

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
October 03, 2019

PETITIONER,
on behalf of STUDENT,¹

Date Issued: October 3, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0189

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing Dates: September 30, 2019
and October 1, 2019

Respondent.

Office of Dispute Resolution, Room 423
Washington, D.C.

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 alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by failing to provide Student an appropriate Individualized Education Program (IEP) and educational placement for the 2018-2019 and 2019-2020 school years and by not conducting an Occupational Therapy (OT) evaluation of Student.

¹ Personal identification information is provided in Appendix A.

Petitioner's Due Process Complaint, filed on July 30, 2019, named DCPS as Respondent. The undersigned hearing officer was appointed on July 30, 2019. On August 21, 2019, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. On August 23, 2019, the parties met for a resolution session and were unable to resolve the issues in dispute.

The due process hearing was convened before the undersigned impartial hearing officer on September 30 and October 1, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Mother appeared in person for the first day of 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 EDUCATIONAL ADVOCATE as an additional witness. DCPS called SCHOOL SOCIAL WORKER as its only witness. Petitioner's Exhibits P-1 through P-66 were admitted into evidence without objection. DCPS' Exhibit R-1 through R-78 were admitted into evidence, including Exhibits R-1 through R-29 admitted over Petitioner's objections. At the conclusion of Petitioner's case-in-chief, DCPS made a motion for a directed finding against the Petitioner on all counts. I took the motion under advisement. After DCPS completed presentation of its 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.

PRIOR CASE

Mother brought a prior due process proceeding on behalf of this student in January 2018 (Case NO. 2018-0009), which resulted in a Hearing Officer Determination issued by Impartial Hearing Officer Keith L. Seat on April 8, 2018 (the April 8, 2018 HOD). In the April 8, 2018 HOD, Hearing Officer Seat concluded, *inter alia*, that DCPS denied Student a FAPE by not providing for sufficient IEP Behavioral Support Services and by not timely conducting an updated Functional Behavior Assessment (FBA) and revising Student's Behavior Intervention Plan (BIP). Hearing Officer Seat ordered DCPS to increase Student's IEP BSS to 180 minutes per month and awarded Student 40 hours of mentoring as compensatory education. Hearing Officer Seat also found, *inter alia*, that DCPS had not denied Student a FAPE by not providing for a dedicated aide or ESY services in Student's IEP. The parties, by counsel, have agreed that I may adopt the findings of fact made by Hearing Officer Seat, as relevant to the present case.

ISSUES AND RELIEF SOUGHT

The issues for determination in this case, as certified in the August 21, 2019 Prehearing Order, are:

- A. Whether DCPS failed to provide the student with an appropriate Individualized Education Program (IEP) and/or Placement or appropriately update the student's Behavior Intervention Plan (BIP) during the 2018-2019

school year or for the 2019-2020 school year in that the DCPS IEP does not provide sufficient Behavioral Support Services (BSS) supports or goals to address attendance and behavior issues that are impeding the student's ability to access education, and the student's BIP needs to be updated; the IEP does not provide for placement in a sufficiently restrictive environment and the IEP transition plan needs to be updated to include input from the student.

B. Whether DCPS denied Student a FAPE by not comprehensively evaluating Student, by failing to conduct the occupational therapy evaluation that DCPS agreed to conduct and for which the parent signed consent on March 1, 2018.

For relief, Petitioner requests that DCPS be ordered to conduct or fund an occupational therapy evaluation, as well as, an updated clinical psychological evaluation of the student; to revise Student's IEP to provide for an increase in BSS and an updated transition plan, and to consider placement in a more restrictive environment; to revise Student's BIP; to place and fund Student in a non-public placement with transportation and to provide Student with compensatory education for denials of FAPE that alleged in the complaint.

FINDINGS OF FACT

PRIOR HOD FINDINGS

I adopt the following Findings of Fact from the April 8, 2018 HOD:

A. In 2016-2017 Student attended PRIOR PUBLIC SCHOOL. Student was retained twice in a lower grade, but after 2016-2017 was "socially promoted" and skipped the grade prior to the current GRADE.

