

**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
September 06, 2019

<i>Student,</i> ¹)	Case No.: 2019-0150
through <i>Parent,</i>)	
<i>Petitioner,</i>)	Date Issued: 9/6/19
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	Hearing Dates (Room): 8/27/19 (410) &
("DCPS"),)	8/28/19 (112)
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student's Parent, pursued a due process complaint alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") due to lack of an appropriate Individualized Education Program ("IEP") and placement, and failure to conduct a timely Functional Behavioral Assessment ("FBA") and develop a Behavior Intervention Plan ("BIP"). DCPS asserted that it had taken all necessary actions and had not denied Student a FAPE on any claim.

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 6/12/19, the case was assigned to the undersigned on 6/13/19. On 6/21/19, Respondent filed a timely response and did not challenge jurisdiction, but raised an affirmative defense against any claim from prior to

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

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1/30/19, the date of a prior Hearing Officer Determination involving these parties and the issues of (a) whether Student was not assessed in all areas of suspected disability, or (b) whether Student should have been identified, located and evaluated by November 2016. In the present matter a resolution meeting occurred on 7/24/19, but did not resolve the case. The 30-day resolution period ended on 7/12/19. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by a 14-day continuance granted on 8/7/19, which requires a Hearing Officer Determination (“HOD”) by 9/9/19.

Following the prehearing conference on 8/7/19 and issuance of the Prehearing Order on 8/8/19, the due process hearing took place on 8/27/19 and 8/28/19 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner was present in person for the testimony of Student, who was the initial witness in the hearing, but became upset (as described by Respondent’s counsel in the exhibit designated HO1, listed below) and did not participate for the remainder of the first day; Petitioner testified and listened to the hearing on the second day by telephone, with agreement by counsel for both sides.

Petitioner’s Disclosures, submitted on 8/20/19, contained a cover letter and documents P1 through P53, which were all admitted into evidence over a number of objections. Petitioner also submitted Supplemental Disclosures on 8/22/19, containing a cover letter and documents P54 through P56, which are on the DCPS website and to which the undersigned may give Administrative Notice, but to which Respondents objections as to lack of timeliness as 5-day disclosures were upheld.

Respondent’s Disclosures, submitted on 8/20/19, contained a cover letter and documents R1 through R17, including R1A and R8A, all of which were admitted into evidence without objection. In addition, at the request of Respondent’s counsel, an incident report made to building security by Respondent’s counsel during the first morning of the hearing is included as an exhibit, Hearing Officer-1 (“HO1”), to which Petitioner’s counsel did not object.

Petitioner’s counsel presented 5 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. Student
2. *Clinical Psychologist* (qualified without objection as an expert in Clinical Psychology)
3. *Center Director of Learning Center* (qualified over objection as an expert in Educational Assessments and Educational Recommendations)
4. *Special Education Advocate* (qualified over objection as an expert in Special Education and IEP Programming)
5. Parent

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Respondent's counsel presented 4 witnesses in Respondent's case (*see* Appendix A):

1. *Social Worker at Public School*
2. *Case Manager and Inclusion Special Education Teacher at Public School*
3. *Special Education Teacher at Public School* (qualified without objection as an expert in Special Education Programming and Placement)
4. *Director of Specialized Instruction at Public School* (qualified without objection as an expert in Special Education Programming and Placement and in Psychology)

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

Issue 1: Whether DCPS denied Student a FAPE by failing to develop or provide an appropriate IEP and/or placement from 12/12/18 to present, due to (a) inappropriate baselines and present levels of performance ("PLOPs"), (b) unattainable goals, (c) inadequate hours of specialized instruction, which should be outside general education, and/or (d) inadequate Behavioral Support Services ("BSS").² *Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.*

Issue 2: Whether DCPS denied Student a FAPE by failing to provide appropriate behavioral supports when it failed to conduct a Functional Behavioral Assessment ("FBA") and develop a Behavioral Intervention Plan ("BIP") between 7/26/18 and 5/21/19, while Student exhibited extreme work avoidant and truant behaviors and the psychological evaluation provided to DCPS on 7/26/18 recommended an FBA. *Petitioner has the burden of persuasion on this issue.*

The relief requested by Petitioner is:

1. A finding that Student was denied a FAPE.
2. DCPS shall amend Student's IEP to provide specialized instruction outside general education for all classes.
3. For any denials of FAPE, DCPS shall provide or fund compensatory education.³

² At the beginning of the due process hearing, Petitioner's counsel withdrew without prejudice from Issue 1 the subpart of "an inadequate transition plan."

