement and/or update a BIP during the last 2 years as behaviors continued to escalate, and/or otherwise address Student's attendance issues that are linked to Student's disability. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did meet her burden of proof on this issue prior to Student enrolling in Public School in October 2017, when Student's attendance issues were not adequately addressed, including insufficient efforts to conduct an FBA and develop a BIP.

In certain circumstances failing to conduct an FBA and develop a BIP may be a denial of a FAPE. *See, e.g., Z.B.*, 2018 WL 2011461, at *7; *Long*, 780 F. Supp. 2d at 61. More generally, the IDEA does require that a school district respond to a student's frequent or extended absences. *See, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009); *Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F. Supp. 2d 18, 34 (D. Me. 2005) (if not in school, student could not be said to be receiving "a free appropriate public education").

Here, there is no doubt that Student's lack of attendance was a severe problem. In 2017/18, Student had over 100 absences (to date), and was thus making no academic progress. Similarly, Student made no progress in 2016/17 (and had to repeat Grade) due to excessive absences. Student was failing all classes but one at the time of the 2016 IEP due to lack of attendance.

The question is whether DCPS has given Student all the supports that are reasonable in the circumstances to address Student's extreme absences. In January 2016, a Behavior Support Services data sheet (alignment plan) was completed, raising Student's chronic attendance issues, but noting the last FBA was from June 2014 with a BIP on 11/10/14. As Educational Advocate B credibly testified, an FBA should have been conducted to determine areas of concern and targeted behavior and then a BIP or attendance plan developed to overcome the identified barriers. But no other FBA/BIP appeared in the record until the spring of 2018. Further, there were no efforts by Prior Public School to reach out to Student's family from 12/16/15 to 10/13/17 recorded in the contact log (apart from scheduling the annual IEP meeting), in marked contrast to the contacts after Student transferred to Public School.

At the October 2017 IEP meeting, Student's teachers at Public School noted Student's excessive absences and the need to go to classes. The 10/19/17 triennial psychological evaluation recommended that Student be supported by the school attendance

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

team, family, and other community based supports that could address truant behaviors and encourage school attendance, as well as consider an incentive-based program that targets attending school and completing assignments. While there is no indication that these recommendations were implemented, Student was mostly absent making implementation difficult. Public School's Social Worker spoke with Parent several times in 2017/18 including during a home visit, tried to contact Parent other times, and developed the best FBA he could at the urging of Parent's advocates, even though Student did not participate.

Ultimately, as long as the school does its part, it is up to Student to do what is required and to be responsible for Student's own educational results. In *Garcia ex rel. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 2007 WL 5023652, at *14 (D.N.M. 2007), *aff'd in part sub nom. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116 (10th Cir. 2008), the court addressed the problem of a high school student with a pattern of extreme truancy and found that the "IDEA does not provide a remedy for this kind of case – where the access to a free and appropriate public education is wide open, but the student refuses to attend school and refuses the numerous and extensive educational opportunities afforded to [the student]." *See also S.J. ex rel. S.H.J. v. Issaquah Sch. Dist. No. 411*, 2007 WL 2703056, at *7 (W.D. Wash. 2007) ("School District is not responsible for the Parents' failure to ensure the Student was at school in order to benefit from [the student's] education").

Here, as Parent testified, she wakes Student up in the morning and tries to get Student to school, but Student generally goes back to bed rather than to school. The undersigned determines that Public School did take reasonable steps to try to address Student's absences and disengagement from school, but that Student was making Student's own choices about whether to go to school and attend classes.

In sum, this Hearing Officer concludes that DCPS did not provide the support that Student needed at Prior Public School, which directly impacted Student's education and was a denial of FAPE that contributes to the compensatory education awarded below, but that the efforts of Public School were reasonable – even if unsuccessful – and thus there was no denial of FAPE after October 2017.

Issue 4: *Whether DCPS denied Student a FAPE by failing to fully implement Student's IEP by providing all of Student's BSS from 3/1/16 to present, with only 10.5 hours of BSS during that time period. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden on the issue of missing Behavioral Support Services. With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student's IEP. *See 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 v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), *quoting Catalan 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*

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

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*, 194 F. Supp. 3d at 139.

