

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

<b>Parent on behalf of Student<sup>1</sup></b>	)	<b>Case No. 2020-0202</b>
	)	
<b>Petitioner,</b>	)	<b>Hearing Dates: March 25-26, 2021</b>
	)	
	)	<b>Conducted by Video Conference</b>
<b>v.</b>	)	
	)	<b>Date Issued: May 3, 2021</b>
<b>District of Columbia Public Schools</b>	)	
	)	<b>Terry Michael Banks,</b>
<b>Respondent.</b>	)	<b>Hearing Officer</b>

**HEARING OFFICER DETERMINATION**

**INTRODUCTION**

Petitioner is the mother of a X-year-old student (“Student”) attending School A. On November 30, 2020, Petitioner filed a *Due Process Complaint Notice* (“*Complaint*”) alleging that the District of Columbia Public Schools (“DCPS”) denied the student a free appropriate public education (“FAPE”) by failing to provide an appropriate placement for the 2020-21 school year, failing to implement her/his Individualized Education Program (“IEP”), and failing to provide access to her/his education records. DCPS filed *District of Columbia Public Schools’ Response* (“*Response*”) on December 10, 2020, denying that it had failed to provide a FAPE in any way.

**SUBJECT MATTER JURISDICTION**

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

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

## PROCEDURAL HISTORY

On October 13, 2020, Petitioner filed the *Complaint* alleging, *inter alia*, that DCPS denied Student a FAPE by (1) failing to provide an appropriate placement for the 2020-21 school year, (2) failing to implement Student's 2020- 2021 IEP, and (3) failing to provide access to education records, particularly her/his report card, progress report, recordings of meetings in October and November 2020, and records of a referral to the police for truancy. DCPS filed its *Response* on December 10, 2020 and asserted that (1) DCPS provided an appropriate location of services at School A and was provided virtual instruction, including one-on-one instruction in Algebra 1, Reading 1, and extended classroom sessions; (2) DCPS has not failed to implement Student's IEP; (3) Student has 41 unexcused absences and has not made him/herself available for behavior support services ("BSS"); and (4) DCPS has provided documents when requested and/or when they became available.<sup>2</sup>

The parties participated in resolution meetings on October 27, 2020 that did not result in a settlement. A prehearing conference was conducted by telephone on November 20, 2020, and the Prehearing Order was issued that day.

The due process hearing was conducted on March 25 -26, 2021 by video conference. The hearing was closed to the public at Petitioner's request. Petitioner filed Disclosures on March 11, 2021 containing a witness list of six witnesses and proposed Exhibits P1-P44. DCPS filed objections to Petitioner's disclosures on March 23, 2021. Respondent withdrew the objection to Exhibit P5, I sustained DCPS' objection to Exhibit P29, I deferred ruling on Exhibits P32 and P33, overruled DCPS' objections to Exhibit P3, Exhibit P28, Exhibits P30-31, and Exhibits P34-36, and Exhibits P43-44 were withdrawn by Petitioner. During the hearing, I admitted P32, but did not admit P33. Thus, Petitioners' Exhibits P1-P28, P30-P32, and P34 – P42 were admitted into evidence.

Respondent's Disclosures, also filed on March 11, 2021, contained a witness list of five witnesses and documents R-1 through R-22, including R2A. Petitioners filed no objections to Respondent's disclosures, but DCPS deferred offering exhibits into evidence until its direct case. At the inception of DCPS' direct case, Respondent's counsel offered Exhibits R2-R4, R6-R13, R15-R22 into evidence, which request was granted.

Petitioner presented as witnesses in chronological order: Witness A, Witness B, Petitioner, Witness C, and Student. Witness A was accepted as an expert in school psychology, and Witness B was accepted as an expert in special education programming and placement. Respondent presented as witnesses in chronological order: Witness D and Witness E. Witness D was accepted as an expert in social work; Witness E was accepted as an expert in special education programming and planning. Counsel for the parties provided oral closing arguments at the conclusion of testimony on March 26, 2021.

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<sup>2</sup> At the prehearing conference, Petitioner's counsel stated that DCPS had provided the report card, progress report, and recordings described in the *Complaint*, but he has been unable to open the recordings through office computers. Respondent's counsel stated that the police referral alleged to be related to student's absences in the *Complaint* was actually a welfare check, and records relating to that referral had been sent to Petitioner's counsel.

