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**Confidential**

<p>Parent on Behalf Student<sup>1</sup>,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools ("LEA")</p> <p>Respondent.</p> <p>Case # 2016-0151</p> <p>Date Issued: August 29, 2016</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Hearing Dates:</p> <p>July 25, 2016 August 23, 2016 August 24, 2016</p> <p>Counsel for Each Party listed in Appendix A</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> Personally identifiable information, including the name of the Respondent, is in Appendices A & B attached to this decision which must be removed prior to public distribution.

## **JURISDICTION:**

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on July 25, 2016, August 23, 2016, and concluded on August 24, 2016, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, N.E., Washington, D.C. 20003, in Hearing Room 2006.

## **BACKGROUND AND PROCEDURAL HISTORY:**

The student is age \_\_\_\_\_ and in grade \_\_\_\_\_.<sup>2</sup> He has been determined eligible for special education and related services pursuant to IDEA with a disability classification of intellectual disability (“ID”).

The student began attending a self-contained special education program housed in a District of Columbia Public Schools (“DCPS”) [REDACTED] school (“School A”) at the start of school year (“SY”) 2014-2015, and was in the same program during SY 2015-2016.

On June 16, 2016, the student’s parent (“Petitioner”) filed a due process complaint alleging, inter alia, that DCPS, the local education agency (“LEA”) denied the student a free appropriate public education (“FAPE”) by (1) failing to provide the student with an appropriate individualized educational program (“IEP”) on or about May 11, 2015; (2) failing to amend the student’s IEP following the December 15, 2015, multidisciplinary team (“MDT”) meeting and/or timely provide the student with a functional behavior assessment (“FBA”) or behavior intervention plan (“BIP”); (3) failing to fully implement the student’s May 11, 2015, IEP and/or provide the student with his least restrictive environment (“LRE”) or exposure to non-disabled peers; (4) failing to provide a finalized IEP reflecting the agreed upon changes to the student’s LRE and services, during the May 10, 2016, meeting; (5) failing to comprehensively re-evaluate the student by conducting an occupational therapy (“OT”) evaluation and/or speech and language evaluation, and (6) failing to provide Petitioner access to the student’s educational records.

Petitioners seek as relief that the Hearing Officer finds that the DCPS denied the student a FAPE. Petitioner requests DCPS provide parent’s counsel with full access to the student’s records, including, service trackers and discipline records from SY 2014-2015, all evaluation reports and ESY progress notes. Petitioner wants DCPS to provide her with a finalized IEP that reflects the program changes from the May 10, 2016, meeting. Finally, Petitioner requests an award of compensatory education based upon the alleged FAPE denials contained in her complaint.<sup>3</sup>

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<sup>2</sup> The student’s current age and grade are indicated in Appendix B.

<sup>3</sup> In a prior HOD, issued August 29, 2016, the Hearing Officer has already granted Petitioner compensatory education as relief for the expedited issue raised in the complaint.

On June 27, 2016, the LEA filed a timely response to Petitioner's complaint in which it denies that it failed to provide the student with a FAPE. The LEA asserts that the student's May 11, 2015, IEP, was appropriate for the student at the time that it was developed and it was appropriately implemented in a self-contained classroom.

The LEA asserts that the MDT convened on May 10, 2016, to review the student's IEP and that the team agreed the student required twenty-five (25) hours per week of specialized instruction and one hundred twenty (120) minutes per month of behavior support services outside of general education. The LEA contends Petitioner requested that the student be re-evaluated and it has now conducted the requested evaluations. The LEA contends it has provided copies of the student's records at the request of the parent's counsel on multiple occasions during SY 2015-2016 and will provide the Petitioner with a copy of the student's May 10, 2016, IEP.

The parties participated in a resolution meeting on July 1, 2016. The parties did not resolve the complaint and did not mutually agree to proceed directly to hearing. The 45-day period began on July 16, 2016, and ends [and the Hearing Officer's Determination ("HOD") is due] on August 30, 2016.

The undersigned Impartial Hearing Officer ("Hearing Officer") convened a pre-hearing conference ("PHC") on the complaint on July 13, 2016, and issued a pre-hearing order ("PHO") on July 18, 2016, outlining, inter alia, the issues to be adjudicated.