B. Student's disability classification is now Multiple Disabilities ("MD"), with both Specific Learning Disability ("SLD") and Other Health Impairment ("OHI") based on Attention Deficit Disorder ("ADD") or Attention Deficit Hyperactivity Disorder ("ADHD").

C. Student met the diagnostic criteria for a Specific Learning Disorder in the

areas of reading, math and writing. SLD was first added to Student's December 18, 2017 IEP.

D. A court-ordered Psychoeducational Evaluation was completed on September 21, 2017. Based on the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”), Student's Full Scale IQ (“FSIQ”) was 74, which is considered very low, with a 95% confidence interval of 69-81. Student appeared to have “test anxiety” based on behavior during some of the cognitive testing tasks. Student was restless and frustrated on tasks such as reading and writing. SCHOOL PSYCHOLOGIST believed that Student is likely at the high end of the FSIQ confidence interval in the 9/21/2017 evaluation.

E. An earlier Comprehensive Psychological Reevaluation of Student dated 1/25/2015, administered the Reynolds Intellectual Assessment Scales (“RIAS”). Student had a Composite Intelligence Index (“CIX”) of 89, in the below average range, and a Total Test Battery (“TTB”) score of 91, in the average range. Prior to that, a 10/21/2013 Psychoeducational Evaluation of Student administered the Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”) and found a FSIQ of 71, which is borderline.

F. Student's academic abilities are well below expected age and grade level. According to the Woodcock-Johnson results reported in Student's 12/18/2017 IEP, Student was four grades behind in math and observed counting on Student's fingers during testing, five to six grades behind in reading, and six grades behind in writing. The March 1, 2018 report card Progress Report showed that Student was receiving all “Ds” and “Fs.” Student was said to produce good and sound work when motivated and focused, but consistently displayed negative, inappropriate, and off-task behaviors.

G. According to SRI lexile scores, Student had progressed steadily in reading and had been in the Basic band at each data point available in 2015/2016, 2016/2017 and 2017/2018, except that Student was in the Proficient band at the end of 2016/2017 (at the lower grade level before skipping a grade).

H. Behavior. Student is likeable, outgoing and independent, but “over-the-top” playful. Student disrupts instruction by engaging in teasing, excessive talking, and profanity towards peers and teachers, which impedes Student and others. Student reported to an evaluator that Student is very popular and has “too many friends,” with many friends several years older than Student. Student viewed self as a “player” but was “calming down in 2017. While sociable and playful, Student teased other students to the point of bullying and did not know when to stop.

Student is overactive, impulsive, and disruptive in both school and home settings, with a tendency to be quick-tempered. Student has difficulty regulating emotions and behavior, which is a reflection of the existing attention disorder and low cognitive functioning.

I. As of 12/15/2017, Student had 27 unexcused absences for 2017/2018 when Student had not been at school the entire day, and another 25 days when Student was tardy, out of 78 days enrolled. The Progress Report showed that Student had 40 absences for the year as of March 1, 2018.

J. Specialized Instruction. DCPS reduced Student's specialized instruction hours in the 12/18/2017 IEP because "Parent indicated that she did not want her [child] in classes with all disabled students" and the IEP team concurred. DCPS's notes from the 1/18/18 meeting report that "parent stated she would like for student not to be placed in a full time self-contained setting." Educational Advocate's notes from the 1/18/2018 meeting confirmed that Parent wanted Student to be with nondisabled peers and not in a self-contained setting.

K. Dedicated Aide. The court-ordered 9/21/2017 Psychoeducational Evaluation recommended a dedicated aide. Student did not fit any of the categories for a dedicated aide, as Student is very capable; a dedicated aide is not needed for Student to access the curriculum. SPECIAL EDUCATION COORDINATOR A and School Psychologist credibly testified that given Student's self image as a "cool kid," they were certain that Student would not tolerate a dedicated aide and that there was no way a dedicated aide could prevent Student from skipping classes or leaving in the middle of class.