³ Petitioner's counsel was put on notice at the prehearing conference that Petitioner must introduce evidence at the due process hearing 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 to be

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4. Any other just and reasonable relief.

Findings of Fact

After considering all the evidence, as well as the arguments of both 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 at Public School.⁶ Student previously attended *Prior School*, but was consistently bullied in 2016/17 and 2017/18 until obtaining a safety transfer to Public School on 2/18/18.⁷ Student is a "polite, respectful, kind and caring" young person.⁸

2. Student was exposed to cocaine, nicotine and alcohol in utero.⁹ Student was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), Combined Type, during childhood.¹⁰ In the independent comprehensive psychological evaluation of Student dated 7/21/18 and amended some weeks later, Student was diagnosed with Specific Learning Disorder, ADHD (by history), and Borderline Intellectual Functioning; Student was also diagnosed with Autism Spectrum Disorder, which was later ruled out with a Gilliam Autism Rating Scale – Third Edition ("GARS-3").¹¹

3. IEP. Student's initial IEP, which is at issue in this case, is dated 12/12/18 and provides 5 hours/week of specialized instruction outside general education and 5 hours/week of specialized instruction inside general education, along with 120 minutes/month of BSS.¹² Student's disability classification in the IEP is Multiple Disabilities ("MD"), with both Specific Learning Disability ("SLD") and Other Health

prepared at the due process hearing 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 *Id.*

⁷ P7-3,4; R6-9; P33-1; Parent.

⁸ R8A-7; R9-10.

⁹ P7-3,16; Parent (Mother has been sober since Student was about 2 years old).

¹⁰ P7-3,16.

¹¹ P7-17,18; R6-5,6.

¹² R9-2,13.

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Impairment (“OHI”) due to ADHD.¹³ The entire IEP team, apart from Student, agreed on the MD classification.¹⁴ Case Manager and other Public School staff supported the goals, baselines, PLOPs, and amount of specialized instruction and BSS in Student’s IEP.¹⁵

4. Cognitive and Academic Challenges. Student has major cognitive deficits and academic delays that impact academic functioning and impede the ability to follow directions and process information.¹⁶ Based on the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”), Student’s Full Scale IQ (“FSIQ”) is 77, while Student’s Processing Speed Index (“PSI”) is 72, both in the Very Low range; the other 4 composite scores are all in the Low Average range.¹⁷ Student’s very low intellectual abilities impede the ability to learn, think rationally, problem solve, and deal effectively with life’s challenges.¹⁸

5. Student’s academic skills are significantly below expected grade level, based on the Woodcock-Johnson IV (“WJ-IV”).¹⁹ Student’s reading, math and writing skills are deficient, falling between 4 years and 9 years behind grade level.²⁰ The Wechsler Individual Achievement Test – Third Edition (“WIAT-III”) indicated that Student’s Oral Language composite was at the 4th percentile rank, while on subtests, Reading Comprehension was at the 1st percentile, and Listening Comprehension and Oral Expression were both at the 5th percentile.²¹ The SRI for Student’s reading on 9/14/17 indicated that Student was 5 years behind, which is the last SRI on Student’s report cards through 2018/19.²²

6. Grades. Student’s Grade Point Average (“GPA”) for term 1 of 2018/19 was 0.875 on a 4.000 point scale.²³ Student’s 10/19/18 midterm Progress Report shows 4 “Fs” and 1 “D+” out of 8 classes, with better grades only in “specials”: PE (“A”), Spanish (“B”), and music (“C”).²⁴ Student’s GPA for term 2 of 2018/19 was 1.000 (a “D” average).²⁵ Student’s GPA for term 3 dropped to 0.338, with almost all “Fs,” and further dropped to 0.250 in term 4.²⁶ Student’s summer school classes in 2019, with significant support and specialized instruction, resulted in grades of “B” and “C” (a GPA of 2.500).²⁷

¹³ R9-2.

¹⁴ R8-3.

¹⁵ Case Manager.

¹⁶ P7-16; R8A-7.

¹⁷ P7-6,7.

¹⁸ P7-8,9.

¹⁹ P7-5,6.

²⁰ P7-16; P5-1 (WJ results).

²¹ P7-9.

²² P24-4; P28-5.

²³ P24-1.

²⁴ P23-1,2.

²⁵ P24-1.

²⁶ P26-1,2,3; P28-1.

²⁷ Special Education Teacher; P29-1.

