

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

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

OSSE
Office of Dispute Resolution
October 31, 2020

<i>Student</i> , ¹)	Case No.: 2020-0150
through <i>Petitioner</i> ,)	
)	Date Issued: 10/31/20
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Date: 10/14/20
("DCPS"),)	Video Platform: Microsoft Teams
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") by DCPS failing to meet its Child Find obligations and timely evaluate and find Student eligible for special education and related services. DCPS responded that Student previously had been found ineligible for special education and that the Section 504 Plan for Student was effective when Student attended school, which was rare.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

Following the filing of the due process complaint on 8/26/20, the case was assigned to the undersigned on 8/27/20. Respondent filed a response on 9/9/20, and did not challenge jurisdiction. A resolution meeting occurred on 9/9/20 which did not resolve the case or

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

Hearing Officer Determination

Case No. 2020-0150

shorten the 30-day resolution period which ended on 9/25/20. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 11/9/20.

The prehearing conference was held on 9/24/20 and the Prehearing Order was issued the same day, which addressed the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 10/14/20 and was closed to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present by videoconference for most of the hearing.

Petitioner’s Disclosures, submitted on 10/6/20, contained documents P1 through P47, which were admitted into evidence without objection except for P18 and P34, which were withdrawn by Petitioner. Respondent’s Disclosures, submitted without objection on 10/7/20, contained documents R1 through R9, which were admitted into evidence without objection.

Petitioner’s counsel presented 4 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. *Psychologist* (qualified without objection as an expert in Psychology)
2. *Educational Advocate* (qualified without objection as an expert in Special Education Programming)
3. Parent
4. Student

Respondent’s counsel did not present any witnesses and did not cross-examine any of Petitioner’s witnesses.

At the end of Petitioner’s case-in-chief, Respondent’s counsel orally moved for a directed verdict on both the issue and the compensatory education remedy, which the undersigned took under advisement and hereby denies for the reasons set forth below.

The issue to be determined in this Hearing Officer Determination is:

Issue: Whether DCPS denied Student a FAPE by failing to timely evaluate for special education and related services based on the school’s Child Find obligations beginning in August 2018 due to failing current grade repeatedly and behavior and attendance issues, as well as low academic and standardized test scores, and/or a written request for evaluation on or around 9/11/19.² (*Petitioner has the burden of persuasion on this issue.*)

² In response to inquiry by the undersigned, Petitioner’s counsel confirmed by email on 8/27/20 that the date at issue was 9/11/19, not 9/11/20 as stated in the complaint.

Hearing Officer Determination

Case No. 2020-0150

The relief requested by Petitioner is:

- 1) A finding that Student was denied a FAPE.
- 2) DCPS shall provide compensatory education for any denial of FAPE.³
- 3) Any other just and reasonable relief.

Findings of Fact

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

1. Student is a resident of the District of Columbia; Petitioner is Student's Parent.⁵ Student is *Age*, *Gender* and in *Grade* for the fourth time, having returned to Public School in 2020/21⁶ after a few weeks at *Public Charter School* and 2019/20 at *Prior Public School*.⁷ Student is well-mannered and demonstrates maturity in the academic environment when present, but is filled with anxiety about academic abilities and prospects.⁸

2. Special Education Process. In February 2015, Parent sought a determination of Student's eligibility for special education based on an independent 12/27/14 psychoeducational evaluation from when Student boarded at a public charter school.⁹ The 2014 evaluation found that Student did not qualify for special education services under the classification of Specific Learning Disability, but that the team should consider the classifications of Other Health Impairment ("OHI") based on Attention Deficit

³ Petitioner's counsel was put on notice at the prehearing conference that at the due process hearing Petitioner must introduce evidence supporting the requested compensatory education, including evidence of specific educational deficits resulting from Student's alleged denial of FAPE and the specific compensatory measures needed to best correct those deficits, i.e., to elevate Student to the approximate position Student would have enjoyed had Student not suffered the alleged denial of FAPE. Respondent was encouraged at the prehearing conference to be prepared to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

⁴ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁵ Parent.

⁶ All dates in the format "2020/21" refer to school years.

⁷ Parent; Educational Advocate; P19-1.

⁸ P39-4; P37-10.