**ISSUES:** <sup>4</sup>

The issues adjudicated are:

1. Whether the LEA denied the student a FAPE by failing to provide the student with an appropriate IEP on or about May 11, 2015, because the IEP lacked (a) OT services and goals, and (b) goals in the area of emotional, social and behavioral development.
2. Whether the LEA denied the student a FAPE by (a) failing to fully implement the student's May 11, 2015, IEP by providing the student the 6.5 hours per week of exposure to non-disabled peers that his LRE required.
3. Whether the LEA denied the student a FAPE by failing to amend the student's IEP following the December 15, 2015, MDT, meeting to include a BIP or at least initiate a FBA following this meeting.
4. Whether the LEA denied the student a FAPE by failing to comprehensively re-evaluate the student by conducting an OT evaluation and/or speech and language evaluation agreed to at the March 10, 2016, MDT meeting.

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<sup>4</sup> The Hearing Officer restated the issues at the outset of the hearing and the parties agreed that these are the issues to be adjudicated.

5. Whether the LEA denied the student a FAPE by failing to provide a finalized IEP reflecting the agreed upon changes to the student's LRE and services, within five (5) business days of the May 10, 2016, meeting.
6. Whether the LEA denied the student a FAPE by failing to provide Petitioner with access to the student's educational records pursuant to her May 26, 2015, written request.

#### **RELEVANT EVIDENCE CONSIDERED:**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 101 and Respondent's Exhibits 1 through 23) that were admitted into the record and are listed in Appendix A.<sup>5</sup> Witnesses' identifying information is listed in Appendix B.<sup>6</sup>

#### **SUMMARY OF DECISION:**

Petitioner sustained the burden of proof by a preponderance of the evidence that the student's IEP did not include emotional social and behavioral development goals. Petitioner did not sustain the burden or proof with regard to OT services and goals.

Petitioner sustained the burden of proof by a preponderance of the evidence that the student was not provided 6.5 hours per week of exposure to non-disabled peers. However, Petitioner did not sustain the burden of proof that the student missed one week of instruction when he returned from a March 2016 suspension.

Petitioner did not sustain the burden of proof by a preponderance of the evidence on the remaining issues that were adjudicated.

As result of the denials of FAPE determined herein the Hearing Officer granted Petitioner additional compensatory education and clarified the amount of compensatory education that was provided in the companion HOD that was issued on August 29, 2016. The Hearing Officer also directed that DCPS convene a MDT meeting at the student's SY 2016-2017 school location to review the student's schedule to determine to what extent he is being exposed to non-disabled peers and to consider whether the student should be on diploma track, rather than certificate track or whether it is appropriate for the student to be enrolled in credit bearing course(s) as a part of his current educational program.

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<sup>5</sup> Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

<sup>6</sup> Petitioner presented six witnesses: Petitioner, the student's classroom teacher, two educational advocates employed by Petitioner's law firm, an educational consultant regarding compensatory education and the parent of another student who attended the student's school program. Respondent presented four witnesses: The student's classroom teacher, the principal of the student's school, a DCPS program manager, and a DCPS compliance case manager.

## **FINDINGS OF FACT:<sup>7</sup>**

1. The student has been determined eligible for special education and related services pursuant to IDEA with a disability classification of ID. (Petitioner's Exhibit 2-1)
2. The student began attending a self-contained special education program housed in School A, a DCPS [REDACTED] school, at the start of SY 2014-2015 and was in the same program at School A during SY 2015-2016. (Parent's testimony)
3. The student's self contained program, entitled the Intellectual Learning Support ("ILS") program is designed for students with varying intellectual deficits to provide them modified instruction and daily living skills and transition training. The students are on certificate track rather than on track to earn a high school diploma. The program includes class based academic instruction and community based training to prepare students for life after school. (Witness 8's testimony)
4. During SY 2014-2015 The ILS program at School A allowed for the ILS students to interact with their non-disabled peers during lunch and in extracurricular activities and there was a buddy system where the ILS students were paired with general education students for regular and consistent interaction. The ILS students also took lunch with general education students. (Witness 6's testimony)
5. During SY 2014-2015 the student had an IEP that was dated May 21, 2014, that prescribed that the student be provided 24.5 hours per week of specialized instruction outside general education and 120 minutes per month of behavioral support services outside general education. The IEP noted that the student was discharged from occupational therapy ("OT") services. DCPS completed a completion of services report on October 24, 2013, that indicated, among other things, a statement that the student had mastered his IEP OT goals. (Petitioner's Exhibit 8-12, 8-13, Respondent's Exhibit 14)
6. The student's IEP included academic goals in the areas of math, reading, written expression, and adaptive and daily living skills, emotional, social and behavioral development. The student had two emotional, social and behavioral development goals regarding increasing self-control and decreasing impulsivity and identifying and implementing appropriate positive coping skills when faced with challenging situations. (Petitioner's Exhibit 8-3 through 8-12)
7. At a May 30, 2014, meeting at the student's DCPS school where he attended prior to attending School A, the team confirmed the student's continued ID disability classification based on a review of assessments and noted that the student's IEP goals

