

**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 16, 2022

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<i>Student</i> , <sup>1</sup>	)	Case No.: 2022-0088
through <i>Parent</i> ,	)	
<i>Petitioner</i> ,	)	Date Issued: 9/16/22
	)	
v.	)	Hearing Officer: Keith L. Seat, Esq.
	)	
District of Columbia Public Schools	)	Hearing Dates (using Microsoft Teams):
("DCPS"),	)	8/23/22, 8/24/22 & 9/2/22
Respondent.	)	
	)	

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**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 DCPS's failure to provide timely or appropriate Individualized Education Programs ("IEPs") and comprehensive evaluations, among other things. DCPS responded that Student's IEPs were timely and appropriate and there was no denial of FAPE.

**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 A30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

**Procedural History**

Following the filing of the due process complaint on 5/12/22, the case was assigned to the undersigned on 5/13/22. Respondent filed a response on 5/20/22 and did not challenge jurisdiction. A resolution meeting took place on 5/31/22, but the parties did not

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<sup>1</sup> Personally identifiable information is provided in Appendix A, including terms initially set forth in italics. Personal pronouns and other terms that would indicate Student's gender are omitted.

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settle the case or shorten the 30-day resolution period, which ended on 6/11/22. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, as extended by 45-day and 7-day continuances, which requires a Hearing Officer Determination (“HOD”) by 9/16/22.

A prehearing conference was held on 8/5/22 and the Prehearing Order was issued on 8/6/22, addressing, among many other things, the use of a videoconference platform to conduct the due process hearing. The due process hearing took place on 8/23/22, 8/24/22 and 9/2/22 and was open to the public. Petitioner was represented by *Petitioner’s counsel*. DCPS was represented by *Respondent’s counsel*. Petitioner participated in much of the hearing.

### Documents and Witnesses

Petitioner’s Disclosure, submitted on 8/12/22, contained documents P1 through P88, which were all admitted into evidence over numerous objections, except for P84, a video exhibit, which was not admitted. Respondent’s Disclosure, submitted on 8/16/22 and amended on 8/19/22, contained documents R1 through R30, all of which were offered into evidence except for R10 through R12; all offered documents were admitted into evidence without objection.<sup>2</sup>

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

1. *Educational Advocate* (qualified over objection as an expert in Special Education Programming, Placement and Procedures, with Emphasis in Working with ED Students)
2. Student
3. *Private Occupational Therapist* (qualified over objection as an expert in Occupational Therapy and Assistive Technology)
4. Parent

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

1. *Special Education Teacher* (qualified without objection as an expert in Special Education Programming)

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<sup>2</sup> Citations herein to Petitioner’s documents are indicated by a “P” followed by the exhibit number, followed immediately by a “p” (for page) and the Bates number with any leading zeros omitted, while Respondent’s documents are indicated in the same manner beginning with an “R.”

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2. *Special Education Coordinator* (qualified without objection as an expert in Special Education)
3. *School Occupational Therapist* (qualified without objection as an expert in Occupational Therapy)
4. *Social Worker* (qualified without objection as an expert in Clinical Social Work)

Petitioner's counsel submitted brief testimony of Educational Advocate and of Parent as the only rebuttal evidence.

### **Issues and Relief Requested**

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

**Issue 1:** Whether DCPS denied Student a FAPE by failing to ensure an IEP from the beginning of 2021/22<sup>3</sup> until 12/21/21 as required by 34 C.F.R. § 300.323. (*Petitioner has the burden of persuasion on this issue.*)

**Issue 2:** Whether DCPS denied Student a FAPE by failing to (a) develop an appropriate IEP on 11/22/21, 12/21/21 or 5/6/22, and/or (b) make an appropriate IEP and/or placement available during 2021/22, where the IEPs (i) were not based on comprehensive evaluations and failed to consider Student's need for assistive technology and occupational therapy, (ii) did not address all identified needs in reading, written expression, math, and Social Emotional Behavioral Development, (iii) failed to provide sufficient specialized instruction and/or therapeutic supports, and/or (iv) failed to include an appropriate transition plan, goals, and/or services. (*Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.*)

**Issue 3:** Whether DCPS denied Student a FAPE by failing to (a) conduct comprehensive evaluations (occupational therapy and assistive technology evaluations and an updated Functional Behavioral Assessment ("FBA")) following a 9/14/21 meeting, and/or (b) timely conduct comprehensive reevaluations. (*Petitioner has the burden of persuasion on this issue.*)

**Issue 4:** Whether DCPS denied Student a FAPE by failing to provide an appropriate Behavior Intervention Plan ("BIP") and/or otherwise address attendance issues resulting from Student's disability. (*Petitioner has the burden of persuasion on this issue.*)

**Issue 5:** Whether DCPS denied Student a FAPE by failing to fully implement (a) specialized instruction, (b) related services, and/or (c) transportation services from 12/21/21 to 3/2/22 by timely submitting request forms to OSSE. (*Petitioner has the burden of persuasion on this issue.*)

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<sup>3</sup> All dates in the format "2021/22" refer to school years.

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The relief requested by Petitioner is:

1. A finding that Student has been denied a FAPE.
2. DCPS shall revise Student's IEP to provide: (a) increased specialized instruction, (b) increased Behavioral Support Services ("BSS"), (c) additional academic, transition and Social Emotional Behavioral Development goals, (d) assistive technology, and (e) transportation.
3. DCPS shall conduct an FBA and fund occupational therapy and assistive technology evaluations.
4. Within 15 days after completion of all the evaluations above, DCPS shall reconvene the IEP team to review the results, revise Student's IEP, and develop a BIP and/or a plan to address any impediments to Student's attendance.
5. DCPS shall (a) fund a compensatory education evaluation, and (b) provide compensatory education for any denials of FAPE.<sup>4</sup>
6. Any other just and reasonable relief.

### **Findings of Fact**

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact<sup>5</sup> are as follows:

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<sup>4</sup> So far as Petitioner's request for compensatory education depends on the findings of assessments that may be carried out in the future, that portion of the compensatory education claim is reserved pending the completion of Student's assessments and a determination of eligibility for additional special education and related services.