L. FBA/BIP. An FBA and Behavioral Intervention Plan ("BIP") had been completed for Student around 11/6/2015. The 9/21/2017 Psychoeducational Evaluation recommended an FBA and BIP to assist with monitoring and controlling Student's disruptive classroom behavior. On 12/18/2017, Student's IEP team determined that Student needed an FBA and BIP to address attendance issues and planned to move forward. The FBA had not been completed when the hearing concluded on 4/5/2018.

M. Occupational Therapy ("OT"). Educational Advocate and Parent sought an OT evaluation at the 12/18/2017 meeting based on concern about Student's handwriting and sensory issues raised in the Comprehensive Psychological Reevaluation. Special Education Coordinator A emailed Parent a consent to evaluate form for OT on 2/27/2018 which was signed and returned on 3/1/18 (along with consent for adaptive measures and FBA).

N. Adaptive Measures. Adaptive measures are routinely used when the IQ is 70 or below, which is 2 standard deviations below the mean. To determine whether adaptive measures were needed, School Psychologist gave Student an informal assessment and determined that Student was in the average range for all areas covered, including washing clothes, making telephone calls, writing letters, and completing a job application, among other things. Student's teacher confirmed that adaptive behavior was not a concern and that Student's adaptive skills were comparable to non-disabled peers.

O. DCPS proposed on 3/13/2018 to amend Student's IEP to return Student to about 27.5 hours/week of specialized instruction outside general education; Parent agreed and Petitioner's counsel confirmed by email. The proposed IEP amendment left BSS unchanged at 120 minutes/month. Student's IEP was amended to make the change in the first days of April 2018. A new location of services ("LOS") letter for Student naming CITY SCHOOL 2 was to be sent to Parent on 4/5/2018. City School 1 offered tutoring to Student, but Student made clear Student's unwillingness to stay after school for tutoring. Similarly, Student visited PROPOSED NONPUBLIC SCHOOL and was very clear that Student was not going to attend there.

Additional Findings of Fact

After considering all of the evidence received at the September 30 to October 1, 2019 due process hearing in the present case, as well as the argument of counsel, my additional findings of fact are as follows:

1. Student, an AGE youth, is a resident of the District of Columbia.

Testimony of Mother.

2. Student is eligible for special education under the IDEA disability classification Multiple Disabilities (SLD, Other Health Impairment). Exhibit P-3.
3. Student received a court-ordered psychiatric evaluation on August 11, 2017. The psychiatrist diagnosed Student with Unspecified Bipolar and Related

Disorder; Rule-out ADHD (“Rule-out” indicates a diagnosis that may be present, but further evaluation is needed before ruling in or ruling out the diagnosis), Parent-Child Relational Problem, and Problems Related to Other Legal Circumstances (Involvement with Juvenile Court.) Exhibit P-40.

4. In a court-ordered psychoeducational evaluation completed in September 2017, Student was diagnosed with ADHD (by history), Rule-out Persistent Depressive Disorder with anxious distress, Specific Learning Disability with Impairment in Reading, Mathematics and Written Expression, Severe, Borderline Intellectual Functioning and parent-child relational problems. Exhibit R-27.

5. A District of Columbia court order requires Student to be at school, on time, every day. Testimony of Mother.

6. At an Analysis of Existing Data Meeting on January 18, 2018, Mother stated that she wanted Student to remain on the high school diploma track and that she would like for Student not to be placed in a full time self-contained setting. Exhibit R-38.

7. In the April 8, 2018 HOD, Hearing Officer Seat ordered, *inter alia*, that (1) within 15 business days, DCPS was to increase the BSS in Student’s IEP from 120 minutes per month to 180 minutes per month and that within 30 days, DCPS was to complete an FBA of Student and develop a suitable BIP. Exhibit P-56. On April 11, 2018, Student’s IEP was amended to increase BSS hours to 180 minutes per month. Exhibit P-8. DCPS conducted updated FBAs of Student on April 23, 2018 and

November 7, 2018. Student's BIP was revised on June 12, 2018, November 16, 2018 and November 27, 2018. Exhibits P-43 through P-47.