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<sup>7</sup> The evidence (documentary and/or testimony) that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. A document is noted by the exhibit number. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

would be continued because the student had not mastered his goals. DCPS had conducted a Woodcock Johnson III academic achievement assessment and the student performed well below grade and age expectations across all subtests. The student was operating on first to second grade level in his academic functioning. (Petitioner's Exhibits 9-2, 9-3, 17-1, 17-3, 17-4, 26-1, 27-2)

8. During SY 2014-2015 the student received weekly group counseling services from the School A psychologist and progressed relative to his IEP academic goals and mastered a number of his math, reading and written expression goals by the third reporting period that ended April 3, 2015. (Petitioner's Exhibits 18, 77, 79)
9. On May 11, 2015, School A convened an IEP meeting to update the student's IEP. The student's mother participated in the meeting. The student's teacher noted, among other things, that the student could read first to fourth grade level text with little assistance. The team determined the student would be on certificate track rather than diploma track and noted that although the student had been receiving consistent behavioral support services the student's IEP needed to be adjusted to add social emotional goals. (Petitioner's Exhibit 7)
10. The student's May 11, 2015, IEP prescribed 25 hours per week of specialized instruction outside general education and 120 minutes per month of behavioral support outside general education, or approximately 5 hours per week outside the general education setting (not including the time he is provided behavioral support of approximately 30 minutes per week). The school day at School A starts at 8:45 a.m. and ends at 3:15 p.m. and includes one hour for lunch. As result, there are 6.5 hours in each school day. In addition to the hour lunch period, the student's IEP prescribes that he be in a general education setting approximately 2 additional hours per week beyond his lunch period. (Witness 6's testimony, Petitioner's Exhibit 4-2, 4-11)
11. On June 15, 2015, DCPS generated a final eligibility determination report and an analysis of existing data that summarized the information DCPS reviewed in determining that the student continued to be eligible with the ID disability classification. The student's eligibility was opened for the sole purpose of including social emotional and behavioral goals in the student's IEP. (Witness 5's testimony, Petitioner's Exhibits 30, 31)
12. On June 17, 2015, the student's mother signed a form consenting the student being evaluated to determine whether he continued to be eligible for special education services. The consent form did not indicate what specific evaluation(s) would be conducted. Although the student's parent signed the evaluation consent form there was no intention by the student's IEP team to initiate any evaluations because his eligibility had already been determined. (Witness 5's testimony, Petitioner's Exhibit 32)
13. On June 18, 2015, DCPS issued a prior written notice ("PWN") noting that an eligibility would be opened to add behavior support goals to the student's IEP and that he had been receiving social emotional services. (Witness 5's testimony, Petitioner's Exhibit 29)