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7. Student's Grade. Student was in Grade-2 in 2017/18 and understood that Grade-2 must be repeated in 2018/19; Student's transcript for 2018/19 shows Grade-2 and the 12/12/18 IEP shows Grade-2 on the first page, although the IEP PLOPs refer to Student being in Grade-1.²⁸ An explanation in the middle of Student's IEP states that Student is in Grade-2 "by transcript," but is in the Grade-1 "cohort."²⁹ Student took 2 required English classes in summer school in 2019 and was advanced 2 years and placed in Grade for 2019/20.³⁰

8. Specialized Instruction. Clinical Psychologist concluded in the comprehensive psychological evaluation that Student needs full-time special education services with a low student-to-teacher ratio in classes, increased individualized attention and instruction, and minimized stimuli in the classroom.³¹ Petitioner's advocates raised concerns prior to the IEP being finalized.³² Student's IEP notes that Student was not progressing in general education and had a long history of academic challenges; Student masked what was not understood in class by avoiding work, leaving class, and talking to peers.³³

9. In May 2018, Parent urged that Student be pulled from general education for all core academic courses.³⁴ In the 4/9/19 dissent letter from Special Education Advocate to Director of Specialized Instruction, Petitioner sought at least 20 hours/week of specialized instruction, with all core academic classes outside general education.³⁵ Clinical Psychologist credibly testified that Student needed more specialized instruction – up to full-time – in order to make academic progress.³⁶ Case Manager and other Public School staff believed that Student should simply obtain help needed by meeting with teachers at lunch and after school.³⁷

10. Small Group and 1:1 Instruction. Student is easily distracted in larger classes, but works well in small group settings and 1:1.³⁸ The 5/7/19 FBA found that Student's off-task behavior was least likely during small group instruction and that Student responds to redirection.³⁹ Student's FBA concluded that Student should have additional small group support with teachers.⁴⁰

²⁸ R9-1,2,5,7; P20-1; Parent.

²⁹ R9-10; Case Manager.

³⁰ Special Education Teacher.

³¹ P7-18; Clinical Psychologist.

³² P33-1.

³³ R9-11.

³⁴ P37-2.

³⁵ P37-1,3.

³⁶ Clinical Psychologist.

³⁷ Case Manager; Director of Specialized Instruction.

³⁸ R9-5; R9-6 (math needs 1:1 support); R9-8 (reading needs small group support); R9-9 (written expression can benefit from small groups and direct instruction).

³⁹ P8-1.

⁴⁰ P8-3.

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11. In inclusion math class, Case Manager would routinely include Student in a small group of 3 students in order to modify the work.⁴¹ Student did well in English classes in summer school in 2019 because of smaller classes of only 7-10 students and significant 1:1 specialized instruction support from Special Education Teacher.⁴² Student's general education classes in math and English contained 20-25 students.⁴³

12. Student needs extensive 1:1 support to stay focused and comprehend assignments; Student does not ask for help when confused.⁴⁴ Student's teachers noted that Student does well 1:1, including developing a good essay in history and progress with a lot of prompting in science.⁴⁵ Case Manager noted that it was only by working with Student 1:1 that Student wrote anything for a science research project in chemistry.⁴⁶

13. BSS. Public School's social worker at the time of the IEP sought BSS to address Student's academic challenges overall, inability to focus, significant distraction, talking to peers and not absorbing instruction, and an inability to communicate academic needs to Student's teachers; 120 minutes/month of BSS were provided in Student's IEP to access the curriculum.⁴⁷ In the 4/9/19 dissent letter from Special Education Advocate to Director of Specialized Instruction, Petitioner sought an increase in BSS from 120 to 240 minutes/month outside general education.⁴⁸ Director of Specialized Instruction credibly testified that Student is a "relationship" student who "must know you care" before progress can be made on attendance or other issues, which requires persistence.⁴⁹

14. IEP Goals. In the IEP meeting on 12/12/18, Special Education Advocate expressed concerns about goals being set at too high a level for Student.⁵⁰ Special Education Advocate asserted that the goals should be written for the level Student is at, while Case Manager stated that the goals must be written for the grade Student is in, with intensive support and scaffolding provided for those goals.⁵¹ The IEP goals set forth in the IEP appear challenging but reachable for Student's abilities.⁵²

15. Baselines and PLOPs. In the 12/12/18 IEP meeting, Special Education Advocate stated that the baseline data was too general and vague; DCPS agreed to add some additional detail.⁵³ In Student's finalized IEP, math baselines are the same for all 3 goals,

⁴¹ Case Manager.

⁴² Student; Special Education Teacher.

⁴³ Case Manager.

⁴⁴ P18-2 (10/24/18 AED).

⁴⁵ P33-2 (Special Education Teacher, Case Manager); Social Worker.