## ISSUES

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

1. Whether DCPS denied Student a FAPE by failing to provide an appropriate placement for the 2020-21 school year.
2. Whether DCPS denied Student a FAPE by failing to implement his/her 2020 - 2021 IEP.
3. Whether DCPS denied Student a FAPE by failing to provide access to education records, particularly her/his report card, progress report, recordings of meetings in October and November 2020, and records of a referral to the police for truancy.

## FINDINGS OF FACT

1. Student is X years old, and during the 2019-20 school year, s/he was in grade F at School A.<sup>3</sup>

2. On November 27, 2019, when Student was attending School B, Witness A completed a Comprehensive Psychological Evaluation of Student.<sup>4</sup> Witness A noted that “[his/her] attendance is sporadic. Previous to this [his/her] attendance was also a concern, and [s/he] failed many classes... When queried about [her/his] experiences at school, and [his/her] lack of attending classes, [s/he] did not have a response... When not in school on school days, [Student] reports that [s/he] goes to the Georgetown area of D.C., and reportedly hands out flyers... The teacher reported that [Student] was dangerous, physically aggressive towards students and teachers, disruptive, and refused to complete assignments. [S/he] was also described as a ‘bully of others,’ and evidenced physical aggression towards teachers, staff, and students. The student’s refusal to complete work suggested that [s/he] was not performing on grade level, according to the teacher.” During the 2017-18 school year, “The teacher reported that [Student] attracted attention by cursing, being rude, and being uncooperative with classmates and adults. [S/he] would tip over furniture and walk out.” At the beginning of the school year, Student was performing at grade level. However, s/he was habitually absent and failed Language Arts, Graded Advisory, Reading Workshop, and Science, had D’s in Math and World Geography & Cultures, and a C in Health and Physical Education.<sup>5</sup>

On the Woodcock-Johnson Tests of Cognitive Abilities (“WJ-IV”), Student’s Intellectual Ability was in the Average range (93). S/he was High Average (116) in Oral Vocabulary, Average (97) in Verbal Attention, and Low Average (80) and in Number Series, which measures one’s broad reasoning and ability to solve problems using unfamiliar or novel procedures. On the WJ Tests of Achievement, Student scored in the Low range (70) in Math (Grade D.6 Equivalent), and

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<sup>3</sup> Petitioner’s Exhibit (“P:”) 19 at page 1 (205). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., P19:1 (205).

<sup>4</sup> P3:1 (16).

<sup>5</sup> *Id.* at 2 (17).

Low Average (88) in Reading (Grade F.6 Equivalent) and Written Language (85 – Grade E.6 Grade Equivalent).<sup>6</sup>

On the Behavior Assessment System for Children (“BASC-3”), the responses of a grade G teacher’s at School C rated Student Clinically Significant in Externalizing Problems, Hyperactivity, Aggression, Conduct Problems, Depression, on the Behavioral Symptoms Index, Atypicality, Withdrawal, Adaptive Skills, Adaptability, and Social Skills. Student was rated At-Risk, School Problems, Attention Problems, Learning Problems, Study Skills, and Functional Communication. A second grade G teacher at School C rated him/her Clinically Significant in Externalizing Problems, Hyperactivity, Aggression, Conduct Problems, Internalizing Problems, Depression, School Problems, Attention Problems, on Behavioral Symptoms Index, Atypicality, Adaptive Skills, Adaptability, Social Skills, Leadership, and Study Skills. Student was rated At-Risk in Anxiety, Learning Problems, Withdrawal, and Functional Communication. Petitioner’s responses rated Student Clinically Significant in Anxiety, Withdrawal, and Adaptability, and At-Risk in Hyperactivity, Internalizing Problems, Depression, Somatization, on the Behavioral Symptoms Index, Attention Problems, Adaptive Skills, Social Skills, Leadership, and Functional Communication.<sup>7</sup>

Witness A diagnosed Student with a Major Depressive Disorder, Oppositional Defiant Disorder, Attention Deficit Hyperactivity Disorder, and PTSD (previously diagnosed).

It is evident that [Student] is a student with an Emotional Disturbance, and Other Health Impairment, and [s/he] appears to have needed an IEP for quite some time, so that [s/he] can access the curriculum. [His/her] presentation at school of aggressiveness, and non-compliance with teacher's commands would have been a clue that there was a deep emotional piece that needed to be remediated so that learning could take place... [Student] has poor self-esteem, and feelings of impotence, these feelings have been externalized to others in the environment, and can be readily seen through [his/her] assaultive behavior towards peers and teachers alike...