With regard to any request for compensatory education to be awarded in the HOD, Petitioner's counsel was put on notice at the prehearing conference that 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 invited to be prepared at the due process hearing to introduce evidence contravening the requested compensatory education in the event a denial of FAPE is found.

<sup>5</sup> 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.

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1. Background. Student is a resident of the District of Columbia; Petitioner is Student's Parent.<sup>6</sup> Student is *Age, Gender, in Grade* during 2021/22 at *Public School* after being at *Prior School*.<sup>7</sup> Parent was pleased with the program at Public School and believed Student was a "good fit" at Public School.<sup>8</sup> Student reported liking school "sometimes" and liked the teachers at Public School.<sup>9</sup> Student has impressive tenacity and even with a tumultuous school history Student continued to try to engage.<sup>10</sup> Student is polite, endearing, well-mannered and cooperative, as well as reserved and guarded.<sup>11</sup>

2. Student has been psychiatrically hospitalized several times, attended 3 residential treatment programs, and placed in 4 foster homes (as of 2016).<sup>12</sup> Student's history includes self-injurious behaviors, depression, running away, allegations of [REDACTED] mood instability, impulsivity, suicidal ideations, engaging in high risk situations, aggression to self and others in the home, and allegations of physical abuse by stepfather.<sup>13</sup> Student stated in a 2016 evaluation that Student had been in fights "a lot" and was harassed and bullied.<sup>14</sup>

3. On 10/23/21, a Saturday, Student texted Special Education Teacher that Student wanted to kill self, adding "I love you."<sup>15</sup> Special Education Teacher contacted police, Parent, principal, Special Education Coordinator, social worker and others.<sup>16</sup> Parent was reportedly busy and did not go to Student right away, but Special Education Coordinator began driving toward where Student might be and was able to get the address from Student while driving.<sup>17</sup> Student wanted to leave with Special Education Coordinator, but Special Education Coordinator was not allowed to drive Student due to school policy.<sup>18</sup> The police said they had to take Student; Special Education Coordinator talked to police about [REDACTED].<sup>19</sup>

4. *Friend* hit Student to keep Student from going to school; Friend opposed school because Friend had not graduated.<sup>20</sup> School staff worried that Friend was actually a [REDACTED] and raised concerns with Student.<sup>21</sup> Special Education Coordinator contacted both DC

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<sup>6</sup> Parent.

<sup>7</sup> Parent; P7p111.

<sup>8</sup> P25p319.

<sup>9</sup> P25p320.

<sup>10</sup> Educational Advocate; Parent.

<sup>11</sup> P25p328.

<sup>12</sup> P25p316; P15p226,230; P16p236.

<sup>13</sup> P25p316; P15p225-26; P15p230; P16p236.

<sup>14</sup> P15p227-28.

<sup>15</sup> Special Education Teacher.

<sup>16</sup> *Id.*

<sup>17</sup> Special Education Coordinator.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*



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Police and CSFA protective services on 2/18/22 after seeing images and video of Student with bruises on lip, face and arms; Student stated that Friend was threatening to kill Student.<sup>22</sup> Public School believed that Student was being [REDACTED] and notified Petitioner's counsel and outside groups.<sup>23</sup> Social Worker and Special Education Coordinator raised concerns with Parent.<sup>24</sup>

5. School staff took great efforts to connect with Student, even engaging with Student when they were out of state, on weekends and whenever needed, trying to help Student work things out and encouraging school attendance, even though often no one knew where Student was, or if even within the DC region.<sup>25</sup> Student believed Special Education Coordinator cared about Student; Student talked about Student's personal life with Special Education Coordinator.<sup>26</sup>

6. Enrollment at Public School; Prior HOD. Petitioner's counsel referred Student to DCPS's child find office on 5/19/21, noting that Student had previously been identified for special education; DCPS responded on 5/20/21 that it needed to verify DC residency; the referral was completed on 8/18/21 and the next day DCPS sought to set up a data review meeting in September.<sup>27</sup> On 9/14/21 an Analysis of Existing Data ("AED") meeting was held and the team determined that Student needed a comprehensive psychological evaluation, an occupational therapy observation, academic testing (Woodcock-Johnson IV ("WJ-IV")), a vocational assessment (requested by Petitioner's counsel from a specific DCPS evaluator), and an FBA after other testing.<sup>28</sup> Student's case manager and social worker were to meet with Student to provide support as needed during the evaluations.<sup>29</sup>

7. An HOD issued on 11/1/21 to the parties in this case dismissed Petitioner's complaint with prejudice, holding that Petitioner failed to make a *prima facie* showing that DCPS failed to provide an updated IEP, placement, and location of services; the Hearing Officer concluded that DCPS was justified in requiring Petitioner to establish residency, as it was compelled by statute.<sup>30</sup> Student enrolled at Public School on 8/30/21 but Public School was not aware that Student had an IEP, so Student only participated in general education as of 11/9/21.<sup>31</sup>

8. School Attendance. Student's history is notable for poor school attendance; Student did not engage in virtual learning at all during 2020/21 and missed the entire year of

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<sup>22</sup> R19p123.

<sup>23</sup> R21p128; R22p130.

<sup>24</sup> Parent.

<sup>25</sup> R23; R23p137-38 (in Atlanta; not in Florida).

<sup>26</sup> Student.

<sup>27</sup> P41p396-97, 388.

<sup>28</sup> R7p15.

<sup>29</sup> *Id.*

<sup>30</sup> HOD, Case 2021-0121 at 9,10 (11/1/21).

<sup>31</sup> P25p314; P29p339.