⁴⁶ P35-1 (2/12/19).

⁴⁷ R9-11.

⁴⁸ P37-3.

⁴⁹ Director of Specialized Instruction.

⁵⁰ R8-5.

⁵¹ R10-2; Case Manager.

⁵² R9-6,7 (math); R9-8 (reading); R9-10 (written expression).

⁵³ R8-5; Case Manager.

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stating Student's scores and general ability to comprehend scaffolded problems.⁵⁴ Reading baselines are very similar for both goals and state Student's functional grade level and PARCC score.⁵⁵ Written expression baselines are the same for both goals and state grade level and PARCC score.⁵⁶ PLOPs for math, reading and written expression are provided in Student's IEP with some amount of detail, based on Student's WJ scores, PARCC and PSAT scores (for math and reading), with a brief explanation of Student's grades and strengths and weaknesses.⁵⁷

16. Attendance. By the time the IEP was developed on 12/12/18, Student had 27 unexcused absences and 17 tardies; attempts were made to have Student report to the attendance office daily and pick up and return an attendance contract, but Student "forgot" and the contract was never followed.⁵⁸ Student was often in the school building but skipped class or was very late, often arriving 60 minutes late to an 80-minute class.⁵⁹ Student's math teacher explained in the 10/24/18 eligibility meeting that Student missed a lot of days and was often going to another class.⁶⁰ Director of Specialized Instruction expressed concern about Student failing school due to lack of attendance.⁶¹

17. At the 30-day review of the IEP on 1/25/19, DCPS noted that Student was not going to math or English classes, and saw that as a reason not to make any changes in Student's IEP.⁶² By 5/7/19 when the BIP was developed, Student had 63 unexcused absences and 34 tardies.⁶³ DCPS's Student Attendance History for Student lists 80 unexcused absences and 37 unexcused tardies for 2018/19.⁶⁴ Clinical Psychologist stated that she could not confirm that all 80 were related to Student's disabilities.⁶⁵ Missing even 1 period during the day counts as being absent the whole day.⁶⁶

18. Because Student was failing all classes as of 5/21/19, Public School teachers encouraged Student to work with them at lunch or after school to complete assignments, which Student did not do.⁶⁷ Student's IEP Progress Report at the end of 2018/19 showed

⁵⁴ R9-6,7.

⁵⁵ P9-9,10.

⁵⁶ R9-10.

⁵⁷ R9-5,7.

⁵⁸ R9-11; R6-9; P9-1,2,3 (Academic Success Plan attempted in 5/7/19 BIP).

⁵⁹ P14-2 (Social Worker found Student in another classroom); P16-2; Social Worker; Student; Parent.

⁶⁰ P30-1; Student.

⁶¹ P30-1 (10/24/18).

⁶² R10-3; P15-3 (in term 2 of 2018/19, Student had stopped going to English class, but did not complete any work in classes Student did attend).

⁶³ P9-2.

⁶⁴ R15-3; P28-1 (Student's final 2018/19 report card showed 80 absences, all unexcused).

⁶⁵ Clinical Psychologist.

⁶⁶ P32-1.

⁶⁷ P16-2; R11-4; Special Education Advocate.

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virtually no progress on goals in math, reading or written expression; in Emotional, Social, and Behavioral Development Student had mixed results from the BIP.⁶⁸

19. FBA and BIP. Clinical Psychologist “strongly” recommended in her 7/21/18 comprehensive psychological evaluation that an FBA and BIP be developed to address Student’s truancy and failure to complete homework.⁶⁹ Special Education Advocate requested a BIP at the 10/24/18 eligibility meeting, but the Public School social worker at the time disagreed that Student needed an attendance contract or BIP because Student was not having “behavior problems.”⁷⁰

20. An FBA was conducted on 5/7/19, focusing on off-task behavior in class and poor attendance/coming late to class.⁷¹ In the 5/21/19 meeting to review the FBA and BIP, one of the action items at the end of the meeting was for DCPS to collect data on why Student was coming late to classes and provide it to Petitioner’s counsel.⁷² Clinical Psychologist credibly testified that it would have helped Student to have the BIP much sooner.⁷³

21. Student’s View. Student was opposed to the IEP process and did not want any special education services; Student did not believe Student’s problems significantly affected home, social or academic functioning.⁷⁴ Student refused to test with the school psychologist.⁷⁵ On 4/19/18, Student handwrote a note stating that Student did not “want to test” and that “I don’t need sped at all.”⁷⁶ Student was willing to work with a tutor and stated Student would be starting soon.⁷⁷ Student was embarrassed for peers to know of Student’s special education services and sought to avoid being seen as a special education student.⁷⁸

22. Compensatory Education. DCPS voluntarily provided authorization for 50 hours of independent counseling for Student on 8/19/19, to be completed by 8/31/20.⁷⁹ The Compensatory Education Proposal submitted on behalf of Petitioner sought 400-600 hours of services at Learning Center to remediate Student’s reading at an hourly cost of \$136, along with transportation, plus additional undefined remediation from Learning Center in

⁶⁸ P17.