8. The April 23, 2018 FBA, prepared at City School 1, identified Student's history of defiance, inappropriate conversation, inappropriate language and excessive truancy as interfering with learning. The FBA noted that Student had previously refused to utilize a Behavior Tracker tied to incentives and rewards. The function of Student's behavior could not be ascertained due to Student's lack of availability for the assessment because of PARCC testing. Exhibit R-55.

9. Student's location of Services was changed to City School 2 on or about April 6, 2018. Exhibit P-60. Student transferred to City School 2 on May 2, 2018,

10. Because City School 2 is located outside of Student's neighborhood, DCPS made special education transportation services available to Student. Exhibit P-60. Student did not like school bus transportation because Student felt singled out and subject to teasing by classmates. On September 21, 2018, Mother requested that the transportation services be cancelled. Exhibit P-5, Testimony of Mother.

11. For the 2017-2018 school year, Student's end-of-year grades were C's in English and Argument Writing, D's in math and F's in all other subjects. Exhibit P-11. Over the school year, Student was reported as absent or late for some 145 classes. Most of these absences were unexcused. Exhibit P-20.

12. School Social Worker developed written attendance contracts for Student which were discussed at meetings on May 3, 2018 and in September 2018. However the

parent never returned the signed attendance contracts. Exhibit P-57, Testimony of School Social Worker.

13. On June 12, 2018, School Social Worker, developed a BIP for Student at City School 2. At that point, the only behavior of concern for Student observed at City School 2 was Student's inconsistent attendance. Exhibit R-57.

14. On May 30, 2018, August 27, 2018, August 28, 2018, August 31, 2018, September 4, 2018, and September 21, 2018, January 18, 2019, February 15, 2019, April 26, 2019, April 29, 2019, May 7, 2019, May 20, 2019, September 4, 2019, September 7, 2019, School Social Worker contacted Mother by telephone or email. Most of these contacts were to discuss Student's attendance. On May 2, 2019, School Social Worker made a visit to Student's home, with another social worker, to check on Student and to inquire about school attendance. Student was not at home and was reported not to have come home the night before. On February 7, 2019 and March 11, 2019, School Social Worker spoke with Student's probation officer to discuss Student's performance at school. Exhibit R-71, Testimony of School Social Worker.

15. City School 2 convened a 30-day review meeting on June 12, 2018 to review Student's transition to City School 2. It was noted that Student had already accrued a significant number of absences, particularly in the 1st period Spanish class. It was reported that Student had received a grade level score on the End-of-Year Scholastic Reading Inventory (SRI) assessment. Student's score on the Measures of Academic Progress (MAP) had declined from the prior MAP testing. The team agreed that

Student's FBA needed to be updated at City School 2 and that an attendance plan needed to be developed for Student. Exhibit R-58.

16. Student was confined to the D.C. youth detention center for a period in the fall of 2018. When Student returned to City School 2 in November, 2018, Student's behaviors changed. Student was coming to school on time and completing school work. After winter break, Student lost motivation. Student was late to class and Student's performance spiraled downward. School Social Worker communicated with Mother and Student's probation officer regarding these changes. Mother reported that these changes in Student had been observed in the home and community as well. Testimony of Educational Advocate, Exhibits P-2, P-23. In the final reporting period of the 2018-2019 school year, Student's inconsistent attendance had a negative impact on Behavioral Support Services. Exhibit P-25.

17. School Social Worker completed an updated FBA of Student on November 7, 2018. It was reported that the behaviors of Student observed at City School 2 were not completing assignments, inattentiveness and attendance issues, especially missing the first period class. Only two observations of Student were completed due to Student's not being available. School Social Worker hypothesized that the function of Student's behaviors was to avoid academics or to get attention. Exhibit R-64.