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instruction.<sup>32</sup> Student's attendance was problematic at Public School in 2021/22, with 37 absences as of 11/4/21 and, even when Student did attend, Student often skipped classes.<sup>33</sup> Social Worker reported that Student did not attend school during January 2022.<sup>34</sup> Student was not in the school building most of February 2022 and didn't go most of March 2022 or any of June 2022.<sup>35</sup> By the end of Term 3 in 2021/22, Student had been absent 110 unexcused days; by the end of 2021/22, Student had been absent 154 days of which 141 were unexcused.<sup>36</sup>

9. Even in the first month or two at Public School, poor attendance was significantly impacting Student; teacher stated that if attendance was better, Student could succeed academically.<sup>37</sup> Student was "jumped" by a group and fought after school on 9/23/21, which impacted future school attendance; Student had a black eye and then a death in the family, so did not return to school until 10/6/21.<sup>38</sup> Parent received many "robo-calls" from Public School about Student's absences.<sup>39</sup> As of 12/21/21, Student was "actively" working towards attending each class and staying for the duration with the support of daily trackers.<sup>40</sup> The 2021/22 Term 3 IEP Progress Report repeatedly noted that Student was progressing "due to improved attendance"; some Transition goals had no progress due to "poor attendance."<sup>41</sup>

10. On 10/28/21, Student's education team developed an Academic Plan by which Student could achieve *Goal* in the spring; the Academic Plan addressed emotional stability, truancy, and missing assignments.<sup>42</sup> A Re-engagement/Goal Plan Meeting on 3/14/22 noted a path for Student to achieve Goal in June 2022 or during the summer and looked at re-engagement when Student was in the school building, including incentives.<sup>43</sup> DCPS was working to support Student in reaching Goal.<sup>44</sup> Student's team developed an attendance tracker as part of the Academic Plan to assist with Student's accountability.<sup>45</sup> Social Worker repeatedly sought to meet with Student, who was absent or unavailable; Social Worker sought to provide BSS, but Student was chronically absent.<sup>46</sup>

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<sup>32</sup> P25p316.

<sup>33</sup> P25p316; P44p410 (59 unexcused absences as of 12/20/21); P8p137 (94 unexcused absences as of 3/14/22).

<sup>34</sup> P31p346.

<sup>35</sup> Educational Advocate.

<sup>36</sup> P37p364; P40p381.

<sup>37</sup> P25p319.

<sup>38</sup> R16p87; P30p342; Educational Advocate; Student; Parent.

<sup>39</sup> Parent.

<sup>40</sup> P7p113,115,117.

<sup>41</sup> P39p374,375,377,378,379.

<sup>42</sup> P25p316,318.

<sup>43</sup> P8p137,140.

<sup>44</sup> Special Education Coordinator; P8p138.

<sup>45</sup> P25p319.

<sup>46</sup> P25p319; P31p345-47.

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11. Educational Advocate sent a letter to Special Education Coordinator on 2/1/22 raising issues about the 1/24/22 attendance meeting, and another letter on 3/24/22 about the 3/14/22 re-engagement meeting, repeatedly raising concerns about Student's chronic absenteeism and seeking meetings, testing, new plans, and collaboration.<sup>47</sup> Student's advocates urged that attendance might be addressed through an FBA/BIP and adding IEP goals.<sup>48</sup>

12. DCPS's Central Office sought to assist its schools and students with attendance challenges.<sup>49</sup> DCPS sought to support Student in multiple ways.<sup>50</sup> Special Education Coordinator and Special Education Teacher were in near daily contact with Student and Parent.<sup>51</sup> Special Education Coordinator described to Petitioner's counsel in detail on 12/20/21 the interventions in place to address Student's poor attendance, including the daily attendance trackers, daily and weekly text messages and calls to Student and Parent, teacher communications with Student, weekend check-ins, instructions about excused absences, impact of meeting requirements to achieve Goal and more.<sup>52</sup> Relationship was key.<sup>53</sup> Student was not present much, but Public School's security guards and all staff knew that Student was Special Education Coordinator's student and would let Special Education Coordinator know about anything relevant.<sup>54</sup> Public School was doing all it could to address attendance, including considering incentives.<sup>55</sup> Student was able to regularly check-in with Social Worker, Special Education Teacher and Special Education Coordinator, if desired.<sup>56</sup> The school team cared about Student and was doing a lot for Student; Special Education Teacher was a "definite advocate" for Student and wanted the best for Student.<sup>57</sup>

13. IEPs. Student was identified as a student with Emotional Disturbance ("ED"), which is the disability classification in each IEP discussed herein; attempts to provide emotional and behavioral support at Public School were unsuccessful due to Student resistance or unavailability.<sup>58</sup> Student's last IEP prior to 2021/22 at Public School was dated 5/29/18 and provided 28 hours/week of specialized instruction outside general education, 240

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<sup>47</sup> P46p417-18; P64p474-76.

<sup>48</sup> P44p411.

<sup>49</sup> P81p527-55, 542, 544 (Annual Attendance Report, specifically including Public School); Special Education Coordinator.

<sup>50</sup> P50p428.

<sup>51</sup> P44p411.

<sup>52</sup> P44p410.

<sup>53</sup> Special Education Coordinator.

<sup>54</sup> *Id.*

<sup>55</sup> P8p141.

<sup>56</sup> *Id.*

<sup>57</sup> P8p142; P44p411; Parent (Public School "loves" Student).

<sup>58</sup> P12p208 (Student met ED criteria in 2011); P5p64; P6p84; P7p111; P11p167; P25p314,318; P25p329 (eligible for ED).



