

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
May 11, 2020

PETITIONER,
on behalf of STUDENT,¹

Date Issued: May 11, 2020

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2020–0060

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Online Video Conference Hearing

April 30 and May 1, 2020

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (MOTHER) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). In her due process complaint, Petitioner seeks relief for DCPS’ allegedly not timely determining Student eligible for special education and developing an allegedly inappropriate initial Individualized Education Program (IEP) for Student in February 2020.

Petitioner’s Due Process Complaint, filed on February 28, 2020, named DCPS as Respondent. The undersigned hearing officer was appointed on March 2, 2020. On March 13, 2020, the parties met for a resolution session and were unable to resolve the

¹ Personal identification information is provided in Appendix A.

issues in dispute. On March 17, 2020, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters.

Due to the closing of hearing rooms at the Office of Dispute Resolution in the wake of the Coronavirus outbreak, the due process hearing in this case was held online and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on April 30 and May 1, 2020. Mother appeared online for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the parties made opening statements. Mother testified at the hearing and called PSYCHOLOGIST, EDUCATIONAL ADVOCATE and Student as additional witnesses. DCPS called LEA DESIGNEE as its only witness. Petitioner's Exhibits P-1 through P-72 and DCPS' Exhibits R-1 through R-31 were all admitted into evidence without objection. At the conclusion of the taking of the evidence, counsel for the respective parties made oral closing arguments.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the March 17, 2020

Prehearing Order, are:

A. Whether District of Columbia Public Schools (DCPS) denied the Student a free appropriate public education (FAPE) by failing to timely evaluate the Student for special education services beginning April 2018, based on the parent's written request and/or the District's obligation under the Child Find provisions of the IDEA;

B. Whether DCPS denied the Student a FAPE by failing to timely determine the Student's eligibility for special education and developing an appropriate individualized education program (IEP) and

C. Whether DCPS' proposed 2020 initial IEP is inappropriate for the Student because it does not meet the Student's need for full time special education services and increased behavioral support services;

D. Whether DCPS has denied the Student a FAPE by failing to develop an appropriate behavior intervention plan (BIP) before January 2018 and failing to update the BIP since January 2018 and

E. Whether DCPS denied the Student a FAPE by failing to allow the parent access to all of the Student's education records pursuant to written requests.

For relief, the Petitioner requested as follows:

An order for DCPS to immediately provide the Petitioner and her counsel with Student's requested school records; an order for DCPS to ensure that the Student's IEP is revised to provide for at least 20 hours per week of specialized instruction services outside general education and 240 minutes per month of behavioral support services and for the Student's placement in a nonpublic therapeutic day school; and an order for DCPS to conduct an updated functional behavior assessment (FBA) of the Student to

address absenteeism and to conduct any other assessments that are warranted.

Petitioner also seeks an award of compensatory education for the denials of FAPE alleged in the complaint.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides with Mother in the District of Columbia.

Testimony of Mother.

2. On January 15, 2020, the CITY SCHOOL 3 eligibility team determined that Student was eligible for special education services under the IDEA disability classification Other Health Impairment/Attention Deficit or Attention Deficit Hyperactivity Disorder (OHI-ADHD). Exhibit R-7.

3. In May 2015 at CITY SCHOOL 1, Student was determined eligible for a Section 504 Plan (Section 504 of the Rehabilitation Act of 1973), due to ADHD. Psychological documentation considered indicated that Student had been diagnosed with ADHD and Post-Traumatic Stress Disorder (PTSD). A diagnosis of Oppositional Defiant Disorder (ODD) was considered but not formally given. The Section 504 Plan provided for preferential seating for Student, cool-down breaks as needed, check-ins to discuss work completion, feelings and emotions as needed and access to school mental health professionals as needed. Exhibit P-47. Student's 504 Plan was renewed and updated periodically through January 2019. Exhibits P-48 through P-50.