14. Although School A initiated the process to add behavior support goals to the student's IEP, the goals were never added. The May 11, 2015, did not contain goals for the student's emotional, social and behavioral development but continued to prescribe 120 minutes of behavior support services per month. (Petitioner's Exhibit 4-1, 4-11)
15. During SY 2015-2016 the student had significant behavioral difficulties that included making threats to his teachers and threats of self-harm. As a result, on occasion the student was required by School A to see a mental health professional before returning to school following these incidents. (Parent's testimony)
16. During SY 2015-2016 the ILS student's had less contact with general education students at School A and the ILS classroom was relocated on to the lower level of school where the ILS student's had significantly less interaction with general education students. The ILS student did not take any classes, including physical education with general education students. The ILS students were expected to sit together during lunchtime. The ILS class was provided information about activities in the school but there was no effort made by the school to incorporate the ILS class in activities with general education students. The resulting limited interaction with non-disabled peers was contrary to rationale for DCPS locating the ILS program at School A initially. (Witness 5's testimony, Witness 8's testimony)
17. This limited interaction with general education students and the fact that all the student's instruction was solely in the self-contained ILS classroom was a source of frustration to the student and a factor that resulted in his behavioral difficulties during SY 2015-2016. (Parent's testimony, Witness 5's testimony)
18. In December 2015 as result of student's behavior difficulties the student's parent requested a MDT meeting and asked that the student's school location be changed. A DCPS representative assured the parent there would be changes that would allow the ILS students more interaction with general students and more access to other areas of the school. The parent agreed for the student to remain at School A. However, the student's parent did not see the promised changes during the remainder of the school year. (Parent's testimony, Petitioner's Exhibit 6-2)
19. During the SY 2014-2015 and the first semester of SY 2015-2016 the student was making academic progress. However, his academic progress stagnated in December 2015 principally due to his behavioral difficulties and resulting absences. The student was operating about third grade level in reading and a bit lower than that in math. However, the student was one of the higher academically functioning students in his ILS classroom. The student would benefit from academic tutoring and mentoring to due to the difficulties he had during SY 2015-2016. (Witness 2's testimony, Witness 5's testimony)
20. Although the School A psychologist provided the student behavior support services during SY 2015-2016 the student's IEP lacked specific social, emotional and behavioral goals and the student continued to display behavioral difficulties through out the school

year. During a psychiatric hospitalization in February 2016 a psychological evaluation was conducted that, among other things, assessed the student's cognitive functioning in the extremely low range and rated his full scale IQ at 50. (Parent's testimony, Respondent's Exhibit 7-2, Petitioner's Exhibits 4-1, 4-11, 13)

21. In March 2016 the student was suspended for sending inappropriate text messages to another students and returned to school on April 6, 2016. After his return the student was separated from his ILS class and received instruction in the library for one day. School A then hired additional staff so the ILS program could be separated into two classes so the student would be separated from the other student engaged in the incident that led to his suspension. The student was provided all his instruction during this time from his ILS special education teacher and/or instructional aide at the direction of the teacher. The student did not miss any of his special education services as a result of the modifications made to the ILS classroom. (Witness 5's testimony)
22. On May 3, 2016, School A convened an IEP meeting and developed a BIP for student. Prior to that date the student did not have a BIP at School A. The student's parent did not attend the March 3, 2016, meeting but School A convened a meeting on May 10, 2016, to review with the parent the issues that had been discussed at the May 3, 2016, meeting. (Parent's testimony)
23. On May 10, 2016, Petitioner met with the student's team and it was discussed that the student's IEP should be amended to provide him with some access to the general education curriculum and setting with inclusion support. Petitioner requested that the student take at least one elective course with inclusion support on a trial basis. (Parent's testimony)
24. The student's ILS teacher expressed at the meeting that with inclusion support from a special education teacher in the general education class room the student should at least be allowed to try a general education class. However, she noted that without support he would struggle in a general education class. Although there was a request for the student to be on diploma track the student's special education teacher did not agree it was appropriate at School A, but perhaps it could the student could try a general education class at his next school setting. (Witness 5's testimony)
25. Following the May 10, 2016, meeting the student was not placed in a general education class at School A during the remainder of SY 2015-2016. Petitioner did not receive a copy of the student's updated IEP following the meeting. (Parent's testimony)
26. The parent's educational advocate participated in the May 10, 2016, meeting. She requested copies of the student's educational records from School A. She was provided his attendance records from SY 2015-2016 and after the meeting was provided more of the student's IEPs and records of behavior support services. (Witness 1's testimony)