[Student] should be classified under the special education category of Multiple Disabilities: OHI (ADHD) and Emotional Disturbance (Depression; PTSD; ODD).

[Student] requires an IEP, where [s/he] can receive special education services, 100% outside of the general education setting, in a self-contained class. [S/he] needs 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. If there is no public school that can meet this criteria, a full time special education school should be the next option.

[Student] will require counseling in the school setting. [Her/his] anxiety is related to [his/her] education, and perceived peer rejection and bullying impacts [his/her] academic progress. [S/he] needs counseling for at least an hour per week.

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<sup>6</sup> *Id.* at 4-5 (19-20).

<sup>7</sup> *Id.* at 5-11 (20-26).

[Student] will require an F.B.A. A Functional Behavior Assessment will seek to uncover any triggers to [Student's] behavior in the classroom. If the triggers are known, the behaviors can be stamped out.

After the F.B.A., a Behavior Intervention Plan (B.I.P.) will be required. The B.I.P. will uncover how positive behaviors will be rewarded, and negative ones will be punished. Also, the B.I.P. should contain a plan for attendance...<sup>8</sup>

3. On February 28, 2020, Petitioner initiated a due process proceeding against DCPS for its alleged failure, *inter alia*, to find Student eligible for services timely and to develop an appropriate initial IEP. The Hearing Officer determined that DCPS failed to respond timely for Petitioner's February 2019 request for evaluation and failed to develop an appropriate initial IEP. On May 11, 2020, The Hearing Officer ordered DCPS to place student in a self-contained class "for all academic and specials classes."<sup>9</sup>

4. For the 2019-20 school year, Student received failing grades in every course.<sup>10</sup>

5. On June 1, 2020, when Student was in grade I at School B, DCPS issued an Amended IEP. Student was classified as a child with an Other Health Impairment due to ADHD.<sup>11</sup> The Math Present levels of Academic Achievement and Functional Performance ("PLOP") provided that Student was performing at a mid-grade D level, five grades below Student's grade at that time. The baseline was the same. The single goal was: "[s/he] will develop his/her comprehension for number expression of rational numbers; decimal expansion which repeats eventually into a rational number; truncating the decimal expansion; explain how the definition of the meaning of rational exponents follows from extending the properties of integer exponents to the assigned values with four out of five trials."<sup>12</sup> In Reading, the PLOP cited his/her High Average score on the WJ-IV Oral Vocabulary subtest. The baseline noted the same as well as his/her Low Average scores in Reading Comprehension and Reading Fluency. The goal was: "[s/he] will develop decoding skills, reading comprehension and reading fluency through vocabulary development, reciprocal teaching strategies and use of previewing and literary analysis in four out of five trials."<sup>13</sup> In Written Expression, the PLOP cited his/her WJ-IV Low Average score, and noted that his/her writing was at an E.9 level, three grades below his/her level at that time. The Written Expression goal repeated his/her *Math* goal.

In Emotional, Social, and Behavioral Development ("Behavior"), the PLOP noted Witness A's recommendations of classification with multiple disabilities and full-time placement in a self-contained class, but reported that the IEP team rejected the recommendation of multiple disabilities and for a full-time self-contained class. "The evaluator recommended a full time placement in a self contained class. The MDT only accepted the diagnosis of ADHD and rejected the E.D. diagnosis due to not all the protocols being completed... The MDT team did not support a full

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<sup>8</sup> *Id.* at 12-13 (27-28).

<sup>9</sup> P4:25 (5).

<sup>10</sup> P14:3 (102).

<sup>11</sup> P5:1 (57).

<sup>12</sup> *Id.* at 3 (59).

<sup>13</sup> *Id.* at 4 (60).

time inclusion program but did recommend placement in an inclusion setting.” Student had 98 absences (approximately 460 class absences), and was failing her/his classes due to truancy:

[Student] also has a history of school refusal dating back to [his/her] prior school at [School C]. The IEE indicates that [Student] previously had a 504 plan. [S/he] had problems with attendance due to being bullied but teachers at [her/his] last school reported that [s/he] bullied others as well. During an interview with [Witness A], [Student] revealed [s/he] had problems attending school this year since [s/he] does not feel safe at [School B] due to [her/his] concerns about [the neighborhood] crews which trigger [his/her] PTSD.