4. In the 2015-2016 school year, when Student attended City School 1, Student was evaluated for special education eligibility due to concerns about a history of problematic behaviors that frequently impeded Student's ability to remain in the classroom for extended periods of time. After conducting an evaluation, the City School 1 eligibility team determined on February 10, 2016 that Student did not meet criteria for Emotional Disturbance (ED) because there was no significant impact on Student's educational performance. At that time, Mother was reported to agree with the eligibility decision. Exhibit P-7.

5. Student attended CITY SCHOOL 2 for the 2017-2018 school year. For the year, Student failed all core academic courses and had to repeat REPEATED GRADE. Student accrued 34 days of unexcused absences and 91 tardies. Exhibit P-34, Testimony of Mother.

6. On November 6, 2017, the City School 2 principal requested that Student be evaluated for special education services because of an uptick in Student's problem behavior to the point that it was impeding Student's progress academically. Exhibit R-17. On December 19, 2017, City School 2 staff requested consent from Mother to evaluate Student for special education eligibility. Mother withheld consent because she did not believe that Student should be placed in special education, but that the school team should focus on a better Section 504 Plan. Exhibit P-9.

7. After the 2017-2018 winter break, City School 2 teachers reported to Mother that Student was not turning in work, had many absences, had behavior

outbursts, was disrupting classes, was using inappropriate language and was threatening physical violence. A teacher requested that Student not be allowed to return to their classroom without a parent or guardian. A school administrator wrote Mother by email that Student was unable to control behavior and unable to offer respect to self, to others or to school property. The administrator wrote Mother that Student “is a bully and a menace. I cannot locate a redeeming quality, so far.” Exhibits P-10 through P-16.

8. Student remained at City School 2 for the 2018-2019 school year. On November 12, 2018, an outside psychological group issued a letter to certify that Student now had diagnoses of ADHD, ODD and Depressive Disorder. The letter stated that Student struggled with sadness and that as a result of being teased, Student’s desire to attend school was obstructed; that Student tended to be tardy often and to withdraw to places of solitude like the restroom. Exhibit P-27. Mother provided the letter to City School 2. Testimony of Mother.

9. On February 13, 2019, Mother submitted a written request for Student to receive a comprehensive psychological evaluation to determine whether Student was eligible for special education. Exhibit P-28. City School 2 acknowledged receipt of Mother’s referral. Exhibit P-29. In April 2019, City School 2 completed an Analysis of Existing Data on Student. Exhibit P-30.

10. On April 29, 2019, City School 2 issued Prior Written Notices to Mother that DCPS would not proceed further with Student’s evaluation process because Mother had been non-responsive to a request to meet, because there was insufficient data on

Student's academic ability and because Student had not attended math or English Language Arts (ELA) classes during the school year. Exhibit P-31.

11. Student failed all courses, except Choral Music, for the 2018-2019 school year. Exhibit P-37. Student was enrolled in summer school, but did not attend regularly and did not pass or meet the requirements for promotion to the next grade. Exhibit P-25.

12. In an email to Mother sent June 28, 2019, the City School 2 principal wrote that the IEP team could not move forward because of Student's poor attendance and that Student was not at school regularly enough for the evaluation team to observe Student in class and perform the necessary assessments. Exhibit P-24.

13. Mother wrote the City School 2 principal on July 24, 2019, to state, *inter alia*, that she had requested that City School 2 do testing to determine whether Student needed special education and had signed an authorization for the evaluation. The principal wrote Mother by email on July 24, 2019 to propose that she consider a program at City School 3 for Student. She wrote that the City School 3 program was much smaller and had the capacity to accelerate Student's path to get back on track to graduation in a much faster way than at City School 2, and that City School 3 would allow Student to start in Grade rather than repeating Repeated Grade for a third time. Exhibit P-25.