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minutes/month of BSS outside general education, and 30 minutes/month of BSS consultation.<sup>59</sup>

14. Student's 11/22/21 draft IEP provided for 10 hours/week of specialized instruction outside general education and 5 hours/week of specialized instruction inside general education, along with 240 minutes/month of BSS outside general education; Student, Parent and advocate generally agreed with the services, so the support was unchanged in the final IEP.<sup>60</sup> No one sought more specialized instruction in the draft IEP; the specialized instruction was reduced from earlier IEPs, but the team agreed it was appropriate.<sup>61</sup>

15. Student's 12/21/21 final IEP also provided for 10 hours/week of specialized instruction outside general education and 5 hours/week of specialized instruction inside general education, along with 240 minutes/month of BSS outside general education.<sup>62</sup> DCPS recommended not making requested adjustments in the IEP until Student was attending school.<sup>63</sup> The Positive Behavior Interventions and Supports ("PBIS") in the IEP provided some information, including an attendance tracker.<sup>64</sup> Educational Advocate believed the 12/21/21 IEP left an "enormous" gap and was nowhere near enough support for Student to access education, as more direct intervention was needed along with a smaller setting.<sup>65</sup> DCPS's witnesses testified that Student did not lack the specialized instruction needed to be successful, but simply needed to receive the services offered.<sup>66</sup>

16. Student's IEP was amended on 5/6/22 to reduce BSS from 240 to 60 minutes/month and add a second BSS goal for therapy to explore Student's trauma history.<sup>67</sup>

17. BSS. Parent sought 240 minutes/month of BSS, which couldn't help Student's progress unless Student attended and was willing to engage with a mandatory reporter.<sup>68</sup> Student was not present to receive services and had made clear that Student would not talk to Social Worker, a mandatory reporter who could not keep all of Student's sharing confidential.<sup>69</sup> Student felt that if Student talked, it should be confidential, "between us."<sup>70</sup>

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<sup>59</sup> P5p64,75.

<sup>60</sup> R5p13; P6p95; P7p121; Special Education Coordinator.

<sup>61</sup> Special Education Coordinator.

<sup>62</sup> P7p111,121.

<sup>63</sup> R4p5.

<sup>64</sup> P7p112; Educational Advocate (PBIS insufficient).

<sup>65</sup> Educational Advocate.

<sup>66</sup> Special Education Teacher; Special Education Coordinator.

<sup>67</sup> P11p167,177,178. In apparent errors, DCPS's 12/21/21 IEP meeting notes state that the educational team agreed to "90 hours of emotional support"; the 12/21/22 Prior Written Notice ("PWN") refers to agreement on specialized instruction, along with "90 hours of emotional-behavioral support" outside general education. R4p5; R8p16.

<sup>68</sup> Social Worker.

<sup>69</sup> *Id.*

<sup>70</sup> Student.

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Student's history with social workers was unwillingness to disclose and be vulnerable.<sup>71</sup> BASC-3 parent rating scales indicated concern for necessary levels of attention at school, depressed mood, and rule-breaking behavior; Student's teacher did not report concerns, but Student's chronic absenteeism limited observation.<sup>72</sup> Student denied suicidal ideation during the comprehensive psychological reevaluation, but Student's history is significant for suicidal ideation.<sup>73</sup>

18. Cognitive. Student's 11/9/21 comprehensive psychological reevaluation cognitive test results were significantly lower than prior testing and were considered "invalid"; prior testing indicated average to low average cognitive abilities.<sup>74</sup>

19. Academics. Student's overall academic functioning was weak, with Student's biggest challenges in math, which was very low across the board; Student was very low in reading comprehension and reading fluency; written expression was average.<sup>75</sup> The comprehensive psychological reevaluation noted that the results were an "underestimate" of Student's abilities and that prior academic skills were average to low average; WJ-IV results in 2016 had standard score outliers of 70 and 115, with most in the low 90s or 80s (or close).<sup>76</sup>

20. Student's IEP present levels of performance ("PLOPs") relied on Student's questionable WJ-IV results which found that Student was 9 years below grade in math, with a grade of "B" in Term 1 in Probability and Statistics; Student was 9 years below grade in reading, with a grade of "C" in Term 1 in the highest English class; Student was 6 to 7 years below grade in written expression.<sup>77</sup> The comprehensive psychological reevaluation recommended evidence-based interventions to remedy Student's reading, math and writing.<sup>78</sup>

21. Parent indicated that Student is "bright," always on the honor roll (when supported with an IEP), and expressed a desire to go to college.<sup>79</sup> Student only needs a few courses to achieve Goal.<sup>80</sup> At Prior School, Student had a cumulative Grade Point Average ("GPA") of 2.75 in 2016/17, a cumulative GPA of 3.05 in 2017/18; and a cumulative GPA of 3.11 in 2018/19, without any specialized instruction from an IEP, although classes were small.<sup>81</sup> Student returned from a residential treatment facility in the Fall of 2019, but had not

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<sup>71</sup> Social Worker.

<sup>72</sup> P25p329.

<sup>73</sup> *Id.*

<sup>74</sup> P25p321,328-29; P25p317-18 (Student's Full Scale IQ ("FSIQ") standard score was 89 in 2011 and 87 in 2016).

<sup>75</sup> P25p329.

<sup>76</sup> P25p327,328,318.

<sup>77</sup> P7p113,114,115,117.

<sup>78</sup> P25p330.

<sup>79</sup> P25p319.

<sup>80</sup> P79p515.

<sup>81</sup> P26p333; P27p335; P28p337; Educational Advocate; Parent.

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engaged in school since then, until Public School in 2021/22.<sup>82</sup> At Public School, Student's GPA for 2021/22 was 0.44.<sup>83</sup>

22. FBA/BIP. Student's advocates requested an FBA and BIP, to which Public School agreed.<sup>84</sup> DCPS planned to conduct an FBA once Student was attending regularly and then do a BIP which couldn't begin until attendance was in place.<sup>85</sup> Student needed to be present 3 times in differing settings to obtain FBA baseline data, but an FBA was not needed to know Student was truant because basic needs for shelter, clothing and the like were not being met.<sup>86</sup> While Student's ED disability needed intensive support from a BIP, implementing a BIP doesn't work if Student is not in the school building.<sup>87</sup>

23. Assistive Technology. It is hard for Student to access Grade when 6 to 9 years behind; assistive technology may help bridge the gap.<sup>88</sup> Student's significant academic deficits required more assistance, with an assistive technology evaluation to trial things and see what would work to help Student.<sup>89</sup> Student's advocate sought consideration of assistive technology on 11/22/21, but did not seek an occupational therapy assessment.<sup>90</sup>

24. Occupational Therapy. Performing an occupational therapy observation at Student's age would be unusual, as the need would usually be identified earlier.<sup>91</sup> School Occupational Therapist doubted that a need for occupational therapy was overlooked earlier, especially since several evaluations had been conducted.<sup>92</sup> School Occupational Therapist reviewed Student's evaluations and nothing warranted an occupational therapy observation or evaluation; no recommendation for occupational therapy was made by the psychologist or any evaluator; nothing was calling for occupational therapy testing.<sup>93</sup> Student's behaviors did not appear to be sensory processing issues, as crowds would be an issue, but Student likes to publicly dance and sing, and tactile issues would make tattoos too painful.<sup>94</sup> Student attending school is necessary to carry out an occupational therapy screener.<sup>95</sup> The occupational therapy screener could not be carried out due to Student's attendance issues.<sup>96</sup>

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<sup>82</sup> P67p482.