18. On or about November 27, 2018, Student's IEP team convened at City School 2 to conduct a 30 day review, review Social Worker's FBA and revise Student's IEP. Mother and her representatives from LAW FIRM participated in the meeting. It

was noted that Student had refused to participate in developing the IEP post-secondary transition plan, but that Student's case manager and social worker would work together with Student on the transition plan. The resulting November 27, 2018 IEP continued to provide for Student to receive full-time, 27.5 hours per week, Specialized Instruction outside general education and 180 minutes per month of Behavioral Support Services. Exhibits P-5, P-3.

19. On or about November 27, 2018, School Social Worker drafted an updated BIP for Student. The BIP stated that Student's attendance and failure to complete work were impacting Student's academic progress. BIP strategies to increase replacement behaviors included addressing Student in a positive, gentle and private manner, Structuring the academic environment with clearly defined rules, expectations, incentives and consequences, and frequent check-ins and classroom breaks. Exhibit R-68.

20. On December 4, 2018, a Life Skills assessment of Student was conducted at City School 2. On December 5, 2018, a Life Skills Inventory Independent Living Skills Assessment Tool was completed for Student. Exhibits P-38, P-42.

21. On April 12, 2019, Student's IEP team met at City School. The meeting was requested by Mother to review Student's academic and behavioral progress. Mother did not attend, but she was represented by an attorney from Law Firm and Educational Advocate. At that meeting, the team discussed Student's attendance issues. Educational Advocate asked whether the IEP team could send a Justification for Removal Statement

(JRS) to the D.C. Office of the State Superintendent of Education (OSSE) for review of a different location of services for Student. The school LEA Representative responded that there was not enough data for a JRS referral to OSSE at that time and that the team needed to address Student's attendance in Behavioral Support Services goals. Exhibit P-2.

22. For the 2018-2019 school year at City School 2, Student's grades were all F's. Student was reported to have 108 total days absent including 80 unexcused days. Exhibit P-12. Student has not been promoted and for the 2019-2020 school year, is repeating Grade for the third year. Exhibit P-53.

23. Student will reach the age of majority on MAJORITY DATE.

24. At the August 23, 2019 resolution session meeting (RSM) for the present case, DCPS agreed to conduct a comprehensive psychological reevaluation and an occupational therapy (OT) evaluation of Student. On September 19, 2019, Petitioner's Counsel emailed to DCPS Mother's signed consent for DCPS to conduct these assessments. Exhibit P-53.

25. In the current 2019-2020 school year at City School 2, Student already has accrued 12-13 absences. Testimony of School Social Worker. Student is currently failing all classes. Testimony of Mother.

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

- A. Did DCPS fail to provide the student with an appropriate IEP and/or Placement or appropriately update the student's Behavior Intervention Plan during the 2018-2019 school year or for the 2019-2020 School year in that the DCPS IEP does not provide sufficient Behavioral Support Services (BSS) supports or goals to address attendance and behavior issues that are impeding the student's ability to access education, and the student's BIP needs to be updated; the IEP does not provide for placement in a sufficiently restrictive environment and the IEP transition plan needs to be updated to include input from the student.

In the April 8, 2018 HOD, Hearing Officer Seat found that Student had a history of chronic school absences and tardiness. Hearing Officer Seat ordered DCPS to increase Student's IEP Behavioral Support Services (BSS) from 120 minutes to 180

minutes per month and to complete a Functional Behavior Assessment (FBA) and develop a suitable Behavior Intervention Plan (BIP). As Hearing Officer Seat explained in his decision, he ordered these measures because insufficient Behavioral Support Services may have contributed to Student's numerous school absences and because due to the lack of a current FBA and BIP, Student was "constantly cutting up in class and so disengaged from school that by [March 1, 2018] Student had been absent 40 full days." DCPS timely complied with Hearing Officer Seat's HOD order. Student's IEP was amended to provide 180 minutes per month of BSS and DCPS school social workers conducted FBAs on April 23, 2018 and November 7, 2018. Student's BIP was revised on June 12, 2018, November 16, 2018 and November 27, 2018.