14. Student enrolled in City School 3 for the 2019-2020 school year. On September 27, 2019, DCPS issued a funding authorization letter for Student to obtain an

Independent Educational Evaluation (IEE) Comprehensive Psychological Evaluation.

Exhibit P-57.

15. City School 3 has an enrollment of 175 to 200 students in grades 7 to 12. The school's objective is to allow students, who are behind grade level, to excel. Most classes have not more than 14 students, including usually 8-9 students with 2 adults. The middle school and high school are on different floors. Approximately 50 students are enrolled in the middle school. The school's security includes 2 security officers for each floor, security officers at the school entrance and Metropolitan Police patrols outside the building multiple times every day. Testimony of LEA Designee.

16. Since the start of the 2019-2020 school year, Student has had poor school attendance at City School 3. LEA Designee would call mother to report Student's absences and Mother would say that Student was at school. Most days, Student was not in the building. When asked about attendance in January or February 2020, Student said that when not at school, Student was at home playing video games. Testimony of LEA Designee.

17. By letters of September 10, 2018 and October 3, 2019, City School 3 gave notice to the parents that Student had accumulated excessive days of unexcused absences. In the October 3, 2019 letter, the school wrote that Student had been absent consecutively for more than 20 full days and was slated to be withdrawn from the student roster. Exhibits R-26, R-24.

18. By March 5, 2020, Student had accrued 154 reported behavior incidents at

City School 3. Student had some 100 unexcused absences to date for the school year.

Exhibits R-25, R-23, R-22. Student testified at the due process hearing that school attendance was okay, except when Student left for personal issues such as being sick or when in court. I did not find this testimony credible.

19. Psychologist conducted a Comprehensive Psychological Evaluation of Student on November 9, 2020. Psychologist interviewed Student and Mother and conducted a battery of tests to assess Student's cognitive, academic, and social-emotional functioning. Teachers from City School 2 completed behavior rating scales. Psychologist was not able to obtain input from Student's City School 3 teachers or to observe Student at school. Student's cognitive functioning (Brief Intellectual Ability (BIA)) tested in the Average range. On educational testing, Student scored in the Low Average range for Reading and Written Language and in the Low range for Math. Psychologist reported that Student is a student with an Emotional Disturbance, and Other Health Impairment. She diagnosed Student with Major Depressive Disorder, Oppositional Defiant Disorder, ADHD, and PTSD (previously diagnosed). For the special education category, she recommended that Student should be classified as having Multiple Disabilities: OHI (ADHD) and Emotional Disturbance (Depression; PTSD; ODD). For IEP special education and related services, Psychologist recommended that Student receive special education services, 100% outside of the general education setting, in a self-contained class; that Student needed to be placed in a school where bullying is dealt with appropriately, and where staff are empathetic to Student's history and feelings of poor self-worth; that Student receive counseling in the school setting for at least one hour per week and that Student have a

Functional Behavior Assessment (FBA) and updated Behavior Intervention Plan (BIP). Exhibit P-60, Testimony of Psychologist.

20. On January 15, 2020, the eligibility team at City School 3 met to review the IEE psychological evaluation report and an academic teacher questionnaire on Student's progress in the classroom. The team had a dearth of existing data due to Student's chronic absenteeism. The team determined that Student met special education eligibility criteria as a student with OHI-ADHD. Exhibits R-6, R-7. Mother and Petitioner's Counsel, as well as Educational Advocate, participated by telephone in the eligibility meeting and indicated agreement with the determination. Exhibit R-7.

21. Student's IEP team met to develop the initial IEP on February 11, 2020. Mother, Petitioner's Attorney and Educational Advocate attended by telephone. The team identified Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development as IEP areas of concern. For Special Education and Related Services, the IEP provided for 2 hours per day of Specialized Instruction in the General Education Setting and 120 minutes per month of Behavioral Support Services. Exhibit R-11.