<sup>83</sup> P40p381.

<sup>84</sup> R4p5; P44p410.

<sup>85</sup> P8p141,143; Social Worker.

<sup>86</sup> Social Worker.

<sup>87</sup> *Id.*

<sup>88</sup> Special Education Teacher.

<sup>89</sup> Private Occupational Therapist; Educational Advocate.

<sup>90</sup> P43p407-08; Special Education Coordinator.

<sup>91</sup> School Occupational Therapist; Private Occupational Therapist; Educational Advocate.

<sup>92</sup> School Occupational Therapist.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Private Occupational Therapist.

<sup>96</sup> Special Education Coordinator.

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25. Transition Plan. Student's Post-Secondary Transition plan was written by an experienced DCPS staffer requested by Petitioner's counsel and contains a great deal of information, based on a comprehensive vocational assessment conducted by the same staffer.<sup>97</sup> In the Casey Life Skills assessment, Student stated that Student doesn't have friends, doesn't have significant relationships with teachers or other school staff, and generally doesn't feel supported in the school environment.<sup>98</sup> Special Education Teacher met with Parent and advocates about their IEP concerns and Public School agreed to make requested changes in the transition plan.<sup>99</sup> Student's attendance was a barrier to obtaining the transition services that were available to Student.<sup>100</sup>

26. Transportation. Student told Special Education Coordinator that Student did not want to ride the special education bus.<sup>101</sup> The 11/22/21 Eligibility and IEP Team Meeting notes reported that "Parent and student did to (sic) want transportation at this time."<sup>102</sup> Transportation was not available following after-school credit recovery, which was not a problem for Parent.<sup>103</sup> Student's living situation was unstable.<sup>104</sup> Student "did and didn't" live with Parent; Student asked for bus pick-up from Parent's house, then from Student's godmother's house, and then again from Parent's house; Student sometimes lived elsewhere but was "not comfortable" saying where.<sup>105</sup> In 2021/22, Student was also with biological father for several weeks and was homeless 4 times based on the choices Student made (according to Parent).<sup>106</sup> As of the hearing date, Student was living with Parent, except for a night with a Friend each week.<sup>107</sup> The school bus showed up at the wrong place.<sup>108</sup> Student was not taking the bus when sent; the bus will no longer come if a student is not being picked up.<sup>109</sup>

### 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,

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<sup>97</sup> P7p126-34.

<sup>98</sup> P7p127; P24p305.

<sup>99</sup> Special Education Teacher.

<sup>100</sup> Special Education Teacher; P7p134.

<sup>101</sup> Special Education Coordinator.

<sup>102</sup> R5p10. The undersigned reads the phrase as "did not want."

<sup>103</sup> P8p137.

<sup>104</sup> Educational Advocate.

<sup>105</sup> Student.

<sup>106</sup> Parent.

<sup>107</sup> *Id.*

<sup>108</sup> Student.

<sup>109</sup> Special Education Coordinator.

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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 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 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; *Endrew F.*, 137 S. Ct. at 1000 (children with disabilities should receive education in the regular classroom to the extent possible); *Montuori v. Dist. of Columbia*, No. 17-cv-2455 (CKK), 2018 WL 4623572, at \*3 (D.D.C. 2018).

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



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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).

**Issue 1:** *Whether DCPS denied Student a FAPE by failing to ensure an IEP from the beginning of 2021/22 until 12/21/21 as required by 34 C.F.R. § 300.323. (Petitioner has the burden of persuasion on this issue.)*

Petitioner failed to meet her burden of persuasion on this initial issue, in part because DCPS prevails on its defense of res judicata, as a prior HOD was issued to the parties in this case on 11/1/21 dismissing the complaint in that case with prejudice. Petitioner asserted in that case that DCPS should not have delayed Student's IEP while awaiting residency to be demonstrated. The HOD held that Petitioner failed to make even a *prima facie* showing that DCPS failed to provide an updated IEP and placement, and that DCPS was justified in requiring Petitioner to establish residency, as compelled by statute.

Chief Judge Beryl Howell explained res judicata in *Lewis v. Parker*, 67 F. Supp. 3d 189, 200-01 (D.D.C. 2014), as follows:

In applying issue preclusion, three elements must be satisfied for a final judgment to preclude litigation of an issue in a subsequent case: “[1], the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case[; 2], the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case[; and] [3] preclusion in the second case must not work a basic unfairness to the party bound by the first determination.” *Martin v. Dep’t of Justice*, 488 F.3d 446, 454 (D.C. Cir. 2007) (quoting *Yamaha*, 961 F.2d at 254 (D.C. Cir. 1992)) (alterations in original).

Chief Judge Howell further stated in *Lewis*:

Notably, “[a] court conducting an issue preclusion analysis does not review the merits of the determinations in the earlier litigation.” *Consol. Edison Co. of N.Y. v. Bodman*, 449 F.3d 1254, 1257 (D.C. Cir. 2006); *see also Nat’l Post Office Mail Handlers, Watchmen, Messengers, and Grp. Leaders Div. of Laborers’ Int’l Union of N. Am. v. Am. Postal Workers Union*, 907 F.2d 190, 194 (D.C. Cir. 1990) (“The doctrine of issue preclusion counsels us against reaching the merits in this case, however, regardless of whether we would reject or accept our sister circuit’s position.”). . . .