School Social Worker also developed attendance contracts for Student, which were discussed at meetings with the parent's representatives on May 3, 2018 and September 2018 and provided to Mother for review. However the parent never returned the signed attendance contracts.

Since Student's transfer to City School 2 in May 2018, School Social Worker reached out to Mother, by telephone and email, some 14 times to try to address Student's attendance issues. School Social Worker also made a home visit in May 2019. None of these efforts was successful in getting Student to attend classes. Even though, according to Mother, Student is under a court order to be at school, on time, every day, Student still has numerous absences in the new school year. Not surprisingly, Student failed all courses for the 2018-2019 school year and is failing classes this school year.

Petitioner contends that because Student has not been successful with the IEPs developed following Hearing Officer Seat's April 8, 2018 HOD, that means that Student's December 17, 2017 IEP (as amended on April 11 2018 and May 4, 2018) and November 27, 2018 IEP are inappropriate. Petitioner's Counsel argues that the next step is for the hearing officer to order DCPS to place Student in a nonpublic special education day school, which offers a smaller school setting and less opportunity for Student to skip classes. DCPS responds that it has offered Student appropriate IEPs and Behavior Intervention Plans, but that Student is still not progressing academically because Student will not regularly attend school. I find that based on the testimony of Educational Consultant, Petitioner has made a *prima facie* showing that Student's IEPs, completed subsequent to the April 8, 2018 HOD, are inappropriate.² Therefore, DCPS must shoulder the burden of persuasion as to the appropriateness of these IEPs.

In *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, ——— U.S. ———, 137 S.Ct. 988, 197 L.Ed.2d 335 (2017), the U.S. Supreme Court elaborated on the standard, first enunciated in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), 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

² Because I find that Petitioner has made a *prima facie* showing that Student's IEPs after the April 8, 2018 HOD are not appropriate, I deny DCPS' oral motion, made during the due process hearing, for a directed finding against the Petitioner on this issue. As explained in the next section of this decision, I will also order DCPS to conduct an occupational therapy evaluation of Student. Therefore, I also deny DCPS' motion for a directed finding on that issue.

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 "*pecially 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, 517 (D.C. Cir. 2018) (In *Endrew F.*, Supreme Court held that the IDEA requires education "reasonably calculated to enable a child to make progress in light of the child's circumstances"—a standard markedly more demanding than requiring merely some educational benefits.)

On April 11, 2018 and May 4, 2018, DCPS amended Student's December 18, 2017 IEP, without meetings, to comply with Hearing Officer's Seat's order to increase Behavioral Support Services to 180 minutes per month and to add special education transportation to the IEP. Inasmuch as DCPS revised Student IEP as ordered in the April 8, 2018 HOD, and there was not evidence of opposition from the parent, I conclude that these revised IEPs were reasonably calculated to enable Student to make appropriate progress. *See Z. B., supra.*

Student's most recent, November 27, 2018, IEP continued to provide for Student

to receive full-time, 27.5 hours per week, Specialized Instruction outside general education and 180 minutes per month of Behavioral Support Services. At the time of the November 27, 2018 IEP team meeting, Student had recently returned to school after being confined to a D.C. youth detention facility. At the IEP team meeting, it was reported that Student was coming to City School 2 on time and completing school work. Educational Advocate's notes from the November 27, 2018 IEP team meeting do not indicate that there was a request then to change Student's educational setting. I conclude that at the time of the November 27, 2018 IEP team meeting, the decision to continue Student's full-time special education placement at City School 2, and to provide 180 minutes per month of behavioral support services as had been ordered in the April 8, 2018 HOD, was reasonably calculated to enable Student to make appropriate progress. *See Z. B., supra*, 888 F.3d at 524 (Standard calls for evaluating an IEP as of the time IEP was created rather than with the benefit of hindsight.)