It is recommended that [Student] would be eligible for behavior support services in school for 120-minute duration monthly. It is recommended that outside therapeutic intervention should also be provided to [Student] to address issues related to [her/his] depression and anxiety as well as issues relating to school refusal. Once [Student] reports to school consistently, an attendance plan should be developed with [her/him] to determine barriers to attendance and what supports are needed to improve attendance and help [her/him] be successful academically.<sup>14</sup>

The baselines were: (1) s/he had missed 85 days and 393 classes this school year, and (2) s/he has a history of school refusal and has been unavailable for instructions. The goals were: (1) to improve class attendance by 50%, and (2) to establish a therapeutic bond in 3 out of 5 trials.<sup>15</sup>

The IEP team prescribed 26.5 hours of specialized instruction outside general education and four hours per month of behavioral support services (“BSS”).<sup>16</sup>

6. On June 29, 2020, DCPS notified Petitioner that it would provide services for Student at School A for the 2020-21 school year.<sup>17</sup>

7. Student had an unspecified problem with her/his computer that was resolved in September. S/he had a new problem three weeks later and received a new computer from School A. S/he has experienced no technical problems with his/her computer since that time.<sup>18</sup>

8. On September 28, 2020, Staff Member C spoke with Student’s father about Student’s attendance. “[Student’s father] reported he was unaware of any missed classes. [Student’s father] reported that he would speak with student today regarding the matter and follow up with the school if any barriers become an issue.”<sup>19</sup>

9. On October 1, 2020, Witness D advised Petitioner that she could pick up a laptop

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<sup>14</sup> *Id.* at 6 (62).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 8 (64).

<sup>17</sup> Respondent’s Exhibit (“R:”) 1 at page 1 (1). The exhibit number and exhibit page numbers are followed by the electronic page number in the disclosure in parentheses, i.e., R1:1 (1).

<sup>18</sup> Testimony of Student.

<sup>19</sup> P12:1 (95).

for Student at School A.<sup>20</sup>

10. Witness D discussed his inability to contact Student with Petitioner on September 24, 2020, October 15, 2020, and October 22, 2020.<sup>21</sup>

11. In September 2020, Student was unavailable to receive BSS from Social Worker A on September 9<sup>th</sup>, September 17<sup>th</sup>, and September 24<sup>th</sup>.<sup>22</sup> In October 2020, Student was unavailable on October 2<sup>nd</sup>, October 14<sup>th</sup>, October 15<sup>th</sup>, and October 26<sup>th</sup>. On October 15<sup>th</sup>, Social Worker A's notes indicated that "Writer will now be communicating with the student's teacher for continued outreach efforts. Plan is to now initiate intervention services for the student during asynchronous class times. Parent outreach efforts also completed." On October 26<sup>th</sup>, "Voice mail could not be left. Text message followed. Writer will now proceed with parent outreach efforts."<sup>23</sup> On October 29, 2020, Social Worker A reached Petitioner "via Google Voice. Session was used to complete the Parent Versions of the Functional Behavior Assessment (FBA) and Strength and Difficulties Questionnaires."<sup>24</sup> In November 2020, Student was unavailable on November 4<sup>th</sup>. On November 12<sup>th</sup>, Petitioner complained to Social Worker A for "the writer contacting MPD to conduct a wellness check for the student. Writer advised the parent that this was initiated given the student's recurrent lack of presence for virtual learning. Parent then informed the writer that she no longer wants the writer providing intervention services for the student." Thereafter, on November 18, 2020, Social Worker A indicated that he was "no longer servicing the student for BSS intervention support given the parent's objections."<sup>25</sup>

12. October 12, 2020, DCPS issued Student's Progress Report for the first term. S/he was failing English, Reading Workshop, Algebra I, and Fitness & Lifetime Sports. S/he had been absent 19 times and was noted by the Algebra teacher and the Fitness teacher as "Does not complete class assignments."<sup>26</sup>

13. In a 30-day Review meeting on October 21, 2020, the team noted that Student's IEP prescribed 26.5 hours of specialized instruction outside of general education, which required him/her to be in a Behavior & Education Support ("BES") class, but was not.<sup>27</sup> BES classes are designed to meet the individual needs of students with emotional and /or behavioral disabilities or who exhibit behaviors that significantly interfere with learning despite multiple interventions.<sup>28</sup> The DCPS staff resolved to place Student in a BES class. Petitioner noted that the camera on Student's computer did not work "for over a week," but the Social Worker A arranged to have it fixed.<sup>29</sup>

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<sup>20</sup> Testimony of Witness D.