22. On February 5, 2020, Educational Advocate wrote an email letter to City School 3 to memorialize areas of dissent from the initial IEP and to request, *inter alia*, that the IEP be changed to provide for a full-time IEP in a therapeutic day school or placement in a Behavior and Education Support (BES) program. Exhibit P-63.

23. Student's grades for the first term at City School 3, ending February 12,

2020, were all F's. Exhibit P-66.

24. On February 13, 2020, Petitioner's Counsel requested DCPS to provide copies of Student's full academic file from City School 3 and behavior incident reports from City School 2. Exhibit P-66.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, in this case DCPS, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

Child Find

A. Did DCPS deny Student a free appropriate public education (FAPE) by failing

to timely evaluate Student for special education services beginning April 2018, based on the parent's written request and/or the District's obligation under the Child Find provisions of the IDEA?

B. Did DCPS deny Student a FAPE by failing to timely determine Student's eligibility for special education and develop an appropriate individualized education program (IEP)?

The parent alleges that DCPS denied Student a FAPE by failing to conduct a timely initial eligibility evaluation. In May 2015 at City School 1, Student was determined eligible for a Section 504 Plan (Section 504 of the Rehabilitation Act of 1973) due to ADHD. DCPS first evaluated Student for special education eligibility in February 2016, when Student was enrolled at City School 1. At that time, Student was determined ineligible for special education and thereafter, Student's Section 504 Plan was regularly reviewed and updated. On December 19, 2017, City School 2 staff requested consent from Mother to evaluate Student for special education eligibility. At that time, Mother withheld consent because she did not believe that Student should be placed in special education. Mother wrote that the school team should focus on a better Section 504 Plan.

The evidence does not establish that Mother requested that Student be evaluated in April 2018. But rather, on February 13, 2019, Mother submitted a written request to City School 2 for Student to receive a comprehensive psychological evaluation to determine whether Student was eligible for special education. City School 2 compiled an Analysis of Existing Data on Student. Ultimately, as stated in an April 29, 2019 Prior Written Notice to Mother, City School 2 decided not to proceed with the evaluation

process because Mother allegedly had not responded to requests to meet with the school team and because Student had not been attending Math and English Language Arts classes for the entire school year. In a later email to Mother sent June 28, 2019, the City School 2 principal wrote that the IEP team could not move forward with the evaluation because Student was not at school regularly enough for the evaluation team to observe Student in class and perform the necessary assessments.

After Student transferred to City School 3 at the start of the 2019-2020 school year, DCPS issued funding authorization for Student to receive an IEE comprehensive psychological assessment. The independent assessment was completed by Psychologist on November 9, 2019. The City School 3 eligibility team met on January 15, 2020 and determined that Student was eligible for special education as a student with an OHI-ADHD disability. Student's initial IEP was completed on February 11, 2020.

Under the IDEA, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir. 2005). Under the Act's child-find requirement, the District must "ensure that '[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.'" *Scott v. District of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006) (quoting *Reid*); 20 U.S.C. § 1412(a)(3). "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process." *Long v. District*

of Columbia, 780 F.Supp.2d 49, 56 (D.D.C.2011). Since July 1, 2018, District of Columbia special education regulations have required that the District must evaluate a student for special education eligibility within 60 days of referral. *See* 5E DCMR § 3005.2. Once the eligibility determination has been made, the District must conduct a meeting to develop an IEP within 30 days. 34 CFR § 300.323(c)(1); *G.G. ex rel. Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279 (D.D.C.2013).

In the present case, Student has clearly been a potential candidate for special education services for the last several school years. In November 2018, Student's outside psychological services provider issued a letter to certify that Student had diagnoses of ADHD, ODD and Depressive Disorder. Although Mother had previously withheld consent to evaluate Student, that changed when Mother submitted a written request to evaluate Student on February 13, 2019.