After the 2018-2019 winter break, Student again lost academic motivation. Student was late to class and Student's performance at school spiraled downward. Mother reported to School Social Worker that these changes in Student had been observed in the home and community as well. It is undisputed that for the 2018-2019 school year, Student failed all courses and stopping showing progress on most IEP goals. At an IEP team meeting on April 12, 2019, Educational Advocate asked whether the IEP team could send a Justification for Removal Statement (JRS) to the D.C. Office of the State Superintendent of Education (OSSE) for review of a different location of services

for Student. The school LEA Representative responded that there was not enough data for a JRS referral to OSSE at that time and that the team needed to address Student's attendance in Behavioral Support Services goals.

The primary issue in the present case is whether, in light of Student's failure to make academic progress at City School 2 subsequent to the November 27, 2018 IEP team meeting, is DCPS obliged to place Student in a more restrictive education setting, specifically in a nonpublic day school. It is clear that a school district has a duty under the IDEA to address a special education student's excessive absenteeism. Once a special education student's truancy becomes excessive, a school district has an affirmative duty to take some sort of responsive action. *See, e.g., Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009). However, each student's case must turn on its own facts. *Id.* at 162. In the present case, DCPS and City School 2 have diligently, if unsuccessfully, attempted to address Student's poor class attendance in the 2018-2019 and 2019-2020 school years. Student's IEPs provide a restrictive setting in a full-time special education classroom. The IEPs originally provided for special education school transportation, which the parent later declined. As ordered by Hearing Officer Seat in the April 8, 2018 HOD, Student's IEPs have provided for Student to get 180 minutes per month of Behavioral Support counseling, although Student has often missed those sessions due to absences. Student's FBA was updated on April 23, 2018 and November 7, 2018.

School Social Worker has been particularly diligent in addressing Student's

absenteeism. She revised Student's BIPs on June 12, 2018, November 16, 2018 and November 27, 2018. These BIPs expressly address Student's "excessive absences." She drafted attendance contracts for Student which needed to be signed by Mother and Student. These contracts were discussed at school meetings on May 3, 2018 and September 2018, but the parent never returned the signed contracts. School records document that School Social Worker reached out to Mother on more than 10 occasions in the 2018-2019 and the current school year concerning Student's attendance. She also spoke with Student's probation officer in February and March 2019 regarding Student's performance at school. On May 2, 2019, School Social Worker made a visit to Student's home, with another social worker, to check on Student and to inquire about school attendance. Student was not at home and was reported not to have come home the night before.

The facts in this case are not dissimilar to the school attendance situation discussed in *Garcia ex rel. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 2007 WL 5023652 (D.N.M. Jan. 10, 2007), *aff'd in part sub nom. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116 (10th Cir. 2008). In the *Garcia* case, the student with a disability refused to attend school. The school district made an exceptional number of attempts to contact both the student and her mother, including phone calls and certified letters to the parents and attempts to conduct a home visit—all to no avail. In its decision, the court concluded that "[t]he 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 her.” *Id.* at 14. *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”).

In the present case, there was no competent evidence at the due process hearing that Student is unable to attend school due to Student’s disabilities or mental health condition.³ Student is approaching the age of majority and Petitioner’s attorney reported at an April 12, 2019 IEP team meeting that Mother was not following up on obtaining outside mental health services for Student because “she’s not in control.” I conclude that DCPS and City School 2 have made continuous and conscientious efforts to get Student to attend school. The fact that these efforts have not been successful does not mean that DCPS has denied Student a FAPE. *See W.G. v. New York City Dept. of Educ.*, 801 F.Supp.2d 142, 170 (S.D.N.Y.2011). (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.”)