<sup>21</sup> R9:7-8 (56-57).

<sup>22</sup> P22:1 (150).

<sup>23</sup> P23:1 (151).

<sup>24</sup> *Id.* at 2 (152).

<sup>25</sup> *Id.* at 24:1 (153). *See also*, R9:9 (58).

<sup>26</sup> P7:1 (75).

<sup>27</sup> P9:1 (82).

<sup>28</sup> <https://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/Attachment%20J9%20%28DSI%20SY18-19%20Staff%20Programs%20and%20Resources%20Guide%29.pdf>.

<sup>29</sup> P9:1-2 (82-83). *See also*, R:3 (19).

14. In the BES classroom, Student receives her/his “specials” in the general education setting.<sup>30</sup>

15. On November 9, 2020, DCPS initiated a welfare check “given [Student’s] lack of participation in virtual learning efforts. No staff member has had any direct contact with [her/him] since school began.”<sup>31</sup>

16. On November 10, Behavior Tech A notified Petitioner by email that Student had not participated in virtual learning since October 22, 2020.<sup>32</sup>

It was communicated by you by email on 10/27/20 to [Teacher A] that [his/her] technology device is not working and a response was given on how to address the issue. If this technology device that [redacted] got from the school is not working, it can be either troubleshooted to resolve the problem or exchanged at [School A] for a different working device during Mondays, Tuesdays, Thursdays, or Fridays between the hours of 9 am to 3 pm when the school is open.<sup>33</sup>

Petitioner replied as follows less than two hours later:

[Student] was having computer issues with not being able to log in and I made one of [his/her] teachers aware when [s/he] first was placed in the BES program. [S/he] was not able to use [his/her] computer for at least a week or more. I also made the school aware as well. There was no school last week. The computer [redacted] had trouble with is an [redacted] School device. I have been in contact with [Teacher A]. [Student] is doing [her/his] work as well. I have been working with the school to make sure [Student] gets [his/her] education and that [s/he] gets the services [s/he] needs. October 22 was almost two weeks ago and [her/his] new schedule wasn’t in Canvas right away as well.<sup>34</sup>

Fourteen minutes later, Teacher A replied as follows:

In regards to your concerns, we had school two days last week, Monday and Thursday. [Behavior Tech A] calls students in to classes when they don’t show up on time. [Student] has been called on Teams every day for each of [her/his] classes. [Student] has not shown up for classes nor has [s/he] completed assignments for General Exploration and English [redacted].<sup>35</sup>

17. In a 30-day Review meeting on November 23, 2020, Student’s English teacher, Teacher A, reported that Student had not attended her class and had not turned in any assignments. Petitioner stated that she was unaware that Student was not participating in virtual learning. Staff

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<sup>30</sup> Testimony of Witness E.

<sup>31</sup> P12:1 (95).

<sup>32</sup> P19:5 (139).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 4 (198).

<sup>35</sup> *Id.*



Member A reported that Student “has not signed in at all.”<sup>36</sup> Staff Member B reported that “we actually do call [him/her] in the morning to make sure [s/he] knows how to log on, and [s/he] says[s/he] knows how to log on. It’s ironic that you ask us to call [her/him], because we DO that already. We call [her/him], and then we call mom, and [Student] confirms [s/he] knows how.”<sup>37</sup> Petitioner’s counsel, Attorney A, recommended that an FBA be done once Student attends consistently for 30 days. Social Worker A expressed reluctance to conduct the FBA because “frankly my intentions have been slighted, and that hurts and I would not be comfortable. Last week [Petitioner] said she doesn’t want me to work with [him/her], and she misrepresented my intentions, and I do resent that, and it will not be possible for me to do this FBA.”<sup>38</sup>

18. From the beginning of the 2020-21 school year until the filing date of the *Complaint*, Student was absent 41 out of 42 days on which attendance was recorded.<sup>39</sup>

19. On December 7, 2020, DCPS issued an IEP Progress Report for the first reporting period of the 2020-21 school year. In Math, Reading, Written Expression, Student had made no progress on any goal: “[Student] is not making progress [in Math, Reading, and Written Expression] due to excessive absences on the virtual classroom. [S/he] has not completed any assignment for term 1. At this time, [Student] is not available to complete this goal. Contact and attempts with [Student] has been made during class time.”<sup>40</sup>