Here, Student was to receive 120 minutes/month of BSS from 3/1/16, the date from which the claim is asserted, to 10/20/16, when Student’s IEP was modified and after which only 60 minutes/month of BSS was required. Careful review of Service Trackers, as detailed in the Findings of Fact, from January through June 2016 make it clear that Student received the direct services due unless Student was absent or unavailable or the school closed, which then accounted for every minute. Thus, while March was 60 minutes low and April 30 minutes low, those months were offset by May being 60 minutes high and June 30 minutes high, so it all balanced out.

While it is understandable that there were no services over the summer (with no ESY on Student’s IEP), the first Service Tracker for 2016/17 was for October 2016 and provided 210 minutes of direct services, making up a good portion of what was not reported (and may have been missed) in August and September. The following months clearly provided the required 60 minutes/month of direct services, with an extra 60 minutes in March 2017. Service Trackers are not in the record for May and June 2017 and not again until October when Student absences and school closures of 90 minutes/month are noted through March 2018 after the due process complaint was filed. The single exception is February 2018 when 50 minutes of direct services were reported, along with 30 minutes of school closure. But accounting for 90 minutes/month from October 2017 to March fully offsets the months for which there were no Service Trackers and minutes may have been missed.

In sum, careful analysis reveals that, taking into account times when Student was absent or unavailable and the few school closures noted, there were no BSS services that were unaccounted for and thus not even a minor discrepancy, much less a material deviation. In the judgment of this Hearing Officer there clearly would not have been a material deviation from Student’s IEPs even if the few school closures were taken out of the calculation as missed services.

Issue 5: *Whether DCPS denied Student a FAPE on disciplinary issues by (a) failing to hold an MDR and/or determine that the behavior resulting in Student’s long term suspension on 11/17/17 was a manifestation of disability; (b) excluding Student from school for 45 or more days when the behaviors were clearly a manifestation of disability; and/or (c) failing to conduct an updated FBA and revise Student’s BIP. (Petitioner has the burden of persuasion on this issue.)*

Finally, Petitioner did meet her burden of demonstrating that Student’s behavior in the 11/15/17 incident was a manifestation of Student’s disability. As described above, the incident occurred on 11/15/17 when Student ran up behind a Public School teacher Student did not know in a Public School hallway, slapped the teacher on the back of the head, and ran off. Student later forthrightly admitted to the action, saying that Student was “just playing.”

The IDEA requires that, within 10 school days of any decision to change the

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

placement of a child with a disability for a violation of a code of student conduct, an MDR must be conducted, which was met here with a meeting on 11/22/17. 34 C.F.R. 300.530(e)(1). To conduct the MDR, the Local Education Agency (“LEA”), the parent, and relevant members of the child’s IEP team must review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parent to determine (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or (ii) if the conduct in question was the direct result of the LEA’s failure to implement the IEP. 34 C.F.R. 300.530(e)(1). If the 11/15/17 incident was a manifestation of Student’s disability, Student’s BIP (if already developed, as here) must be reviewed and modified as necessary to address the behavior, pursuant to 34 C.F.R. 300.530(f)(1)(ii), and Student should be returned to Student’s placement, pursuant to 34 C.F.R. 300.530(f)(2), unless certain exceptions are met which are not applicable here.

In determining Student’s OHI and ED classification in 2014, the IEP team concluded that Student displayed “inappropriate behaviors under normal circumstances.” The 6/26/14 psychological evaluation found Student to be impulsive, disruptive, aggressive, defiant, and having rule-breaking behaviors. Sometimes Student’s impulsivity leads to physical aggression. Indeed, on 9/19/14 Student received a 25-day off-site suspension for pushing and shoving an assistant principal and security guard while absconding from class. The recent FBA and BIP note that Student has significant difficulty with interpersonal relationships with both adults and peers. Student’s teachers also identified Student’s impulsive and non-compliant behaviors as problem areas. Educational Advocate A persuasively testified that impulsivity and not considering long-term consequences are related to Student’s disabilities.

Thus, this Hearing Officer is persuaded that the 11/15/17 incident was a manifestation of Student’s disabilities, as it seems entirely in line with the impulsivity and ED definition of Student’s disabilities. If the incident was not caused by Student’s disabilities, it certainly had a direct and substantial relationship to them. However, in terms of remedy the undersigned sees little harm resulting from the long term suspension changing Student’s placement, as Public School was not working for Student anyway. Student was essentially not attending Public School before the incident and did not attend often afterwards. Student was given the chance to go to [REDACTED], and might have benefited from the instruction there more than at Public School, but did not take the opportunity there either.