27. A DCPS compliance case manager has reviewed the student's educational records that are listed in the OSSE/DCPS database and provided Petitioner's counsel with all documents available to DCPS. (Witness 7's testimony)
28. Petitioner engaged the services of an educational consultant who was designated as an expert witness to offer an opinion regarding compensatory education for the student. The consultant presumed, in developing the compensatory education proposal, that the harm to the student for which the plan addressed included: (1) failure to conduct an OT and speech and language evaluation and failure for these services to be included in the student's IEP and program, (2) that the student missed over 22 days of schools and thus 110 hours of instruction because of behavioral concerns during SY 2015-2016, (3) the student missed 44 weeks of behavior support services from May 2015 to June 2016, (4) 20 hours of missed OT services that were in his previous IEP and 40 hours of speech and language therapy. The alleged missed services also included: 135 hours of specialized instruction for the student's exclusion from his non disabled peers and 44 hours of behavior support 20 hours of OT and 40 hours of speech language services. To compensate for these alleged missed services the consultant proposed compensatory the following services: 100 hours of specialized tutoring, 80 hours of mentoring, 20 hours of OT, 40 hours of speech and language services. The consultant based her opinion on review of records and speaking with the parent and student but did not talk with the student's teacher. (Witness 2's testimony, Petitioner's Exhibit 95)

### **CONCLUSIONS OF LAW:**

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--  
(a) Are provided at public expense, under public supervision and direction, and without charge;  
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. 7 *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is

seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

**ISSUE 1:** Whether the LEA denied the student a FAPE by failing to provide the student with an appropriate IEP on or about May 11, 2015, because the IEP lacked (a) OT services and goals, and (b) goals in the area of emotional, social and behavioral development.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that the student's IEP did not include emotional social and behavioral development goals. Petitioner did not sustain the burden or proof with regard to OT services and goals.

To provide a FAPE, the school district is obligated to devise an IEP for each eligible child, 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); *School Comm. of the Town of Burlington, Mass. v. Department 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); *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir.2010).

The FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).

In this case, the behaviors of the student clearly forecasted his need for social and emotional goals on his IEP. During SY 2015-2016, the student continually made threats to do physical harm to himself and others. The facts of this case detail multiple incidents within the school year, which demonstrate the student's need for social and emotional goals. Although the evidence demonstrates the student received consistent behavioral support services the student's troublesome behaviors continued. The Hearing Officer infers that the lack of specific social, emotional and behavioral development goals were a contributing factor to his continued behavioral difficulties. There was not testimony presented by Respondent that served to counter this inference.

The student was sent to the school nurse on several occasions, after which the nurse at School A sited the student's need for evaluation by a doctor. Since the student's behavior was the sole reason for referral to the nurse, the student's psychological needs were evident. It was also evident that the student's May 11, 2015, IEP was not responsive to the student's individual needs.

The FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Smith v. District of Columbia*, 846 F.Supp.2d 197, 202 (D.D.C.2012) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)).

Since the student’s IEP did not respond to his individual need for social and emotional goals, the May 11, 2015 IEP was inappropriate and the LEA failed to provide the student with a FAPE.

IDEA only requires that an IEP team, “in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 20 U.S.C. § 1414(d)(3)(B)(i); see also 34 C.F.R. § 300.324(a)(2)(i).

The evidence demonstrates that the student was at one time provided OT services in his IEP and there was sufficient evidence that the student had mastered his OT goals and that DCPS prepared a report that documented the termination of his OT services. Petitioner did not present any evidence that demonstrated that the student’s May 11, 2015, IEP was deficient because it lacked OT services and goals.

**ISSUE 2:** Whether the LEA denied the student a FAPE by (a) failing to fully implement the student’s May 11, 2015, IEP by providing the student the 6.5 hours per week of exposure to non-disabled peers that his LRE required.

**Conclusion:** Petitioner sustained the burden of proof by a preponderance of the evidence that the student was not provided the exposure to non-disabled peers that his IEP required. However, Petitioner did not sustain the burden of proof that the student missed one week of instruction when he returned from his March 2016 suspension.