⁹ P4-1; P6-1.

Hearing Officer Determination

Case No. 2020-0150

Hyperactivity Disorder (“ADHD”) and Emotional Disturbance (“ED”) based on Student’s negative behaviors while boarding at the public charter school.¹⁰ A 5/9/15 DCPS review of the independent 2014 psychoeducational evaluation concluded that the history of ADHD had “no educational impact” on Student, so Student did not meet special education criteria, but should continue with a Section 504 Plan.¹¹ A 5/11/15 multi-disciplinary team (“MDT”) meeting found that Student was able to keep up with the work and was not performing far enough below grade level to qualify for an IEP, and was performing above cognitive abilities, so was not eligible for special education.¹² Student was not considered again for special education until evaluated in the last year.¹³

3. Parent formally requested that Student be evaluated by letter of counsel dated 9/11/19; Parent provided consent on 10/4/19.¹⁴ On 11/15/19, DCPS authorized independent educational evaluations (“IEEs”) for a comprehensive psychological evaluation and a Functional Behavioral Assessment (“FBA”).¹⁵ The comprehensive psychological evaluation was completed on 6/25/20, after delay by the holidays, the evaluator’s schedule, and the pandemic, although data was collected by 3/11/20, just before in-person classes ended for the school year.¹⁶ The FBA was not completed due to the pandemic.¹⁷ Student required an FBA to uncover any triggers to behavior in the classroom; following the FBA, a BIP was needed to uncover how to reward positive and punish negative behaviors, and create a plan for attendance.¹⁸

4. Public Charter School held an eligibility meeting on 8/25/20 and found Student was eligible for special education and related services with the disability classification of Multiple Disabilities due to ED and OHI (ADHD).¹⁹ Public Charter School began working on an IEP and held an IEP meeting.²⁰ When Student transferred back to Public School in September 2020, Student’s advocates shared the IEE and recent Public Charter School documents and sought an IEP meeting as soon as possible, but DCPS noted protocol requirements.²¹

5. Section 504 Plan. By 2014, Student was receiving accommodations through a Section 504 Plan due to ADHD and Plans continued to the present.²² The Section 504 Plans

¹⁰ P6-7.

¹¹ P7-7,8.

¹² P9-2,3; P10-1; P11-1.

¹³ Parent.

¹⁴ P29; P30-1.

¹⁵ P35-1; R2-4.

¹⁶ Psychologist.

¹⁷ P37-11.

¹⁸ P37-11,12.

¹⁹ P40-1; R2-4; Educational Advocate.

²⁰ Educational Advocate.

²¹ P41; Educational Advocate.

²² P6-1,6; P12; P13; P14; Educational Advocate.

Hearing Officer Determination

Case No. 2020-0150

have never contained related services (including Behavioral Support Services (“BSS”)), transportation, or an attached Behavioral Intervention Plan (“BIP”).²³

6. Cognitive Abilities. In the 2014 psychoeducational evaluation, Student’s Full Scale IQ (“FSIQ”) was a standard score of 75, in the Borderline range, as measured by the Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”).²⁴ In the 2020 comprehensive psychological evaluation, Student’s General Intellectual Ability (“GIA”) was a standard score of 82, in the Low Average range, based on the Woodcock-Johnson IV (“WJ-IV”).²⁵

7. Academics. Student has been in the same Grade for 4 years: in 2017/18, 2018/19, 2019/20 and 2020/21.²⁶ Student’s cumulative Grade Point Average (“GPA”) is 0.56, with 10.50 total credits; Student earned a total of 1 credit from 11 classes in 2017/18, no credits from 17 classes in 2018/19, and a total of 1 credit from 11 classes in 2019/20.²⁷ Based on failing grades alone, Educational Advocate testified that Student should have been re-evaluated and found eligible in or after 2017/18.²⁸ In 2018, Student’s PSAT scores in reading and math were both in the 1st percentile.²⁹

8. Based on the WJ-IV Achievement in the 2020 comprehensive psychological evaluation, Student’s reading was 82 (Low Average); math was 88 (Low Average); written language was 83 (Low Average).³⁰ The 2020 evaluation further noted that Student’s reading was 5 years below Grade (now being taken for fourth time); math was 4 years below Grade; and writing was also 4 years below Grade.³¹ Based on the 8/28/18 SRI, Student’s lexile reading level was 673, which was 7 years below Student’s (repeated) Grade.³² Based on the 5/2/19 SRI, Student’s reading level was 851, which was 5 years below Student’s (repeated) Grade.³³ The 9/8/20 Analysis of Existing Data (“AED”) stated that Student’s history of ADHD negatively impacted Student’s ability to access the curriculum, which may also have contributed to Student’s school avoidance.³⁴

²³ P46-1,3; Educational Advocate (Student “set up to fail”).