20. On December 15, 2020, DCPS issued Student’s report card for the first term of the 2020-21 school year. Student received “Incomplete” or “No Mark” for each subject due to 35 days of unexcused absences.<sup>41</sup>

21. On February 16, 2021, DCPS issued an IEP Progress Report for the second reporting period of the 2021 school year. In Math, Reading, and Written Expression, “[Student] is not making progress due [to] excessive absence missing and incomplete assignment[s].” In Reading, Student scored 1136 on the Reading Inventory on February 9, 2021, “which is above level for [his/her] grade.”<sup>42</sup> Student’s Behavior goals were Just Introduced.<sup>43</sup> S/he had made no progress on his/her Transition services goals.<sup>44</sup>

22. Student told Witness E that [s/he] preferred to work independently and not attend class virtually.<sup>45</sup>

23. School D, a private school, provides full-time special education services. All of its teachers are certified or provisionally certified in the District of Columbia. The total enrollment is

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<sup>36</sup> P10:1-3 (84-86).

<sup>37</sup> *Id.* at 4 (87).

<sup>38</sup> *Id.* at 8 (91). *See also*, R4 (24-5).

<sup>39</sup> P42.

<sup>40</sup> P15:2-4 (107-107).

<sup>41</sup> P13:1-2 (96-97).

<sup>42</sup> P16:1-2 (111-12).

<sup>43</sup> *Id.* at 3 (113).

<sup>44</sup> *Id.* at 4 (114).

<sup>45</sup> Testimony of Witness E.

75 students. Currently students attend in-person two days per week, and virtually three days per week, but may elect to attend virtually full-time. Approximately one-half of students attend virtually exclusively. Were Student to attend School D, s/he would be the ninth student in the class. There would be a certified teacher and a teacher's assistant in the class.<sup>46</sup> School D has a Certificate of Approval from the District of Columbia Office of the State Superintendent of Education.<sup>47</sup>

The *Complaint* was filed on November 30, 2020. I afforded little weight to documents that post-date the filing date, particularly the December 17, 2020 IEP<sup>48</sup> and meeting notes.<sup>49</sup>

## CONCLUSIONS OF LAW

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

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.<sup>50</sup>

In this case, one of the issues involves the appropriateness of Student's placement. Under District of Columbia law, Respondent bears the burden of persuasion on this issue; Petitioner bears that burden of persuasion on the issues of the implementation of the IEP and access to records.

### **Whether DCPS denied Student a FAPE by failing to provide an appropriate placement for the 2020-21 school year.**

Under IDEA, states and territories, including the District of Columbia, that accept federal educational funds must provide a FAPE to students with disabilities residing within their borders.<sup>51</sup> The IDEA defines a FAPE as an education which is "[ (A) ] provided at public expense, under public supervision and direction, and without charge; (B) meet[s] the standards of the State educational agency; (C) include[s] an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) [is] provided in conformity with the individualized

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<sup>46</sup> Testimony of Witness C.

<sup>47</sup> <https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/NP%20List%20Day%20031121.pdf>.

<sup>48</sup> P18:118.

<sup>49</sup> P17:115.

<sup>50</sup> D.C. Code §38-2571.03(6)(A)(i).

<sup>51</sup> 20 U.S.C. §1412(a)(1)(A).

education program required” under other provisions of the IDEA.<sup>52</sup> Once a student is deemed eligible to receive services under the IDEA, a team including the parents, teachers, and a representative of the local educational agency develops an IEP for the student in accordance with the requirements of the IDEA.<sup>53</sup> In addition to developing the IEP, the student's team determines an appropriate educational placement for the student.<sup>54</sup>

A school is deemed to be an appropriate placement if it is capable of substantially implementing a student’s IEP. In *Johnson v. District of Columbia*,<sup>55</sup> the parents argued that the student’s placement was inappropriate because ██████████ School could provide only 28.25 of the 31 hours prescribed on the student’s IEP, and did not have qualified special education teachers to provide adequate instruction in Spanish and physical education. The court ruled that the 28.25 hours was 91% of the hours prescribed and did not constitute a “material deviation” from the requirements of the IEP. The court cited *Savoy v. District of Columbia*,<sup>56</sup> where a difference of one hour per week was not deemed material, and *Catalan ex. rel. E.C. v. District of Columbia*,<sup>57</sup> where this Hearing Officer was upheld for approving counseling sessions being terminated before the full 45 minutes when, in the professional provider’s opinion, the sessions had reached the point of diminishing returns. The *Johnson* court was also satisfied that DCPS was endeavoring to hire special education teachers in Spanish and physical education that would allow the student subsequently to receive the necessary credits.