The IDEA requires school districts to place disabled children in the least restrictive environment possible. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550; D.C. Mun. Regs. tit. 5, § 3011 (2006). Although placement decisions must be made "in conformity" with the least restrictive environment provisions, federal and D.C. regulations require placements to be "based on the child's IEP" and "as close as possible to the child's home." 34 C.F.R. § 300.552; D.C. Mun. Regs. tit. 5, § 3013 (2006). Moreover, in determining the least restrictive environment, consideration is given to the types of services that the child requires. 34 C.F.R. § 300.552(d). Still, "[m]ainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with non-handicapped children is not only a laudable goal but is also a requirement of the Act." *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). 46 IDELR 249 106 LRP 64029 Melissa Roark, a minor, by her parents and next friends, Robert Roark and Abigail Arnold, et al., Plaintiffs, v. District of Columbia, et al., Defendants 460 F. Supp. 2d 32 U.S. District Court, District of Columbia 05-2383 (JDB) October 25, 2006

34 C.F.R. § 300.323(c)(2) requires that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child’s IEP.

5E DCMR 3002.3 provides that:

(c) The LEA shall ensure that an IEP is developed and implemented for each eligible child with a disability served by the LEA.

(d) The LEA shall ensure that special education and related services are provided to an eligible child with a disability in accordance with the child's IEP...

(f) The LEA shall make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a de minimus failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP “*Savoy v. District of Columbia* (DC Dist. Court) February 2012 adopted *Houston Indep. School District v. Bobby R.* 200 F.3d 341 (5<sup>th</sup> Cir. 2000)

A material failure to implement a student’s IEP constitutes a denial of a free appropriate public education. *Banks ex rel. D.B. v. District of Columbia*, 720 F. Supp. 2d 83, 88 (D.D.C. 2010). A material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and those requires by the child’s IEP. *Van Duyn v. Baker Sch. Dist.*, 5J, 502 F.3d 811, 822 (9<sup>th</sup> Cir. 2007).

“IDEA . . . requires that a child be educated in the least restrictive environment possible—that is, the one that provides ‘some educational benefit’ and ‘most closely approximates’ the education a disabled child would receive if she had no disability.”); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006)(“The IDEA requires school districts to place disabled children in the least restrictive environment possible.”) A student may be placed in a residential placement only if the placement is “necessary to provide a free appropriate public education to [the student].” *Leggett v. District of Columbia*, 793 F.3d 59, 74 (D.C. Cir. 2015) *Leggett*, 793 F.3d at 71-72

IDEA requires that children with disabilities be placed in the least restrictive environment (“LRE”) so that they can be educated in an integrated setting with children who do not have disabilities to the maximum extent appropriate. See 20 U.S.C. § 1412(a)(5)(A). Removing a child with disabilities “from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily.” See 20 USC 1412(a)(5), 34 CFR 300.114(a)(2)(i)-(ii) (emphasis added); 34 C.F.R. § 300.550; *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (“The IDEA requires school districts to place disabled children in the least restrictive environment possible.”) Further, an appropriate location of services under the IDEA is one that is capable of “substantially implementing” a Student’s IEP. *Johnson v. District of Columbia*, 962 F. Supp. 2d 263 (D.D.C., 2013).

In addition to asserting that the student was excluded from his non-disabled peers at School A during SY 2015-2016, Petitioner alleged that the student was excluded from his ILS classroom

and missed instruction when he returned to school from his March 2016 suspension. The evidence demonstrates that the student did not miss any services upon his return from suspension. The student's special education teacher credibly testified that she and the instructional aide with her direction provided the student all his required academic instruction upon his return from his suspension.

However, the student's special education teacher, as well as the DCPS expert witness, testified that the ILS students at School A were excluded from interaction with non-disabled peers except during the lunch period and even then the students were required to sit in one location and did not have the freedom to move about in the cafeteria. The Hearing Officer found the teacher's testimony with regard to the ILS interaction with general education students far more credible than that of the School A principal in this regard because of the teacher's far closer interaction with her students. The student's IEP requires that he be provided at least 2 hours per week in the general education setting in addition to the lunch period. The evidence demonstrates that this was not provided to the student during SY 2015-2016 as it had apparently been provided during the prior school year. Consequently, the Hearing Officer concludes that Petitioner sustained the burden of proof on this issue and that the student was denied a FAPE in this regard.