²⁴ P6-2.

²⁵ P37-4,5,9; Psychologist.

²⁶ P19-1; Parent.

²⁷ P19-1 (DCPS Transcript on 6/12/20); P16 (all course grades were “Fs” in Student’s 2018/19 final report card).

²⁸ Educational Advocate.

²⁹ P32-2.

³⁰ P37-9.

³¹ P37-10; P39-1,2,3.

³² P15-5; Educational Advocate.

³³ P16-5; P17-4; Educational Advocate.

³⁴ P39-4.

Hearing Officer Determination

Case No. 2020-0150

9. Attendance. In 2017/18, Student had 120 unexcused absences at Public School.³⁵ In 2018/19, Student had over 160 unexcused absences at Public School.³⁶ In 2019/20 at Prior Public School Student had over 110 unexcused absences through 3/13/20.³⁷

10. At times, Student may have shown up at school but skipped classes or walked out.³⁸ An FBA was begun on 11/18/19 at Prior Public School but teachers stated that Student had never been in class, or with 45 unexcused absences (by mid-November) had no reported behaviors.³⁹ Late in 2019/20, the Spanish teacher had only seen Student 3 times in her class.⁴⁰ The World History teacher had not received enough work to assess Student's academic performance, but thought Student was capable.⁴¹ Another teacher could not answer questions about Student's behavior or relationships, due to not seeing Student in class.⁴²

11. An Intervention Plan was put in place on 11/15/17 due to excessive absences, but relied only on daily trackers.⁴³ An Attendance Plan was developed at a Student Support Team ("SST") Meeting on 10/19/18 that referenced only Student's issues with a DC One card as a barrier to attendance, which was the only SST listed as of 6/4/19.⁴⁴ DCPS's Parent Contact log showed only 1 relevant attempt to contact Parent after 2015 through 9/17/19.⁴⁵ Student's Journal List shows little effort by school to engage Student in school through 9/17/19, with only occasional conversations (or attempts) with Student or Parent in 2018/19 or before.⁴⁶ While DCPS documentation asserted "multiple" student/teacher/counselor meetings, the last one prior to 6/4/19 was on 2/25/19.⁴⁷

12. A DCPS Occupational Therapy evaluator recommended on 11/12/19 that in addition to greater efforts by Parent, the DCPS education staff should work with Student and family to increase consistent attendance at school.⁴⁸ DCPS should have put more supports in place for Student's truancy issues.⁴⁹ Parent was trying to work with the school on Student's attendance, but the school was not helping.⁵⁰

³⁵ P20-12,13,14,15,16,17,18.

³⁶ P37-2 (164 unexcused absences as of 7/18/19 report card); P26-1; P20.

³⁷ P20-1,2,3,4,5.

³⁸ P32-1.

³⁹ P36-1,3.

⁴⁰ P37-3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ P22-1.

⁴⁴ P23-2; P26-2.

⁴⁵ P24-1 (noting Student's absences).

⁴⁶ P25.

⁴⁷ P26-2.

⁴⁸ P33-8.

⁴⁹ P37-10.

⁵⁰ Parent.