⁶⁹ P6-20; P7-19; Clinical Psychologist.

⁷⁰ P30-2; Special Education Advocate.

⁷¹ P8-1.

⁷² R11-4.

⁷³ Clinical Psychologist.

⁷⁴ P7-5,12; R8-7.

⁷⁵ P30-2.

⁷⁶ R4-1 (Student’s note also stated that Student was “one of the most behaved kid (sic) in this school” and that in “all of my years in school I have never disrespected a single teacher...”; the evaluation at P7-5 confirms that Student does not engage in disruptive behaviors in class).

⁷⁷ P13-2 (5/23/19 Service Tracker).

⁷⁸ Parent; Case Manager.

⁷⁹ R3-2.

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math and writing.⁸⁰ In addition, the Compensatory Education Proposal sought 100 hours of counseling and 100 hours of mentoring.⁸¹

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.'" *Endrew 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." *Endrew 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); *Endrew 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." *Endrew 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

⁸⁰ P53-2,3; Center Director; P47-1.

⁸¹ P53-3; Special Education Advocate.

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more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Endrew F.*, 137 S. Ct. at 1001.

In addition, the 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; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori ex rel. A.M. v. Dist. of Columbia*, 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 1: *Whether DCPS denied Student a FAPE by failing to develop or provide an appropriate IEP and/or placement from 12/12/18 to present, due to (a) inappropriate baselines and present levels of performance, (b) unattainable goals, (c) inadequate hours of specialized instruction, which should be outside general education, and/or (d) inadequate Behavioral Support Services. (Respondent has the burden of persuasion, if Petitioner establishes a prima facie case.)*

Petitioner established a *prima facie* case on this issue based on testimony and documents, shifting the burden to Respondent, which largely failed to meet its burden of persuasion, as discussed below.

The applicable legal standard for analyzing the appropriateness of the IEP at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether it was “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F.*, 137 S. Ct. at 1001. As the Court of Appeals for

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the District of Columbia emphasized in *Z.B.*, 888 F.3d at 517, *Endrew F.* “raised the bar on what counts as an adequate education under the IDEA,” requiring more than “merely some” educational benefit. *See also Damarcus S. v. Dist. of Columbia*, 190 F. Supp. 3d 35, 51 (D.D.C. 2016) (IEP must be “reasonably calculated to produce meaningful educational benefit”).

The measure and adequacy of the IEP is determined as of the time it was offered to Student, rather than with the benefit of hindsight. *See Z.B.*, 888 F.3d at 524; *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student’s IEP is analyzed by considering the specific concerns raised by Petitioner, which are considered below in turn.⁸² *See* 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(a) Baselines and PLOPs. As an initial matter, the IDEA does not expressly require “baselines” in IEPs, but does require a description of how progress toward meeting a student’s IEP goals will be measured, in 34 C.F.R. § 300.320(a)(3). That measurement is typically in the form of baselines stating the level at which a student begins so one can determine whether the special education services provided were sufficient to bring about the desired improvement. Here, in the 12/12/18 IEP meeting, Petitioner objected to some of the baseline data as too general and vague. DCPS agreed to add some additional detail to improve the baselines. Thus, in Student’s finalized IEP the math baselines – which were the same for all 3 goals – state Student’s scores and general ability to comprehend scaffolded problems. Student’s reading baselines, which were very similar for both goals, state Student’s functional grade level and PARCC score, as do the written expression baselines, which were the same for both goals. While the baselines could be improved, the undersigned does not consider these baselines to be a violation of the IDEA.

Turning to the present levels, the IDEA does require statements of present levels of performance in IEPs in 34 C.F.R. 300.320(a)(1). PLOPs for math, reading and written expression were provided in Student’s IEP with some amount of detail, based on Student’s WJ scores, PARCC and PSAT scores (for math and reading), along with some explanation of Student’s grades and strengths and weaknesses, which this Hearing Officer finds sufficient and not a violation of the IDEA.