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The same issue is at stake in this case as was necessarily determined in the prior case as of 8/20/21, and there is no unfairness to Petitioner. This Hearing Officer thus concludes that there was no denial of FAPE by DCPS not being able to conduct an evaluation of Student, determine eligibility, and develop an IEP in the few days prior to the beginning of 2021/22 once Petitioner had finally established residency in late August 2021. Indeed, District of Columbia special education regulations require that the District must evaluate a student for special education eligibility within 60 days, and once eligibility has been determined the District must meet and develop an IEP within 30 days. 34 C.F.R. § 300.323(c)(1); *G.G. ex rel. Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279 (D.D.C. 2013). However, Petitioner did not allege further delay and the undersigned finds at most a procedural violation of the IDEA, but no denial of FAPE given Student's extensive attendance delays in the Fall of 2021, as discussed herein. See 34 C.F.R. § 300.513(a)(2).

**Issue 2:** *Whether DCPS denied Student a FAPE by failing to (a) develop an appropriate IEP on 11/22/21, 12/21/21 or 5/6/22, and/or (b) make an appropriate IEP and/or placement available during 2021/22, where the IEPs (i) were not based on comprehensive evaluations and failed to consider Student's need for assistive technology and occupational therapy, (ii) did not address all identified needs in reading, written expression, math, and Social Emotional Behavioral Development, (iii) failed to provide sufficient specialized instruction and/or therapeutic supports, and/or (iv) failed to include an appropriate transition plan, goals, and/or services. (Respondent has the burden of persuasion on this issue, if Petitioner establishes a prima facie case.)*

Petitioner established a *prima facie* case concerning Student's IEPs through testimony and documents, shifting the burden to DCPS, which met its burden of persuasion, as discussed below. However, Petitioner did not establish a *prima facie* case as to placement, as there was an insufficient assertion that DCPS could not fulfill Student's IEPs at Public School. See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 527, 113 S. Ct. 2742, 2758, 125 L. Ed. 2d 407 (1993) (a *prima facie* case requires enough evidence to raise an issue for the trier of fact).

The applicable legal standard for analyzing the appropriateness of the IEPs at issue in this case was articulated by Chief Justice Roberts for a unanimous Supreme Court as whether they were "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 U.S. Court of Appeals for 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 IEPs are determined as of the time they were offered to Student, rather than with the benefit of hindsight. See *Z.B.*, 888 F.3d at 524; *A.T. v. Dist. of Columbia*, CV 16-1086 (CKK), 2021 WL 1978792, at \*12 (D.D.C. 2021); *S.S. ex rel. Shank v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 66 (D.D.C. 2008). The appropriateness of Student's IEPs is analyzed by focusing on the specific concerns raised by

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Petitioner, which are considered in turn.<sup>110</sup> See 34 C.F.R. § 300.320(a); *Honig*, 484 U.S. at 311.

(i) Comprehensive Evaluations, Including Occupational Therapy and Assistive Technology. Petitioner's initial assertion concerning IEPs relates to evaluations, which are discussed in more detail in Issue 3 below, where the undersigned concludes that the comprehensive psychological reevaluation and comprehensive vocational assessment are a sufficient basis for the IEPs at issue herein, and that there was no need demonstrated for an occupational therapy observation or evaluation. However, the undersigned does conclude in Issue 3 that an assistive technology evaluation should be conducted and the outcome may result in modification of Student's current IEP along with an award of compensatory education as may be determined after the assistive technology evaluation. This is addressed in Issue 3, so is not duplicated here.

(ii), (iii) Reading, Written Expression, Math, and Behavior; Specialized Instruction and Therapeutic Supports.

Next, Petitioner asserts in subpart (ii) that the IEPs do not sufficiently address academics and behavior, while raising similar concerns from the other side in subpart (iii) as insufficient specialized instruction and BSS.

First considering specialized instruction, Student's IEPs in 2021/22 provided for 10 hours/week of specialized instruction outside general education and 5 hours/week of specialized instruction inside general education. While this was a marked reduction from Student's 28 hours/week of specialized instruction in earlier years, Student had done reasonably well in Prior School in the interim without an IEP, and Student's team now agreed that the 15 hours of specialized instruction was appropriate. In particular, Student, Parent and advocate generally agreed with the IEP service levels, and no one sought more specialized instruction. DCPS also demonstrated that Student did well in 2021/22 when actually attending school, but not when Student didn't attend, suggesting that specialized instruction was not the pivotal factor.

Turning to BSS, the relatively high level of 240 minutes/month in Student's 12/21/21 IEP was reduced to 60 minutes/month in Student's amended 5/6/22 IEP. Yet, the logic is compelling that BSS can only help Student progress if Student is willing to be present and receive services. Here, Student was absent for most of the school year and was also clear that Student was unwilling to have regular sessions with a mandatory reporter who might be obliged to convey to authorities what Student shared, rather than keeping it all confidential.

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<sup>110</sup> 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. Certain procedural concerns are discussed herein.

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The undersigned finds DCPS's arguments on the amount of specialized instruction and BSS in Student's IEPs to be compelling and to appropriately meet the academic and behavioral needs of Student.

(iv) Transition Plan. Finally, Petitioner challenged Student's transition plan, goals and services in the IEPs. Yet, Student's Post-Secondary Transition plan was written by the skilled DCPS staffer requested by Petitioner's counsel and contains a great deal of information based on a comprehensive vocational assessment conducted by the same staffer. The vocational assessment succeeded in obtaining information about Student for the transition plan relating to training, education, employment, and life skills as needed. Special Education Teacher met with Parent and advocates about their concerns and Public School agreed to make requested changes in the transition plan. Once again, Student's attendance was a barrier to obtaining transition services that were actually available to Student. Further, an IEP is not required to offer Student the "best" transition plan – but only services reasonably calculated to provide the student with meaningful benefit. *See K.S. v. Dist. of Columbia*, 962 F. Supp. 2d 216, 220-222 (D.D.C. 2013). Upon close review, the undersigned concludes that there was no denial of a FAPE for lack of transition plan, goals and services.