Hearing Officer Determination

Case No. 2020-0150

13. Disability. Student is a young person with an Emotional Disturbance based on an Unspecified Anxiety Disorder; Student should be classified under the special education category of ED.⁵¹ Student's anxiety disorder is related to Student's lack of attendance at school.⁵² Student wants to go to school, but school brings out Student's weaknesses, specifically anxiety, and Student feels a lack of support from teachers.⁵³ Student finds school overwhelming.⁵⁴ Student has anxiety about graduation, academic abilities, how Student will turn out, and who Student will become.⁵⁵ Student was filled with anxiety related to educational failure and lack of progress, which should be explored in counseling.⁵⁶ Student has difficulties with anxiety, which relates to poor educational performance and exhibits depressed mood.⁵⁷ Student feels Student can do the work, but is not receiving help needed from teachers.⁵⁸ Student's anxiety manifests through non-attendance at school.⁵⁹

14. Compensatory Education. Educational Advocate's Compensatory Education Proposal seeks a total of 572 hours of tutoring and 60 hours of counseling, based on her assessment of Student's needs.⁶⁰ Educational Advocate explained that with sufficient BSS, Student could have improved in the ability to regulate emotions and behaviors and better control impulses and would have been much more successful academically.⁶¹ Student could be restored to where Student would have been but for the denial of FAPE through tutoring and counseling hours.⁶² Parent testified that Student needs tutoring and more.⁶³ Student testified that tutoring would help in some classes.⁶⁴ Student finds it helpful for teachers to explain the work and how the topic matters in the real world.⁶⁵ Student remains "open" to school, which is hopeful.⁶⁶

⁵¹ Psychologist (Student met requirements for ED); Educational Advocate (same); P37-10,11; P39-3,4 (Student with ED).

⁵² Psychologist.

⁵³ Psychologist.

⁵⁴ P33-2 (Parent).

⁵⁵ P37-10.

⁵⁶ P37-11.

⁵⁷ P37-10; P37-2.

⁵⁸ P37-2,3.

⁵⁹ Psychologist.

⁶⁰ P46-4,6; Educational Advocate.

⁶¹ P46-5; Educational Advocate.

⁶² P46-6; Educational Advocate.

⁶³ Parent.

⁶⁴ Student.

⁶⁵ *Id.*

⁶⁶ Educational Advocate.

Hearing Officer Determination

Case No. 2020-0150

Conclusions of Law

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

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

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

Once a child who may need special education services is identified and found eligible, Respondent must devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Andrew F.*, 137 S. Ct. at 994; *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.*, 137 S. Ct. at 1001. The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Rowley*, 458 U.S. at 203. The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. In its decision, the Supreme Court made very clear that the standard is well above *de minimis*, however, stating that "[w]hen all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all." *Andrew F.*, 137 S. Ct. at 1001.

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

Hearing Officer Determination

Case No. 2020-0150

1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, No. 17-cv-2455, 2018 WL 4623572, at *3 (D.D.C. 9/26/18).

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

Petitioner carries the burden of production and persuasion, except on issues of the appropriateness of an IEP or placement on which Respondent has the burden of persuasion, if Petitioner establishes a prima facie case. D.C. Code Ann. § 38-2571.03(6); *Z.B. v. Dist. of Columbia*, 888 F.3d 515, 523 (D.C. Cir. 2018) (party seeking relief bears the burden of proof); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005). "Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether . . . sufficient evidence [was presented] to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5-E D.C.M.R. § 3030.3.

Issue: *Whether DCPS denied Student a FAPE by failing to timely evaluate for special education and related services based on the school's Child Find obligations beginning in August 2018 due to failing current grade repeatedly and behavior and attendance issues, as well as low academic and standardized test scores, and/or a written request for evaluation on or around 9/11/19. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden of persuasion on the sole issue in this case, persuasively demonstrating that Student was in need of special education services and not just a Section 504 Plan⁶⁷ to deal with serious challenges. The U.S. Court of Appeals for the District of Columbia emphasized in *DL v. Dist. of Columbia*, 860 F.3d 713, 717 (D.C. Cir. 2017), that Child Find is among the most important IDEA requirements, in order to identify, locate and evaluate every child in need of special education. See 34 C.F.R. § 300.111. Here, Public School had determined in 2015 that Student was not eligible for special education, but whether that was a reasonable or proper decision is not at issue here. The question is whether DCPS should have later recognized that Student needed to be evaluated under its Child Find obligations.

The Child Find obligations of an LEA are triggered either by awareness of the child's circumstances or by parental request. See *Long v. Dist. of Columbia*, 780 F. Supp.