(b) Goals. IEPs are required to contain measurable annual goals pursuant to 34 C.F.R. § 300.320(a)(2). Petitioner challenged the goals in Student’s IEP as being set at too high a level for Student, claiming that the goals should be written for Student’s current level. On the other hand, Case Manager asserted that the goals should be written for the grade Student is in, with intensive support and scaffolding to help Student attain those goals. The goals set forth in Student’s IEP appear challenging given Student’s abilities, but in the view of the undersigned are within the range of what Student’s teachers can reasonably work on during the year the IEP is to be in effect. Indeed, the Supreme Court has

⁸² A Hearing Officer must also determine whether “the State complied with the procedures” set forth in the IDEA. *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 193, 204 (D.D.C. 2013), *quoting Rowley*, 458 U.S. at 206-07. The allegations in this matter were not simply procedural violations, as discussed in the text.

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emphasized that students' programs are to be appropriately ambitious. *Endrew F.*, 137 S. Ct. at 1000. This Hearing Officer finds no IDEA violation based on allegedly unattainable goals.

(c) Specialized Instruction (Outside General Education). Petitioner next challenges the fact that Student's IEP provides only 5 hours/week of specialized instruction outside general education and another 5 hours/week inside general education, despite Student being some 5 years behind peers in reading, and many years behind in math and written expression as well. Student's deficits were well known to Public School from the independent comprehensive psychological evaluation conducted in the summer of 2018, as well as Student's very poor grades in the months leading up to the 12/12/18 IEP. Student's GPA for term 1 (in 2018/19) was 0.875 on a 4.000 point scale, meaning less than a "D" average, while Student's 10/19/18 midterm Progress Report showed 4 "Fs" and 1 "D+" out of 8 classes, with better grades only in so-called specials: PE ("A"), Spanish ("B"), and music ("C").

The independent comprehensive psychological evaluation concluded that Student needed full-time special education services with a low student-to-teacher ratio in classes, and increased individualized attention and instruction. In fact, in May 2018 Parent had urged that Student be pulled from general education for all core academic courses. Parent's advocates reiterated concerns prior to the IEP being finalized with only 5 hours/week outside general education (and 5 hours/week inside general education). In fact, Public School noted in Student's IEP that Student was not progressing in general education and had a long history of academic challenges. The IEP further noted that Student masked lack of understanding in class by avoiding work, leaving class, and talking to peers.

Student's need for more specialized instruction is also clearly seen from the fact that seemingly all involved with Student recognize that small groups and 1:1 support are needed or helpful for Student to make progress. Student's IEP noted that Student is easily distracted in larger classes, but works well in small group settings and 1:1, which was reiterated throughout the IEP: math needs 1:1 support; reading needs small group support; and written expression can benefit from small groups and direct instruction. Student's FBA eventually found that Student's off-task behavior was least likely during small group instruction and concluded that Student should have additional small group support with teachers.

This was not just theory. Student did better in a small group in inclusion math class, so Case Manager routinely included Student in a group of generally only 3 students. Student did well in English classes in summer school in 2019 because of much smaller classes and significant specialized instruction that Special Education Teacher provided 1:1, so Student was able to earn a "B" and a "C." Student's teachers noted that Student did well 1:1, giving examples of Student developing a good essay in history and progressing – with a lot of prompting – in science. Case Manager explained that it was only by working 1:1 that Student wrote anything at all for a science research project in chemistry. Nor was this simply after the fact analysis – the 10/24/18 Analysis of Existing Data ("AED") emphasized that Student needed extensive 1:1 support to stay focused and comprehend assignments, especially since Student did not ask for help when confused.

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Public School staff do not dispute that Student needs more help, but their answer is simply that Student should obtain necessary help by meeting with teachers at lunch and after school. That might be helpful if Student were willing to do it, but this Hearing Officer does not find it adequate or a substitute for additional specialized instruction on Student's IEP to enable Student to make appropriate progress in light of Student's circumstances. The undersigned instead is convinced by Clinical Psychologist's persuasive testimony that Student needed more specialized instruction in order to make academic progress and by Petitioner's 4/9/19 dissent letter to Director of Specialized Instruction seeking at least 20 hours/week of specialized instruction to cover core academic classes outside general education. With the significantly better grades Student received in specials (PE, Spanish and music) than all other classes, the undersigned orders below an increase in specialized instruction to 20 hours/week outside general education for core academic courses, rather than full-time, also keeping in mind Least Restrictive Environment principles. *See Endrew F.*, 137 S. Ct. at 1000. Finally, DCPS's argument in the hearing, that Student's FSIQ of 77 would limit Student from being able to do better, is rejected by this Hearing Officer based on the success Student exhibited in summer school with smaller classes and more specialized instruction.