Placement. As for placement, 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, the undersigned concludes that Petitioner failed to establish even a *prima facie* case that Public School could not adequately provide the services set forth on Student's IEPs. The undersigned determines that Public School afforded Student the opportunity to make appropriate progress in Student's particular circumstances. *See 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).

FAPE. In carefully considering the concerns raised above individually and as a group, the undersigned is cognizant of the fact that the analysis is not about achieving perfection. Instead, an IEP and placement simply need to be reasonably calculated to enable Student to make appropriate progress in the circumstances. *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"). On balance, this Hearing Officer concludes that the IEPs meet the required standard and were appropriate for Student, with the exception of the need for an assistive technology evaluation, as discussed further next.

**Issue 3:** *Whether DCPS denied Student a FAPE by failing to (a) conduct comprehensive evaluations (occupational therapy and assistive technology evaluations and an updated Functional Behavioral Assessment) following a 9/14/21 meeting, and/or (b) timely conduct comprehensive reevaluations. (Petitioner has the burden of persuasion on this issue.)*

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Petitioner failed to meet her burden on this issue, apart from the need for an assistive technology evaluation. The importance of assessing students in all areas of suspected disability was emphasized in *Z.B.*, 888 F.3d at 518, *quoting* 20 U.S.C. § 1414(b)(3)(B). The D.C. Circuit Court explained in *Z.B.*, at 524, that failing to conduct adequate assessments is a procedural violation that could have substantive effects by preventing the IEP team from obtaining necessary information about the student. *See also Long v. Dist. of Columbia*, 780 F. Supp. 2d 49, 60-61 (D.D.C. 2011) (“in the absence of necessary and appropriate evaluations the district cannot develop a program that is tailored to the student’s unique needs and reasonably calculated to enable [the student] to receive educational benefits” (citation omitted)); 34 C.F.R. § 300.304(c)(4).

Here, Student’s team met on 9/14/21 to determine what assessments were needed and found that Student needed a comprehensive psychological evaluation, an occupational therapy observation, academic testing (WJ-IV), a vocational assessment, and an FBA after other testing. The dispute here is about the occupational therapy, assistive technology and FBA, which have not been conducted.

Occupational Therapy. Both parties’ occupational therapy experts agreed that performing an occupational therapy observation at Student’s age would be unusual, as any need for occupational therapy would usually be identified earlier. In scanning Student’s past evaluations, School Occupational Therapist saw nothing warranting an occupational therapy observation or evaluation, as there was no recommendation for occupational therapy by any evaluator or other grounds for occupational therapy testing, such as sensory processing issues. Student attending school is necessary to carry out an occupational therapy screener, and it hadn’t been done due to Student’s attendance issues. Nor had Student’s advocate sought an occupational therapy review, and the undersigned declines to require one here.

Assistive Technology. Quite simply, assistive technology might help Student bridge the 6 to 9 year gap in Student’s academics, as it is hard for Student to access Grade being so far behind. An assistive technology evaluation to trial options could see what would work to help Student. Even DCPS’s Special Education Teacher encouraged assistive technology for Student. The undersigned thus concludes that an assistive technology evaluation should be conducted. The outcome may result in modification of Student’s current IEP as appropriate and the possibility of future compensatory education being awarded due to the assistive technology evaluation not being conducted sooner.

Functional Behavioral Assessment. Turning to the FBA, the IDEA requires in the case of a student whose behavior impedes the student’s own learning, as here with Student’s chronic absences, 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); *see also* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540, 46643 (8/14/06) (if a child’s behavior or physical status is of concern, evaluations addressing these areas must be conducted); *Middleton*, 312 F. Supp. 3d at 146; *Z.B.*, 888 F.3d at 524 (failing to conduct an FBA is a procedural violation that could have substantive effects).



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Here, Student's advocates sought an FBA and BIP, to which Public School agreed. DCPS planned to conduct an FBA once Student was attending regularly and then follow with a BIP in the usual manner. Public School staff stated that Student needed to be present 3 times in differing settings to obtain FBA baseline data, but that an FBA was not actually needed to know why Student was truant, as Student's basic needs for shelter, clothing and the like were not being met. The question is whether a useful FBA could have been developed despite Student's absences. DCPS has been very focused on Student's attendance and was very certain an FBA would not have been beneficial until Student was attending school. While Petitioner argued the contrary, the undersigned does not see any basis for overriding the professional expertise of the DCPS team.

(b) Reevaluations. The IDEA requires a reevaluation of each student with a disability at least once every three years, or sooner if the student's parent or teacher requests a reevaluation, or if the LEA determines that the needs of the student warrant reevaluation. 34 C.F.R. § 300.303. In considering a reevaluation, the IEP team (and other qualified professionals as appropriate) must review existing evaluation data and, with input from the student's parents, identify what additional data, if any, are needed to determine whether the student continues to have a disability, and the educational needs of the student. 34 C.F.R. § 300.305(a); *James*, 194 F. Supp. 3d at 143. This was carried out in the 9/14/21 AED meeting discussed above, which satisfied any reevaluation obligation in 2021/22.

**Issue 4:** *Whether DCPS denied Student a FAPE by failing to provide an appropriate Behavior Intervention Plan and/or otherwise address attendance issues resulting from Student's disability. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did not meet her burden of persuasion on this issue. As discussed in other issues, Student's attendance at Public School – or lack of attendance – is often central to the issues in this case. The IDEA requires school districts to 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”).

However, this is not a case where the student was largely ignored or fell through the cracks. All involved were aware that Student needed to attend school and took significant efforts to encourage attendance. The basic question here is whether there was more that Public School could or should have done to encourage Student's attendance, including a BIP. Petitioner's advocates repeatedly raised concerns about Student's chronic absences and repeatedly sought meetings, testing, new plans, and collaboration. Public School did engage extensively with Petitioner's advocates. Special Education Coordinator described on 12/20/21 the interventions in place to address Student's poor attendance, including the daily attendance trackers, daily and weekly text messages and calls to Student and Parent, teacher communications with Student, weekend check-ins, instructions about excused absences, and more. Although Student was not often present in school, Public School's security guards and staff knew that Student was Special Education Coordinator's student and let Special Education Coordinator know about anything relevant to Student.