⁶⁷ Section 504 of the *Rehabilitation Act of 1973*, 29 U.S.C. § 701 *et seq.*

Hearing Officer Determination

Case No. 2020-0150

2d 49, 57 (D.D.C. 2011). Here, DCPS should have been aware of Student's need for a special education evaluation through both Student's circumstances and parental request. There is no doubt that an evaluation was required based on Parent's formal request through counsel on 9/11/19, and DCPS did take action from that point. The question here is whether based on Student's circumstances DCPS should have begun the evaluation process as early as August 2018. Based on the facts of this case set forth above, the undersigned has no doubt that DCPS's Child Find obligations were triggered by August 2018.

DCPS concluded in 2015 that Student's ADHD disability had "no educational impact" and that Student was able to keep up and was not performing far enough below grade level to qualify for an IEP. By contrast, there can be no doubt now that Student has not been keeping up in school and has been far below grade level for years. In fact, Student's 8/28/18 SRI revealed Student's reading level to be 7 years below Student's Grade, which Student was repeating that year. Further, Student's PSAT scores in both reading and math were in the 1st percentile in 2018.

Further, in 2015 DCPS considered Student to be performing above Student's cognitive level, based on a FSIQ standard score of only 75 at that time. However, Student's cognitive level by the 2020 comprehensive psychological evaluation had increased to a GAI standard score of 82, in the Low Average range, so Student's poor academic performance cannot be so readily dismissed. Remarkably, Student remains in the same Grade for the fourth school year in a row and has earned a total of only 2 credits from 39 classes in the last 3 school years.

Student's dismal academic performance is highly correlated with lack of attendance at school. Student's absences have been a tremendous problem, with 120 unexcused absences in 2017/18, over 160 in 2018/19, and over 110 in the partial year of 2019/20. The high numbers may have been impacted by a policy of marking students absent for the day after missing a class, but Student's teachers confirmed that they had rarely, if ever, seen Student. Psychologist clearly testified that Student's anxiety disorder is related to lack of attendance. Student wants to go to school, but school brings out Student's anxiety and weaknesses. Student finds school overwhelming.

The IDEA requires in the case of a student whose behavior impedes the student's own learning, as here, that the IEP team consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). More specifically, the IDEA requires that school districts respond to a student frequently missing school or being tardy, which DCPS failed to do here. *See Middleton*, 312 F. Supp. 3d at 146 (failing to address attendance can be a denial of FAPE); *Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 159 (D. Mass. 2009); *Lamoine School Committee v. Ms. Z. ex rel. N.S.*, 353 F. Supp. 2d 18, 34 (D. Me. 2005) (if not in school, student could not be said to be receiving "a free appropriate public education"). Here, despite hundreds of absences, DCPS did very little to try to address the problem. DCPS put an intervention plan in place that relied only on daily trackers, and developed an attendance plan at a meeting that mentioned only a transportation card as a barrier to attendance. DCPS's documentation shows little effort to engage Student in school or to contact Parent.

Hearing Officer Determination

Case No. 2020-0150

Nor is the fact that Student was offered accommodations under a Section 504 Plan sufficient. The law is clear that if Student is entitled to an IEP it must be provided and substituting a Section 504 Plan will not suffice. “[W]hether or not a child is entitled to receive services under IDEA is statutorily defined and not a matter of educational policy. While school authorities are better situated than courts to determine what educational practices and materials to include in a child’s IEP, they may not choose to exclude qualified children from receiving IDEA services.” *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376 n.9 (8th Cir. 1996), quoting *Rowley*, 458 U.S. at 208, 102 S. Ct. at 3052. Specifically, “the requirements of the IDEA cannot be met through compliance with Section 504 because the IDEA requires an individualized program while Section 504 is a broad anti-discrimination statute.” *N.L. ex rel. Mrs. C. v. Knox Cnty. Sch.*, 315 F.3d 688, 696 n.5 (6th Cir. 2003). See also *N.G. v. Dist. of Columbia*, 556 F. Supp. 2d 11, 29 (D.D.C. 2008).

Psychologist unambiguously testified that Student should be classified under the special education category of ED based on the diagnosed unspecified anxiety disorder. Public Charter School found Student eligible for special education and related services. When transferred back to Public School in September 2020, Parent’s counsel sought prompt development of an IEP, but DCPS cited protocol, exhibiting no urgency despite Student’s age and circumstances, including the fact that Student was beginning Grade for the fourth time.