(d) BSS. The final concern in Issue 1 was that Student's IEP provided only 120 minutes/month of BSS, which Petitioner believed should be increased to 240 minutes/month. Public School viewed the 120 minutes/month (or 30 minutes/week, which would be only 6 minutes daily) as being sufficient to address Student's (1) academic challenges overall, (2) inability to focus, (3) significant distraction, (4) talking to peers and not absorbing instruction, and (5) inability to communicate academic needs to teachers. In addition to that, however, Director of Specialized Instruction credibly testified that Student is a "relationship" student who requires persistence to build trust and connection before progress can be made on attendance or other issues, which are also discussed in more detail in Issue 2, below. Building relationship and rapport requires significant additional time, for Social Worker was spending a great deal of effort searching the school to try to meet and talk with Student. When considered in connection with specialized instruction and Issue 2, the undersigned finds a violation and denial of FAPE supporting an increase to 180 minutes/month of BSS, which is ordered below, and compensatory education in the form of counseling hours.

Placement. The applicable legal standard for educational placement under the IDEA requires "school districts to offer placement in a school and in programming that can fulfill the requirements set forth in the student's IEP." *Middleton v. Dist. of Columbia*, 312 F. Supp. 3d 113, 143 (D.D.C. 2018) *citing O.O. ex rel. Pabo v. Dist. of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008). *See also Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 267 (D.D.C. 2013) (DCPS "must place the student in a setting that is capable of fulfilling the student's IEP"). Here, Student needs a placement that can provide 20 hours/week of specialized instruction outside general education with a low student-to-teacher ratio in small classes and increased individualized attention and instruction. As discussed above, Student is easily distracted in larger classes, but works well in small group settings and 1:1. Spending a majority of time in general education is not appropriate for Student, despite Student's desire not to be seen as needing special education. Student's existing placement in general education classes that are largely not understood does not afford Student a

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meaningful opportunity to attend class and make appropriate progress in Student's circumstances. *N.W. v. Dist. of Columbia*, 253 F. Supp. 3d 5, 17 (D.D.C. 2017), quoting *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Denial of FAPE. In considering the concerns above, the undersigned is cognizant of the fact that the analysis is not about achieving perfection, but merely an IEP and placement reasonably calculated to enable Student to make appropriate progress. *Endrew F.*, 137 S. Ct. at 1001; *Z.B.*, 888 F.3d at 519 (IDEA "stops short of requiring public schools to provide the best possible education"). See also *Hill v. Dist. of Columbia*, 2016 WL 4506972, at *21 (D.D.C. 2016), quoting *Leggett v. Dist. of Columbia*, 793 F.3d 59, 70 (D.C. Cir. 2015).

On balance, however, this Hearing Officer concludes that DCPS only met its burden of persuasion on subpart (a) and (b), but not (c) and (d), for the level and type of specialized instruction in conjunction with the amount of BSS were not reasonably calculated to enable Student to make appropriate progress in Student's circumstances, and thus placement was also not appropriate. This results in changes to Student's IEP below and contributes to compensatory education.

Issue 2: *Whether DCPS denied Student a FAPE by failing to provide appropriate behavioral supports when it failed to conduct a Functional Behavioral Assessment and develop a Behavioral Intervention Plan between 7/26/18 and 5/21/19, while Student exhibited extreme work avoidant and truant behaviors and the psychological evaluation provided to DCPS on 7/26/18 recommended an FBA. (Petitioner has the burden of persuasion on this issue.)*

Petitioner met her burden on this issue. 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. 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, Clinical Psychologist "strongly" recommended in her 7/21/18 comprehensive psychological evaluation that an FBA and BIP be developed to address Student's truancy and failure to complete homework. See *Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 61 (D.D.C. 2011) (BIP/FBA essential because "the quality of a child's education is inextricably linked to that child's behavior"). Special Education Advocate followed up by requesting a BIP at the 10/24/18 eligibility meeting, but the Public School social worker at the time disagreed that Student needed an attendance contract or a BIP because Student was not having "behavior problems." But Public School was well aware by that time of Student's serious behavior issues with attendance and tardiness. At the 10/24/18 meeting, Director of Specialized Instruction expressed concern about Student failing school due to lack of attendance. By the time the IEP was developed on 12/12/18, Student had 27 unexcused absences and 17 tardies. Student's absences steadily increased to a total of 80 unexcused

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absences and 37 unexcused tardies by the end of the school year. Yet, beyond automated calls and letters to Parent, Public School largely focused on having Student get a paper signed each day by Student's teachers, which Student routinely "forgot" to do. The social worker attempted to work with Student, but needed additional BSS minutes, as discussed above.