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Relationship was key and Special Education Coordinator and Special Education Teacher were often in daily contact with Student and Parent. The extent of Public School's focus on relationship to try to encourage Student's attendance was exhibited through the connection between Public School staff and Student in times of crisis, when staff would connect with Student and were sometimes even more responsive than Parent.

While Petitioner asserts that DCPS should have developed an appropriate BIP, the undersigned determined in Issue 3 that it was unreasonable to expect an FBA to have been conducted in light of Student's absences, so it was also premature to expect a BIP to be developed based on the yet to be completed FBA. Notwithstanding Student's ED disability, implementing a BIP doesn't help if Student is not present in the school building or otherwise able to obtain its benefits. Accordingly, this Hearing Officer concludes that there was no failure by DCPS to develop a BIP and that the extensive efforts by Public School to engage Student and overcome Student's chronic absenteeism were reasonable in the circumstances. There was no denial of FAPE here.

**Issue 5:** *Whether DCPS denied Student a FAPE by failing to fully implement (a) specialized instruction, (b) related services, and/or (c) transportation services from 12/21/21 to 3/2/22 by timely submitting request forms to OSSE. (Petitioner has the burden of persuasion on this issue.)*

Petitioner did not meet her burden of persuasion on the final issue, IEP implementation. With a failure to implement claim, the IDEA is only violated when a school district deviates materially from a student's IEP. *See Middleton*, 312 F. Supp. 3d at 144; *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a "*de minimis* failure to implement all elements of [the student's] IEP." *Johnson v. Dist. of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013), *quoting Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts are clear that it is "the proportion of services mandated to those provided that is the crucial measure for purposes of determining whether there has been a material failure to implement." *Turner v. Dist. of Columbia*, 952 F. Supp. 2d 31, 41 (D.D.C. 2013), *citing Wilson v. Dist. of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). Notably, there is "no requirement that the child suffer educational harm in order to find a violation" in a failure to implement claim. *James v. Dist. of Columbia*, 194 F. Supp. 3d 131, 139 (D.D.C. 2016).

Here, there is no dispute that pursuant to the IEPs Student was entitled to specialized instruction and related services, including transportation. Whether there was failure to implement Student's IEPs turns on whether Student's absences are attributed to DCPS based on Petitioner's arguments that DCPS failed to address Student's attendance issues, as discussed above. Here, the undersigned is clear that Student was not willing to attend school and, as discussed above, the undersigned was not persuaded that there was more that Public School could or should have done to engage and educate Student. The undersigned thus concludes that the standard principles should apply under which student absences are not the responsibility of the LEA. In *Catalan ex rel. E.C. v. Dist. of Columbia*, 478 F. Supp. 2d 73, 76 (D.D.C. 2007), the court held that related services sessions missed due to "snow days, holidays, [student's] absence from school, and the like" were not counted toward

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failure to implement the IEP, while *Joaquin v. Friendship Pub. Charter Sch.*, Civ. No. 14–01119, 2015 WL 5175885, at \*8 (D.D.C. 2015), makes clear that services simply need to be offered to a student, even if the student “would not have been present to receive any” of them. *See also Letter to Balkman*, 23 IDELR 646 (OSEP 4/10/95) (does not require missed services due to student absences to be made up, but does require provider or student unavailability due to school functions to be made up).

(a) Specialized Instruction. Student’s IEPs in 2021/22 provided for 10 hours/week of specialized instruction outside general education and 5 hours/week of specialized instruction inside general education. Petitioner did not demonstrate that DCPS failed to provide these hours of specialized instruction, much less a material failure to implement this requirement, as the issue was Student’s lack of attendance.

(b) Related Services. BSS is a “related service” which must be provided if required to assist a student with a disability to benefit from special education. *See* 34 C.F.R. § 300.34(a); *Irving Independent Sch. Dist. v. Tatro*, 468 U.S. 883, 890, 104 S. Ct. 3371, 82 L. Ed. 2d 664 (1984). Here, Student’s 12/21/21 IEP provided 240 minutes/month of BSS, while the 5/6/22 IEP reduced BSS to 60 minutes/month. However, available service trackers demonstrate that Student was not available to receive services, so that there was no material failure of DCPS to provide BSS to Student. In addition to Student’s usual attendance issues here, Student was reluctant to speak about sensitive issues to a mandatory reporter, which further reduced Student’s availability.

(c) Transportation. School transportation is also a related service to which Student was entitled based on Student’s 12/21/21 IEP, although lack of clarity by Student about using the bus made it difficult to provide the service. *See* 34 C.F.R. §§ 300.34(a),(c)(16), 300.323(c)(2). Student told Special Education Coordinator that Student did not want to ride the special education bus and meeting notes reported that Parent and Student did not want transportation. Parent was flexible and the lack of transportation for after-school credit recovery was not a problem. Subsequent efforts to set up transportation were made challenging by Student’s unstable living situation. Student testified that Student “did and didn’t” live with Parent; Student asked for the bus from Parent’s house, then from Student’s godmother’s house, and then again from Parent’s house. Student sometimes lived elsewhere, but was “not comfortable” saying where. Student was also with biological father for several weeks, but at the time of the hearing was living with Parent, except for a night with a Friend each week. Not surprisingly, the bus showed up at the wrong place and Student was not taking the bus when sent. Accordingly, the undersigned finds there was no failure by DCPS to materially implement Student’s IEP relating to transportation services.

## **ORDER**

Petitioner has prevailed on one aspect of this case, as set forth above. Accordingly, **it is hereby ordered that:**

- (1) Within 45 days, DCPS shall conduct an assistive technology evaluation and convene an IEP meeting to revise Student’s IEP as appropriate based on the outcome.

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- (2) Any claim for compensatory education based on the assistive technology evaluation required in the previous paragraph is expressly reserved for subsequent resolution.

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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