**ISSUE 3:** Whether the LEA denied the student a FAPE by failing to amend the student's IEP following the December 15, 2015, MDT, meeting to include a BIP or at least initiate a FBA following this meeting.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence on that DCPS was obliged to amend the student's IEP following the December 15, 2015, meeting.

34 C.F.R. §300.324(b)<sup>8</sup> requires that a student's IEP be updated at least annually. The facts of this case demonstrate that Petitioner requested a meeting in December 2015 due to the student's behavior concerns and to request that the student change schools. She was convinced there would be improvements in the student's interaction with general education students and would be provided greater access to the school building. These things ultimately did not materialize. However, there was no request for, and the team at that meeting did not determine, that a FBA would be conducted for the student or a BIP developed.

"The statute only requires school districts (and even then, only 'as appropriate') to conduct an FBA or to implement a behavioral plan if there is a disciplinary change in placement of the student." See *Andrew F. by Joseph F. and Jennifer F. v. Douglas County Sch. Dist.* RE-1, 798 F.3d 1329, 1337 (10th Cir. 2015) (citing 20 U.S.C. § 1415(k)(1)(D)(ii)).

At the time of the December 2015 meeting the student had not yet had a disciplinary change in

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<sup>8</sup> 34 C.F.R. §300.324(b): Each public agency must ensure that, subject to paragraphs (b)(2) and (b)(3) of this section, the IEP Team-- (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and (ii) Revises the IEP, as appropriate, to address-- (A) Any lack of expected progress toward the annual goals described in Sec. 300.320(a)(2), and in the general education curriculum, if appropriate; (B) The results of any reevaluation conducted under Sec. 300.303; (C) Information about the child provided to, or by, the parents, as described under Sec. 300.305(a)(2); (D) The child's anticipated needs; or (E) Other matters.

placement that mandated a FBA or BIP. Thus, the Hearing Officer concludes that there was insufficient evidence of a denial a FAPE to the student by DCPS as to this issue.

**ISSUE 4:** Whether the LEA denied the student a FAPE by failing to comprehensively re-evaluate the student by conducting an OT evaluation and/or speech and language evaluation agreed to at the March 10, 2016, MDT meeting.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

34 C.F.R. § 300.303(a)(2) make clear that, “A local education agency (“LEA”) shall ensure that a re-evaluation of each child with a disability is conducted...if the child’s parents or teacher requests a re-evaluation.” (emphasis added). 34 C.F.R. § 300.305(d)(2) also clarifies that the parent must be advised by the LEA of the right to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child’s educational needs. See also Letter to Copenhagen, 108 LRP 16368 (OSEP 2007).

A public agency must ensure that a reevaluation of a child with a disability conducted in accordance with 34 C.F.R. §§ 300.304 through 300.311 is completed at least once every three years, or, if the child’s parent or teacher requests one or the public agency determines one is warranted. 34 C.F.R. § 300.303. The IDEA does not mandate any particular assessment, as part of the evaluation or reevaluation process. See, e.g. *EL Haynes Public Charter School v. Frost*, 66 IDELR 287 (D.D.C. Sept.11, 2015).

The evidence demonstrates that there was no March 10, 2016, meeting. Petitioner asserted during the hearing that evaluations were to be conducted after the parent signed consent in June 2015. However, the evidence demonstrates that the consent form was signed in connection with opening the eligibility function so that behavior support goals could be added to the student’s IEP. There was no specific evaluation noted on the form and there was insufficient testimony that an OT evaluation or speech language evaluation was requested or discussed in a June 2015 meeting or that the IEP team intended for these evaluations to be conducted. The student’s special education teacher credibly testified in this regard. There was no evidence presented by Petitioner that refuted her testimony.

**ISSUE 5:** Whether the LEA denied the student a FAPE by failing to provide a finalized IEP reflecting the agreed upon changes to the student’s LRE and services, within five (5) business days of the May 10, 2016, meeting.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence that the IEP was to be include the alleged changes it claimed were made to the IEP. Although Petitioner testified she had not timely received a copy of the IEP from the May 10, 2016, there was insufficient evidence that the failure to provide the IEP timely significantly impeded the parent’s opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

The D.C. Special Education Student Rights Act of 2014 in pertinent part provides that no later

than five (5) business days after a meeting at which a new or amended IEP has been agreed upon, the public agency shall provide the parent's a copy of the IEP.