Here, on November 27, 2019, Witness A completed the only Comprehensive Psychological Evaluation of Student in the record, and recommended that s/he “requires an IEP, where [s/he] can receive special education services, 100% outside of the general education setting, in a self-contained class... If there is no public school that can meet this criteria, a full time special education school should be the next option.” Thereafter, on May 11, 2020, the Hearing Officer ordered DCPS to place Student in a “classroom outside general education, for all academic and specials classes.”<sup>58</sup> A month later, DCPS issued an amended IEP that specifically rejected Witness A’s recommendation for a full-time, out of general education setting, but “did not support a full time inclusion program but did recommend placement in an inclusion setting.” Apparently, the IEP team was oblivious to the HOD that compelled DCPS to adopt Witness A’s recommendation and place Student in a self-contained class for core courses and specials, *i.e.*, Art, Music, Library, Health and Physical Education, etc.

At the beginning of the school year, it is undisputed that Student was not assigned to one of School A’s BES classes, and was scheduled to receive some of his/her core courses in general education classes. This was corrected after the 30-day Review meeting on October 21, 2020. However, Witness E confirmed that Student’s BES class receives its specials in a general education environment.

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<sup>52</sup> 20 U.S.C. §1401(9).

<sup>53</sup> 20 U.S.C. §1414(d)(1)(A and B).

<sup>54</sup> *Id.*, §1414(e).

<sup>55</sup> 962 F.Supp.2d 263 (D.D.C. 2013). *See also, O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 53 (D.D.C. 2008).

<sup>56</sup> 844 F.Supp.2d 23, 34 (D.D.C. 2012).

<sup>57</sup> 478 F.Supp.2d 73, 76 (D.D.C. 2007).

<sup>58</sup> P4:25 (54).

Therefore, I conclude that DCPS has failed to meet its burden of proving that it provided an appropriate placement for the 2020-21 school year, as the placement at School A did not comply with the HOD of May 11, 2020 that required a setting in self-contained classes for all courses.

**Whether DCPS denied Student a FAPE by failing to implement his/her 2020 - 2021 IEP.**

As discussed above, it is undisputed that Student was not assigned to a BES classroom at the beginning of the school year; some of his/her core academic classes were in general education settings, provided virtually. This was corrected at the 30-day Review meeting on October 21, 2020. However, the record supports a finding that Student made little effort to participate in virtual learning from the beginning of the school year until the filing date of the *Complaint*. Petitioner ascribes Student's lack of participation to technical difficulties with Student's computer. However, at the 30-day Review meeting on October 21, 2020, Petitioner indicated that the technical problems endured for no more than a little beyond a week. Student testified that s/he had an unspecified problem with her/his computer that was resolved in September. S/he had a new problem three weeks later and received a new computer from School A. S/he has experienced no technical problems with his/her computer since that time.

More significantly, whenever s/he had access to a working computer, s/he made little to no effort to participate in virtual learning. Petitioner's father professed ignorance of Student's lack of participation on September 28, 2020, and the contact logs cited above<sup>59</sup> reveal that Petitioner was well aware that Student was not logging in to his/her classes. In fact, from the beginning of the 2020-21 school year until the filing date of the *Complaint*, Student was absent 41 out of 42 days on which attendance was recorded. Student admitted to his/her lack of motivation when s/he told Witness E that s/he preferred to work independently and not participate in virtual learning.

Whether Student's IEP was adequate to address her/his long-standing attendance problem is not at issue here; the only issue is the extent to which DCPS implemented that IEP. I conclude that Petitioner has failed to meet her burden that DCPS failed to implement Student's 2020-21 due to Student's chronic unavailability to receive services.

**Whether DCPS denied Student a FAPE by failing to provide access to education records, particularly her/his report card, progress report, recordings of meetings in October and November 2020, and records of a referral to the police for truancy.**

The regulations require the local education agency to allow parents to examine their students' records:

- (a) Opportunity to examine records. The parents of a child with a disability must be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to inspect and review all education records with respect to—
  - (1) The identification, evaluation, and educational placement of the child; and

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<sup>59</sup> R9, R10.