³ Educational Advocate testified that Student told her that Student was afraid to go to school because of the murder of a friend. However, School Social Worker testified that Student had never told her of safety concerns and, according to Mother, Student does go to school, but does not regularly attend classes. Nor was there evidence that the parent had requested a safety transfer for Student to a different school. What, if any, link may exist between Student’s school attendance and the tragic death of this friend, was not established by the hearing evidence.

Petitioner also contends that Student's November 27, 2018 IEP is not adequate because the IEP post-secondary transition plan was completed without Student's input. The IDEA regulations provide that the District must invite a student with a disability to attend the IEP Team meeting if a purpose of the meeting will be the consideration of the post-secondary goals and transition services for the student. In this case, Mother and her Law Firm representatives participated in the November 27, 2018 IEP team meeting, but they did not have Student attend. If the student does not attend the IEP team meeting, the District must take other steps to ensure that the student's preferences and interests are considered. *See* 34 CFR § 300.321(b).

It was stated at the November 27, 2018 meeting that Student had refused to participate in developing the IEP post-secondary transition plan, but that Student's case manager and social worker would work together with Student on the transition plan. Following the meeting, on December 4 and 5, 2018, City School 2 obtained Student's input through a Life Skills Assessment and a Life Skills Inventory/Independent Living Skills Assessment Tool. I find these were appropriate steps by DCPS to ensure that Student's preferences and interests were considered as to post-secondary goals and transition services.

This is an unfortunate 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" by the IEPs. *See Garcia, supra*. Courts have consistently underscored that the "appropriateness of an IEP is not

a question of whether it will guarantee educational benefits, but rather whether it is reasonably calculated to do so.” *K.S. v. Dist. of Columbia*, 962 F.Supp.2d 216, 221 (D.D.C.2013) (citing *Thompson R2–J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148–49 (10th Cir.2008)). I conclude that notwithstanding Student unwillingness to attend classes regularly, DCPS has met its burden of persuasion that its IEPs for Student and Behavior Intervention Plans, developed since the issuance of the April 8, 2018 HOD have been reasonably calculated to enable Student to make progress appropriate in light of Student’s circumstances.

- B. Has DCPS denied Student a FAPE by not comprehensively evaluating Student by failing to conduct the occupational therapy evaluation that DCPS agreed to conduct and for which the parent signed consent on March 1, 2018?

In the April 8, 2018 HOD, Hearing Officer Seat found that DCPS had agreed to conduct an Occupational Therapy (OT) evaluation of Student, sending the parent a consent to evaluate form on February 27, 2018 and that the consent form was signed by Mother and returned on March 1, 2018. Educational Advocate testified that the OT evaluation had still not been conducted as of the November 27, 2018 IEP team meeting. At the August 23, 2019 resolution session meeting (RSM) for the present case, DCPS again agreed to conduct an OT evaluation of Student. On September 19, 2019, Petitioner’s Counsel emailed to DCPS Mother’s signed consent for DCPS to conduct these assessments. Although DCPS’ Counsel argued at the due process hearing that an OT evaluation is not indicated for Student, based on the parent’s prior request and

DCPS' repeated agreement to conduct the OT evaluation, I conclude that motor skills is an area of suspected disability for Student, for which DCPS must conduct an evaluation. *See* 34 CFR § 300.304(c)(4).

At the due process hearing, there was no conclusive evidence that Student needed OT related services and no harm has been shown from DCPS' failure, to date, to conduct the OT assessment. Therefore, I will deny without prejudice Petitioner's request for compensatory education for DCPS' delay in completing the OT evaluation.

ORDER

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

ORDERED:

1. Within 21 school days of the date of this decision, DCPS shall conduct an occupational therapy evaluation of Student. Any delay in completing the evaluation, resulting from Student's not cooperating in scheduling the evaluation or not appearing for the evaluation when scheduled, shall not be deemed a failure by DCPS to comply with this order. Petitioner's request for an award of compensatory education for DCPS' failure to timely complete Student's OT evaluation is denied without prejudice and
2. All other relief requested by the Petitioner herein is denied.

Date: October 3, 2019

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