Petitioner alleged that at the May 10, 2016, meeting the IEP was to be amended to place the student on diploma track, add a general education class and increase the student's behavioral support services. However, the student's special education teacher credibly testified that the student should be tried out in a general education class with inclusion support from special education teacher at his next school setting but did not support such a change in the student's IEP at School A. She also credibly testified that the student was not to be placed in general education class at School A. There was insufficient evidence that that the team determined that the student's behavioral support services were to be increased to one hour per week. Although there was testimony of such a change, there was no documentation to support this assertion.

**ISSUE 6:** Whether the LEA denied the student a FAPE by failing to provide Petitioner with access to the student's educational records pursuant to her May 26, 2015, written request.

**Conclusion:** Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

5E DCMR §3021 in provides in pertinent part:

In accordance with the confidentiality procedures of 34 C.F.R. §§ 300.560-300.576 and 34 CFR § 99, the parent of a child with a disability shall be given the opportunity to inspect and review and to copy at no cost to the parent all of the child's records relating to the identification, evaluation, and educational placement, and the provision of Free Appropriate Public Education (FAPE).

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34 C.F.R. § 300.613 provides:

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. <sup>8</sup> The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to Sec. 300.507 or Sec. Sec. 300.530 through 300.532, or resolution session pursuant to Sec. 300.510, and in no case more than 45 days after the request has been made.

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

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

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

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

§ 300.613 Access rights. (a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution session pursuant to § 300.510, and in no case more than 45 days after the request has been made. (b) The right to inspect and review education records under this section includes— (1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) The right to have a representative of the parent inspect and review the records. (c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

The evidence demonstrates that Petitioner has been provided all the student's educational records that are available to DCPS. Although Petitioner's counsel made a request for records on May 26, 2016, Petitioner has been provided volumes of educational records many of which were disclosed by Petitioner for this hearing. The DCPS witness credibly testified that DCPS has provided all the student's records that are available to DCPS. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue.

**Remedy:**

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that the student's IEP did not include emotional, social and behavioral development goals and that the student was not provided the required exposure to non-disabled peers. As result, the Hearing Officer will grant in the order below that the student be provided compensatory education and that DCPS convene a meeting to determine the extent to which the student should have exposure to his non-disabled peers.

**Compensatory Education**

Under the theory of compensatory education, "courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Reid, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

Petitioner presented a witness who testified that the student would benefit from independent tutoring and mentoring for the time he was removed from school. The amount and type of services that Petitioner asserted the student missed, was not proved. Nonetheless, there was sufficient evidence presented that the student would benefit from and be compensated for the non exposure to his non-disabled peers through counseling/mentoring. The Hearing Officer thus, awards Petitioner in the order below an amount of counseling/mentoring the Hearing Officer considers commensurate with the harm the student suffered by not having sufficient exposure to his non-disabled peers.

**ORDER:**<sup>9</sup>

1. DCPS shall, within thirty school days of the issuance of this order, convene a MDT meeting at the student's SY 2016-2017 school location to review the student's schedule to determine to what extent he is being exposed to non-disabled peers and to consider whether the student should be on diploma track, rather than certificate track, or whether it is appropriate for the student to be enrolled in any credit bearing course(s) as a part of his educational current program. DCPS may combine this meeting with the meeting that was directed to be convened pursuant to the HOD issued August 29, 2016.
2. In addition to the compensatory education awarded to the Petitioner in the HOD issued August 29, 2016, (that required DCPS to authorize fifty (50) hours of independent tutoring and twenty (20)<sup>10</sup> hours of independent counseling, both at the DCPS/OSSE prescribed rates) the Hearing Officer, in this current HOD directs DCPS to provide Petitioner authorization for an additional ten (10) hours of independent counseling at the DCPS/OSSE prescribed rate.

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

*/S/ Coles B. Ruff*

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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: August 30, 2016**

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<sup>9</sup> Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.

<sup>10</sup> The Hearing Officer notes that the August 29, 2016, HOD had a typographical error as to the counseling hours and the intended number of hours for that HOD were twenty (20) hours of counseling.

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