Determining special education eligibility is a collaborative process. *See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, --- U.S. ---, 137 S.Ct. 988, 994 197 L.Ed.2d 335 (2017) (Core of the IDEA is the collaborative process between the parents and the school officials to fashion the IEP.) "Without some minimal cooperation, a school district cannot conduct an evaluation of a disabled child as is contemplated under the IDEA." *Patricia P. v. Bd. of Educ. of Oak Park*, 203 F.3d 462, 468 (7th Cir. 2000). *See, also*, 34 CFR § 300.301(d) (The initial evaluation timeframe does not apply to a public agency if the parent repeatedly fails or refuses to produce the child for the evaluation.)

In the present case, the City School 2 April 29, 2019 Prior Written Notices document that the school decided not to proceed with the initial evaluation of Student due to Mother's alleged failure to respond to requests to meet with the eligibility team and because Student had not been attending school. However, at the due process hearing, no DCPS witness testified to City School 2's efforts to evaluate Student. Nor did DCPS introduce documentation, such as communication logs, of its efforts in spring 2019 to timely complete Student's evaluation or of the parent's failure or refusal to produce Student for evaluation. Moreover, in the current, 2019-2020, school year, Student was still not attending school regularly, but DCPS was able to complete an initial eligibility evaluation based on the IEE psychological evaluation obtained by the parent.

I conclude that the hearing evidence does not justify City School 2's decision in April 2019 not to complete Student's eligibility evaluation, after receipt of Mother's February 13, 2019 request, as required by the IDEA and by District of Columbia law.

An LEA's failure to appropriately assess a student for suspected disabilities is a procedural violation of the IDEA. *See, e.g., I.T. ex rel. Renee T. v. Department of Educ.*, 2012 WL 3985686, 16 (D.Haw., Sept. 11, 2012). *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012). Procedural violations may only be deemed a denial of FAPE 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 CFR § 300.513(a)(2).

Student's ADHD and other mental health conditions were diagnosed in November 2018 or earlier. When Student was evaluated by DCPS in the current school year, it was finally determined that Student is eligible for special education under the OHI-ADHD disability category and is in need of special education and related services. I conclude it is more likely than not that if Student's evaluation had been completed in the spring of the 2019-2020 school year, Student would have been determined eligible for special education. I find, therefore, that Petitioner met her burden of persuasion that DCPS' failure to timely evaluate Student, upon receipt of Mother's February 13, 2019 request, impeded Student's right to a FAPE. This was a denial of FAPE.

IEP Appropriateness

C. Was DCPS' proposed February 11, 2020 initial IEP inappropriate for the Student because it does not meet the Student's need for full time special education services and increased behavioral support services?

When Student's IEP team met to develop the initial IEP on February 11, 2020, the IEP team identified Mathematics, Reading, Written Expression and Emotional, Social and Behavioral Development as IEP areas of concern. For Special Education and Related Services, the initial IEP provided for 2 hours per day of Specialized Instruction in the General Education Setting and 120 minutes per month of Behavioral Support

Services. Petitioner contends that the proposed IEP services are inadequate and that Student needs full-time special education services in a separate special education day school or in a behavior and education support (BES) classroom. DCPS responds that the initial IEP is appropriate because Student does not have significant academic deficits and Student would not need more special education services if Student would attend school on a regular basis.

In *Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260 (D.D.C. 2016), the Court adopted the Report and Recommendation of U.S. Magistrate Judge G. Michael Harvey, which explained how a court or a hearing officer must assess an IEP:

The Supreme Court explained in [*Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)] that a court's assessment of an IEP involves two inquiries:

First, has the State complied with the procedures set forth in the [IDEA]? And second, is the [IEP] developed through the [IDEA's] procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Moradnejad at 274-75. Here, the parent does not allege that DCPS failed to comply with the IDEA's procedural requirements in developing the February 11, 2020 IEP. Therefore, I turn to the second, substantive, prong of the *Rowley* inquiry, was the February 11, 2020 IEP appropriate for Student?