Accordingly, in addition to contributing very modestly to the compensatory education ordered below, DCPS is ordered to reverse the MDR determination and revise all documentation in the SEDS database (and elsewhere) to indicate that Student’s behavior on 11/15/17 was a manifestation of Student’s disabilities. In addition, Student’s BIP must be reviewed and modified as necessary to address the behavior at issue, if that was not done when it was updated after the incident, pursuant to the requirements of 34 C.F.R. 300.530(f)(1)(ii).

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

Remedy

The IDEA gives Hearing Officers broad discretion to provide an equitable remedy for students who have been denied a FAPE. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 522-23 (D.C. Cir. 2005); *B.D. v. Dist. of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016); *Hill*, 2016 WL 4506972, at *25 (IDEA prescribes broad discretion in fashioning relief for educational deprivation).

While there is “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.*, 817 F.3d at 799, 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). Indeed, “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*, 401 F.3d at 523-24.

Here, as the remedy for the denials of FAPE found above, within 30 days an IEP team meeting shall be convened by DCPS to revise Student’s IEP by (1) increasing specialized instruction to a total of at least 20 hours/week outside general education, and (2) increasing the level of BSS to 240 minutes/month outside general education, as well as modifying Student’s records to remove the long term suspension for the incident which was a manifestation of Student’s disabilities. Compensatory education is also awarded below, based on this Hearing Officer’s determination of what would be most beneficial to put Student in the position Student should have been in at this point had there been no deficiencies in the IEP or other denials of FAPE. This determination takes into account Parent’s assessment of Student’s tolerance for outside tutoring of up to 2 hours a day and the recognition that if Student does not get engaged in education through mentoring or counseling that tutoring is unlikely to be useful. Indeed, as School Psychologist noted in the 10/19/17 triennial, Student must be willing to receive the supports offered in order to make progress, which is the reason for mentoring and/or counseling to be provided in addition to tutoring.

While there was no compensatory education proposal presented in the hearing, some of Petitioner’s claims were rejected in any event, so any compensatory education proposal would have had to be adjusted and shaped in just the manner that this award is being determined. Further, since evaluations are not being ordered, there is no reservation of compensatory education for a future determination based on additional information. Nor does this Hearing Officer, in an exercise of discretion, determine it necessary or helpful to order a separate compensatory education evaluation, which would simply multiply the proceedings and delay the relief needed by Student.

Accordingly, DCPS is ordered below to provide funding for a total of (a) 50 hours of counseling and/or mentoring to make up for the lack of BSS, with the blend to be

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

determined at the option of Petitioner with assistance from Petitioner's advocates, and (b) 200 hours of academic tutoring to make up for the lack of specialized instruction, lack of support (including timely FBAs/BIPs) while attending Prior Public School, and a small measure due to the MDR reversal. All compensatory education services may be from independent providers chosen by Petitioner with assistance from Petitioner's advocates. All hours awarded are to be used within 18 months in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent which may result from compensatory education awards stretching over excessively long timeframes.

ORDER

Petitioner has prevailed on certain claims, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Within 30 days, DCPS shall convene an IEP team meeting in order to revise Student's IEP by (a) increasing specialized instruction to at least 20 hours/week outside general education, and (b) increasing the level of BSS to 240 minutes/month outside general education.
- (2) Within 30 days, DCPS shall reverse the Manifestation Determination Review decision relating to Student's 11/15/17 incident and revise all documentation in the SEDS database and elsewhere to indicate that Student's behavior on 11/15/17 was a manifestation of Student's disability.
- (3) As compensatory education for the denials of FAPE found above, DCPS shall provide letters of authorization for a total of (a) 50 hours of counseling and/or mentoring, with the blend to be determined at the option of Petitioner, and (b) 200 hours of academic tutoring, all from independent providers chosen by Petitioner, with such letters to be provided within 10 business days after Petitioner's request(s). All hours are to be provided and used within 18 months; any unused hours will be forfeited.

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

Hearing Officer Determination
Case No. 2018-0048 (**Expedited**)

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:

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