(2) The provision of FAPE to the child.<sup>60</sup>

and

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes—

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.<sup>61</sup>

The courts treat violations of these provision as procedural violations. A procedural violation of the IDEA entitles a plaintiff to relief only if it “(1) impeded the child’s right to a [FAPE], (ii) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of [FAPE] to the parents’ child; or (iii) caused the deprivation of educational benefits.”<sup>62</sup>

Not every procedural violation, however, is sufficient to support a finding that the child in question was denied a FAPE. Technical deviations, for example, will not render an IEP invalid. On the other hand, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits, clearly result in the denial of a FAPE.<sup>63</sup>

Petitioner offered no evidence during the hearing relating to this issue, and Petitioner’s counsel did not mention DCPS’ alleged failure to provide access to records in his closing argument. I also note that most of the records mentioned in the Issues Presented in the Prehearing Order as not having been provided appear to be included within Petitioner’s exhibits.<sup>64</sup> Therefore, I conclude that Petitioner has failed to meet her burden of proving that Student was denied a FAPE or suffered a deprivation of educational benefits on account of DCPS’ failure to provide access to Student’s education records.

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<sup>60</sup> 34 C.F.R. §300.501.

<sup>61</sup> 34 C.F.R. §300.613.

<sup>62</sup> 20 U.S.C. §1415(f)(3)(E)(ii).

<sup>63</sup> *N.B. and C.B. v. Hellgate Elementary School District*, 541 F.3d 1202, 1208 (9<sup>th</sup> Cir. 2008), citing *Amanda J. ex rel. Annette J. v. Clark County School District*, 267 F.3d 877, 890 (9<sup>th</sup> Cir. 2001).

<sup>64</sup> Report cards are provided in P10 and P11 and Progress Reports at P15 and P16. Video recordings of meetings were transmitted to Petitioner by email on December 15, 2020. P20:4 (143). The referral to the police for truancy is not relevant to the issues of placement or implementation of the *Complaint*.

## RELIEF

For relief, Petitioner requests (1) an order requiring DCPS to provide the requested education records, (2) an order placing Student in a nonpublic therapeutic day school, (3) compensatory education services, and (4) attorney's fees.

Despite Student's indifference towards school attendance, DCPS' failure to comply with the May 11, 2020 HOD justifies the relief requested by Petitioner for DCPS' failure to provide an appropriate placement. The testimony of Witness C and the Certificate of Approval issued by OSSE support a finding that School D is capable of implementing Student's IEP. Furthermore, all of School D's classes are outside of general education. Petitioner's counsel conceded in his closing argument that Student's attendance history is such that a "probationary" placement would be warranted, and such is ordered below.

## ORDER

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

**ORDERED**, that DCPS shall immediately place Student at School D and fund that placement though through the 2021-22 school year, including related services and transportation, subject to the following conditions:

1. DCPS shall issue a Prior Written Notice placing Student at School D. The Prior Written Notice shall be provided to School D and shall include the conditions set forth in paragraphs 2 – 4 of this Order.
2. School D shall provide DCPS with Student's attendance records for the previous month, for both virtual and in-person classes, on the first day of every month.
3. In the event School D fails to provide Student's attendance records, ten days after receiving written notice from DCPS that it has not received such records, DCPS may reconvene an IEP team meeting to determine an appropriate placement for Student through the 2021-22 school year.
4. In the event Student's attendance record indicates three or more unexcused absences in a calendar month, DCPS may reconvene an IEP team meeting to determine an appropriate placement for Student through the 2021-22 school year. Excused absences are defined in the *DCPS Attendance and Truancy Policy*.<sup>65</sup>
5. In the event DCPS reconvenes an IEP team meeting to change Student's placement, that placement shall be consistent with the Order in the May 11, 2020 HOD.

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<sup>65</sup>[https://dcps.dc.gov/sites/default/files/dc/sites/dcps/page\\_content/attachments/FINAL%20DCPS%20Attendance%20and%20Truancy%20Policy%2008-21-18.pdf](https://dcps.dc.gov/sites/default/files/dc/sites/dcps/page_content/attachments/FINAL%20DCPS%20Attendance%20and%20Truancy%20Policy%2008-21-18.pdf).

## APPEAL RIGHTS

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

*Terry Michael Banks*  
Terry Michael Banks  
Hearing Officer

Date: May 3, 2021

Copies to: Attorney A, Esquire  
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