In *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, *supra*, the U.S. Supreme Court elaborated on the standard, first enunciated in *Rowley*, *supra*, for what

constitutes an appropriate IEP under the IDEA:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F.*, 137 S.Ct. at 999. . . . The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. *Id.* . . . Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original.) . . . The IEP must aim to enable the child to make progress. . . . [T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement. *Id.* . . . A focus on the particular child is at the core of the IDEA. The instruction offered must be "*specially designed*" to meet a child's "*unique needs*" through an "*individualized* education program." An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability and potential for growth. *Id.* (emphasis in original.) . . . A reviewing court may fairly expect [school] authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances. *Id.*, 137 S.Ct. at 1002.

See, also, Z. B. v. District of Columbia, 888 F.3d 515 (D.C. Cir. 2018).

An IEP must respond to all significant facets of the student's disability, both academic and behavioral. That is why a school district's IEP team is required to assess whether the student's disability-related "behavior impedes his or her learning or that of others" in the classroom. 20 U.S.C. § 1414(d)(3)(B)(i). An IEP that fails to address disability-related actions of violence and disruption in the classroom is not reasonably calculated to enable the student to make meaningful progress. *See Alex R., ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221*, 375 F.3d 603, 613 (7th Cir. 2004).

Petitioner's expert, Psychologist, opined that with only 2 hours per day of

specialized instruction in the general education setting, as provided in the February 11, 2020 IEP, it would be impossible to work with Student given the magnitude of Student's learning problems and the emotional-behavioral aspects of Student's disability. Her opinion is supported by the hearing evidence. In the current school year, by March 5, 2020, Student had accrued 154 reported behavior incidents at City School 3. Student had some 100 unexcused absences for the school year. Student received F's on all courses for the first term.

DCPS' expert, LEA Designee, opined that the February 11, 2020 IEP is appropriate with the limited special education services, because Student is intelligent and would make academic progress if Student only came to school on a regular basis. It is correct that the IDEA does not require school districts "to undertake the responsibility of, for instance, forcing a child physically to attend school when the child is a neither unable to attend nor impeded by an emotional condition to a marked degree in following through on his ability to attend." *W.G. v. New York City Dept. of Educ.*, 801 F.Supp.2d 142, 170 (S.D.N.Y.2011). But the District has an obligation under the Act to address a special education student's excessive absenteeism. *See, e.g., Springfield Sch. Comm. v. Doe*, 623 F.Supp.2d 150, 159 (D.Mass.2009) (finding that once a special education student's truancy became excessive, and where the absenteeism was a documented aspect of the student's disability, the School had an affirmative duty to take some sort of responsive action, such as reconvening the student's IEP team.) Further, if a Student's resistance to attending classes is related to ■■■■ disability and prevents the

student from benefitting from special education, it must be addressed in the IEP.

Lexington Cty. Sch. Dist. One v. Frazier ex rel. D.T., 2011 WL 4435690 (D.S.C. Sept. 22, 2011).

In the present case, Psychologist's testimony was unrebutted that Student's mental health diagnoses – Major Depressive Disorder, ODD, ADHD and PTSD – contributed to Student's abysmal school attendance. She pointed to a "huge" correlation between depression and non-attendance and a student's impulse to escape the learning environment due to ADHD. In light of the evidence of Student's significant mental health challenges, as well as Student's documented behavior issues and school avoidance, I find that DCPS did not offer a cogent and responsive explanation for the City School 3 IEP team's decision to place Student in the general education setting, with only 2 hours per day of push-in special education support, and 120 minutes per month of Behavior Support Services. I conclude that DCPS has not met its burden of persuasion that its initial February 11, 2020 IEP is appropriate for Student.

D. Did DCPS deny Student a FAPE by failing to develop an appropriate behavior intervention plan (BIP) before January 2018 and failing to update the BIP since January 2018?