At the 30-day review on 1/25/19, DCPS noted that Student was no longer going to math or English classes, but remarkably Public School staff saw that as a reason **not** to make any changes in Student's IEP, as though Student merely needed to correct behavior and go to class and the problem would be fixed. Yet, despite the strong recommendation for an FBA and BIP in July 2018, Public School still took no action in January, or even in subsequent months. An FBA was finally conducted and the BIP developed on 5/7/19, focusing on off-task behavior in class and poor attendance/coming late to class. Even so, in the 5/21/19 meeting to review the FBA and BIP, one of the action items at the end of the meeting was for DCPS to collect data on why Student was coming late to classes and provide it to Petitioner's counsel. *See Middleton*, 312 F. Supp. 3d at 146-47 (D.D.C. 2018) (DCPS's few behavior interventions were insufficient to address student's attendance, which violated the IDEA and was a denial of FAPE).

DCPS did raise an affirmative defense to any claim from 1/30/19 based on *res judicata* and/or issue preclusion due to the 1/30/19 HOD issued to the parties which involved cognitive and behavioral testing in one issue and child find in the other. The undersigned is clear that at most the affirmative defense would apply to the delayed FBA in Issue 2, as the court made clear that an FBA is an "educational evaluation" that comes within 34 C.F.R. § 300.304(c)(4) in *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63, 67 (D.D.C. 2008). But the affirmative defense would not apply to the BIP, which is not an evaluation. The undersigned is not at all convinced that the FBA was at issue in the prior HOD, as it was not mentioned in the HOD and was not ordered as a remedy. Nonetheless, this Hearing Officer considers the liability and remedy in this case to be the same if focusing only on the delayed BIP which Student needed in order to improve attendance and classroom engagement.

In circumstances such as these, this Hearing Officer concludes that failing to develop a BIP for the bigger part of a year goes beyond a mere procedural violation and is a denial of FAPE. *See, e.g., Z.B.*, 888 F.3d at 524. Clinical Psychologist persuasively testified that Student would have been helped by having the BIP much sooner. Here, the failure to develop a BIP caused a deprivation of educational benefit to Student by not providing the support needed for Student's behavioral and attendance needs, which should have greatly reduced Student's absences. Thus, the undersigned concludes that this is a substantive violation and a denial of FAPE pursuant to 34 C.F.R. § 300.513(a). This denial of FAPE contributes to the compensatory education awarded below.

Remedies

As an initial matter, DCPS is ordered below to amend Student's IEP to (a) provide a total of 20 hours/week of specialized instruction outside general education for Student's

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core academic classes, and (b) increase BSS to 180 minutes/month, as discussed in Issue 1 above.

In determining compensatory education for denials 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 Compensatory Education Proposal prepared for this case assumed that Petitioner would prevail on all issues. While Petitioner has largely prevailed, a downward adjustment is required as an initial matter in the compensatory education proposed. More significantly, the undersigned was not persuaded that the denials of FAPE require several hundred hours at Learning Center (at \$136/hour) as proposed by Petitioner, both because the undersigned is convinced that a shorter period of tutoring will fully address the progress that Student should have achieved by this point, and because Student was sufficiently clear that Student was not enthused or even willing to participate in a program asking for 2-4 hours a day of extra work, 5 days a week over a period of many months. The remedy ordered takes into account what Student needs as well as what Student may be willing to do.

Based on all the evidence and the various factors discussed in this case, and carefully considering the totality of the circumstances, the undersigned considers that it is appropriate to award 150 hours of academic tutoring along with 50 hours of counseling to make up for the denials of FAPE found above and restore Student to the position in which Student should be at this time but for those denials of FAPE. 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 18 months in order to ensure that the remedial services that Student needs are obtained without undue delay, along with minimizing any administrative burdens on Respondent which may result from compensatory education awards stretching over excessively long timeframes.

ORDER

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

- (1) Within 10 business days, DCPS shall amend Student’s IEP to provide a total of
 - (a) 20 hours/week of specialized instruction outside general education for Student’s core academic classes, and
 - (b) 180 minutes/month of BSS.

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(2) As compensatory education for the denials of FAPE found herein, DCPS shall provide letter(s) of authorization within 10 business days after Petitioner's request(s) for a total of (a) 150 hours of academic tutoring from independent provider(s) chosen by Petitioner, and (b) 50 hours of independent counseling from an independent provider chosen by Petitioner. All hours are to be provided and used within 18 months; 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:

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