In sum, this Hearing Officer concludes that Parent met her burden of persuasion, showing that DCPS did not meet its Child Find obligations to evaluate Student and determine eligibility for special education and related services by August 2018 based on Student’s circumstances. DCPS did not take meaningful action until after the written request by counsel in September 2019. This failure directly impacted Student’s education and denied Student the educational benefits to which Student was entitled, which constituted a denial of FAPE and is the basis for the significant award of independent tutoring and counseling hours as compensatory education, below. See 34 C.F.R. § 300.513(a).

Remedy

Having found a denial of FAPE above, the remaining question is the amount of compensatory education necessary to put Student in the position in which Student would have been but for that denial of FAPE. There is often “difficulty inherent in figuring out both what position a student would be in absent a FAPE denial and how to get the student to that position,” *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016), but that does not permit the effort to be avoided. See *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94, 98 (D.D.C. 2010) (a disabled student who has been denied special education services is entitled to a tailored compensatory education award and limitations of the record are no excuse). Moreover, a student is not required “to have a perfect case to be entitled to compensatory education.” *Cousins v. Dist. of Columbia*, 880 F. Supp. 2d 142, 148 (D.D.C. 2012) (citations omitted).

Here, the undersigned considers it undeniable that Student has a substantial deficit caused by DCPS’s delay in Child Find and provision of special education and related services. Based on her knowledge and expertise, Petitioner’s expert, Educational Advocate,

Hearing Officer Determination

Case No. 2020-0150

seeks 572 hours of tutoring in her compensatory education plan, based on what Student missed over the past 2 years with the Child Find claim from 8/26/18 and the services required to make that up. Educational Advocate testified that these hours would be sufficient for Student to make meaningful progress and put Student where Student would have been but for the denial of FAPE. Parent and Student agreed that Student needs and could handle academic tutoring.

Based on his experience dealing with similar issues, the undersigned concurs that extensive tutoring is necessary to provide the compensatory education to which Student is entitled and in an effort to move Student forward educationally. One-on-one tutoring can help a student progress more quickly by focusing on the areas in need of remediation. As a practical matter, the tutoring hours are likely to be limited by how many can be used by Student, and DCPS will not be charged for unused hours. It will take a great deal of effort and perseverance for Student to address the deficits resulting from not receiving special education services on a timely basis in the past. Accordingly, the undersigned authorizes below a total of 500 hours of independent academic tutoring.

In addition, Educational Advocate seeks 60 hours of counseling in her compensatory education plan to make up for the lack of behavior support for Student over the period in question. The undersigned agrees that counseling will be critical to keep Student on track and engaged in education and to address Student's anxiety, so authorizes the full 60 hours of counseling sought. As for the type of counseling, Educational Advocate's compensatory education plan strongly recommended cognitive behavior therapy as helpful for Student. The undersigned authorizes independent counseling below and leaves it to Petitioner and her advocates to determine that best path for Student.

These determinations by the undersigned are specifically tailored to address Student's unique needs as a matter of equity, as "hearing officers are reminded that '[t]he essence of equity jurisdiction' is 'to do equity and to mould each decree to the necessities of the particular case.'" *Lopez-Young v. Dist. of Columbia*, 211 F. Supp. 3d 42, 55 (D.D.C. 2016), quoting *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005). All compensatory education hours are to be used within 2 years to avoid excessive administrative burden on DCPS, although the undersigned encourages Parent to get Student engaged as quickly as possible to ensure that the remedial services that Student needs are obtained without undue delay.

ORDER

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

As compensatory education for the denial of FAPE found herein, DCPS shall provide a letter(s) of authorization for (a) 500 hours of academic tutoring, and (b) 60 hours of counseling, from independent providers chosen by Petitioner, with such

Hearing Officer Determination

Case No. 2020-0150

letter(s) to be provided within 10 business days after Petitioner's request(s). All hours are to be used within 2 years; any unused hours shall be forfeited.

Any and all other claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Copies to:

Counsel of Record (Appendix A, by email)

OSSE-SPED (due.process@dc.gov)

ODR (hearing.office@dc.gov)

██████████@k12.dc.gov

██████████@k12.dc.gov