At City School 1, Student had a Section 504 Plan beginning in May 2015. In January 2018, at City School 2, a Behavior Intervention Plan - Level II was made part of the 504 Plan. Student's Section 504 Plan with the BIP was reviewed in March 2019. Parent initially alleged that DCPS denied Student a FAPE by not developing an appropriate BIP before January 2018. Prior to January 2018, Student had not been

determined to have an IDEA disability. A school division is not obliged to provide a FAPE to a child not yet determined to have a qualifying disability. *See, e.g., Reid, supra*, 401 F.3d at 518 (IDEA requires that the District “ensure . . . that free appropriate public education [FAPE] . . . is available to *disabled* children.” (Emphasis supplied.))

At the due process hearing, the parent did not offer probative evidence that Student’s BIP, last reviewed in March 2019, was inadequate or needed to be revised at the time of the initial February 11, 2020 IEP team meeting. Petitioner has not met her burden of persuasion on this issue.

Education Records

E. Did DCPS deny Student a FAPE by failing to allow the parent access to all of Student’s education records pursuant to written requests?

On February 13, 2020, after the February 11, 2020 IEP team meeting, Petitioner’s Counsel requested DCPS to provide copies of Student’s full academic file from City School 3 and behavior incident reports from City School 2. Under the IDEA and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, DCPS must permit parents to inspect and review any education records relating to their child with a disability that are collected, maintained, or used by the agency. DCPS must comply with a request without unnecessary delay – in no case more than 45 days after the request has been made and before any meeting regarding an IEP. *See* 34 CFR §§ 300.613(a), 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C. 2006). At the due process hearing, Petitioner did not offer

probative evidence that DCPS had failed to comply with counsel's request for copies of Student's education records. The parent did not meet her burden of persuasion on this issue.

Remedy

In this decision, I have found that DCPS denied Student a FAPE by its failure to timely complete Student's initial eligibility evaluation following Mother's February 13, 2019 evaluation request and by City School 3's failure to develop an appropriate initial IEP. For relief, that parent requests that DCPS be ordered to revise Student's February 11, 2020 IEP to provide for at least 20 hours per week of specialized instruction services outside general education and 240 minutes per month of behavioral support services and for DCPS to place Student in a nonpublic therapeutic day school. Petitioner also requests an order for DCPS to conduct an updated functional behavior assessment (FBA) of the Student to address absenteeism and to conduct any other assessments that are warranted. Finally Petitioner seeks an award of compensatory education for the denials of FAPE determined in this decision.

In her November 9, 2019 psychological evaluation report, Psychologist recommended, *inter alia*, that Student receive special education services, 100% outside of the general education setting, in a self-contained class and that Student receive counseling in the school setting for at least one hour per week. In her February 5, 2020 dissent to the draft initial IEP, Educational Advocate requested that Student be provided a full-time IEP in a therapeutic day school or placement in a Behavior and

Education Support (BES) program in a DCPS school.

Pursuant to the IDEA, DCPS must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services, including instruction in (a) Regular classes; (b) Special classes; (c) Special schools; (d) Home instruction; and (e) Instruction in hospitals and institutions. *See* 5E DCMR § 3012. The IDEA requires that students with disabilities be placed in the “least restrictive environment” so that they can be educated in an integrated setting with students who are not disabled to the maximum extent appropriate. *See, e.g., Smith v. District of Columbia*, 846 F.Supp.2d 197, 200 (D.D.C. 2012). At the due process hearing, Petitioner’s Counsel represented that Student’s admission by a private therapeutic day school had not been secured. Nor was it shown that Student’s needs could not be met in a suitable self-contained class with appropriate behavior supports. Therefore, I will order DCPS to ensure that Student’s IEP is revised to provide for Student’s placement for all academic and specials classes in a suitable self-contained classroom for students with challenging behaviors. As recommended by School Psychologist, I will also order that Student’s IEP Behavioral Support Services be increased to 240 minutes per month.

Petitioner also seeks an order for DCPS to conduct a functional behavior assessment of Student. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46643 (August 14, 2006). (If a child’s behavior or physical status is of concern, evaluations addressing these areas

must be conducted.) In her testimony, Psychologist recommended that Student receive an FBA. I will, therefore, order DCPS to conduct an FBA of Student after Student begins to attend school regularly.

Lastly Petitioner requests that Student be awarded compensatory education for the denials of FAPE in this case. “Once a hearing officer finds that a school district has denied the student a FAPE, she is required to craft an award that will place a student ‘in the position she would be in absent the FAPE denial.’ *B.D. v. District of Columbia*, 817 F.3d 792, 798 (D.C. Cir. 2016).” *Shaw v. District of Columbia*, No. CV1700738 (DLF/RMM), 2019 WL 498731 (D.D.C. Feb. 8, 2019), *report and recommendation adopted*, No. 17-CV-0738 (DLF/RMM), 2019 WL 935418 (D.D.C. Feb. 26, 2019). An award of compensatory education aims to put a student in the position he or she would be in absent the FAPE denial. *See Collette v. District of Columbia*, No. CV 18-1104 (RC), 2019 WL 3502927 (D.D.C. Aug. 1, 2019).

In her compensatory education proposal, Educational Advocate recommended that DCPS be ordered to provide Student 600 hours of academic tutoring, 100 hours of counseling and 200 hours of mentoring. She based that recommendation on the premise that Student should have been provided a full-time IEP in spring 2018 – resulting in a period of harm of an estimated 400 school days.

In this decision, I have determined that DCPS should have started the evaluation process for Student upon receipt of Mother’s request in February 2019. In light of Student’s history of extreme absenteeism and the parent’s reportedly not responding to

eligibility meeting invitations, allowing for reasonable delay, I find that Student's initial eligibility determination should have been completed by the end of the 2018-2019 school year. I conclude, therefore, that DCPS should have had an appropriate, full-time, IEP in place for Student for the start of the 2019-2020 school year and that the period of denial of FAPE is from the start of the 2019-2020 school year through the present. This is a total of approximately 125 school days, not including the period schools have been closed due to the Coronavirus outbreak,² about one-third of the school days posited by Educational Advocate. I will therefore order DCPS to provide Student 200 hours of tutoring and 35 hours of counseling services as compensatory education. I decline to order DCPS to provide compensatory mentoring services. While such services would likely benefit Student, they are not services needed to put Student "in the position he or she would be in absent the FAPE denial." *See Collette, supra.*

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. DCPS is ordered to ensure that Student's IEP is revised within 21 days of this decision (1) to provide for specialized instruction, in a behavior support classroom outside of general education, for all academic and specials classes and (2) to increase Student's Behavioral Support Services

² Mother and LEA Designee differed in their respective testimony on whether Student has been participating in virtual learning since the DCPS schools were closed due to the Coronavirus outbreak. Mother claims that Student has been doing the virtual learning work. LEA Designee testified that Student has not completed any virtual learning assignments. In light of Student's history of not completing school work when City School 3 was open, I found LEA Designee's testimony more credible.

to 240 minutes per month;

2. As Compensatory Education, DCPS shall provide funding authorization for the parent to obtain for Student 200 hours of individual academic tutoring and 35 hours of counseling services;
3. Within a reasonable period after Student's resumption of regular school attendance, DCPS shall conduct a functional behavior assessment of Student at school and shall ensure that Student's behavior intervention plan is revised as appropriate and
4. All other relief requested by the Petitioner herein is denied.

Date: May 11, 2020

s/ Peter B. Vaden
Peter B. Vaden, 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).

cc: Counsel of Record
Office of Dispute Resolution
OSSE - SPED
DCPS Resolution Team
[REDACTED]@k12.dc.gov
[REDACTED]@k12.dc.gov