

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
1050 First Street, NE, 3<sup>rd</sup> Floor  
Washington, DC 20002

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PETITIONER, on behalf of STUDENT,<sup>1</sup> )  
Petitioner, ) Date Issued: February 8, 2024  
v. ) Hearing Officer: Peter B. Vaden  
DISTRICT OF COLUMBIA ) Case No: 2023-0224  
PUBLIC SCHOOLS, ) Online Videoconference Hearing  
Respondent. ) Hearing Date: February 2, 2024  
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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (PARENT or MOTHER) under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-A, Chapter 5-A30 of the District of Columbia Municipal Regulations (DCMR). In this administrative due process proceeding, the Parent alleges that Respondent District of Columbia Public Schools (DCPS) denied her child a free appropriate public education (FAPE) by failing to fully implement the student's Individualized Education Programs (IEPs) in the 2021-2022 and 2022-2023 school years and by failing to afford the Parent timely access to Students education records following a June 2023 request.

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<sup>1</sup> Personal identification information is provided in Appendix A.

Petitioner's due process complaint, filed on November 6, 2023, named DCPS as respondent. The undersigned hearing officer was appointed on November 7, 2023. On November 21, 2023, the parties met for a resolution session and were unable to resolve the issues in dispute. On November 22, 2023, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. The due process hearing was originally scheduled for January 4, 2024. The hearing was postponed due to a technology problem at LAW FIRM, which caused Petitioner's prehearing disclosures to be untimely served. On January 10, 2024, I granted the Parent's unopposed continuance request to reschedule the due process hearing date to February 2, 2024 and to extend the final decision due date to February 12, 2024. With the Parent's consent, the due process hearing was held online and recorded by the hearing officer, using the Microsoft Teams videoconference platform. The hearing, which was open to the public, was convened before the undersigned impartial hearing officer on February 2, 2024. Parent appeared online for the hearing and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Counsel for the respective parties made opening statements. Parent testified and called EDUCATIONAL ADVOCATE and LEGAL ASSISTANT as additional witnesses. DCPS called SCHOOL SOCIAL WORKER as its only witness. Petitioner's Exhibits P-1 through P-11, P-13 through P-42, P-45 and P-47 through P-49 were admitted into evidence, including Exhibits P-39 and P-49 admitted over DCPS' objections. I sustained

DCPS' objections to Exhibits P-12, P-43, P-44 and P-46. DCPS' Exhibits R-2, R-4, R-5, R-8, R-9, R-20, R-23 and R-37 were admitted into evidence, including Exhibits R-2, R-4, and R-9 admitted over Petitioner's objections. I sustained Petitioner's objection to Exhibit R-11. After the taking of the evidence was completed, counsel for the respective parties made oral closing arguments. There was no request to submit written closings.

### **JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-A, § 3049.1.

### **ISSUES AND RELIEF SOUGHT**

The issues for determination, set out in the November 22, 2023 Prehearing Order, are:

- Whether DCPS denied Student a FAPE by failing to provide, fully provide, or timely provide access to Student's educational records following a June 28, 2023 written request and
- Whether DCPS denied Student a FAPE by failing to fully implement Student's IEPs during the 2021-2022 or the 2022-2023 school years by failing to provide the student with all of his/her IEP Behavioral Support Services.

For relief, Petitioner requests that the hearing officer order DCPS to immediately provide the requested education records for Student to Petitioner's counsel by email and determine that the statute of limitations is tolled for any possible issues from August 12, 2023 until the time that DCPS fully provides a records response; and order DCPS to provide Student with compensatory education for the denials of FAPE alleged in the complaint.

**FINDINGS OF FACT**

After considering all of the evidence received at the due process hearing in this case, as well as the argument of counsel, my findings of fact are as follows:

1. Student, an AGE youth, resides with Mother in the District of Columbia.

Testimony of Mother. In the 2021-2022 and the 2022-2023 school years Student was recognized by DCPS to be a “child with a disability”, as defined by the IDEA, as having an Emotional Disturbance disability. Exhibit P-11.

2. Student currently attends PUBLIC CHARTER SCHOOL. For the 2021-2022 and 2022-2024 School Years, Student attended CITY SCHOOL, a DCPS public school. Testimony of Mother.

3. In a April 20, 2019 DCPS psychological evaluation report, it was reported that Student’s behavior had been a concern since he/she was in pre-kindergarten, with Mother noting that her concerns started at the child’s age of 3. Student’s teachers and Mother agreed on the behavioral areas of concern, to include aggression, bullying, hyperactivity/impulsivity, executive functioning difficulties, withdrawal, conduct problems, and mood shifts. Student’s social skills were appropriate when he/she was calm, but his/her emotional lability and inconsistent behavior impacted his/her relationships, especially with peers. Student’s behavior also significantly impacted his/her educational participation and was increasingly impacting his/her educational performance. Student’s behavior was reported to have led to a decline in the amount of direct instruction he/she received and necessitated the addition of additional classroom

support throughout the day to assist with management of his/her behavior. His/her behavior negatively impacted his/her educational participation due to behaviors such as: yelling out, walking around the room, leaving the room without permission, distracting peers, angry outbursts, refusal (passive and verbal) to do work, aggressive behavior toward peers and staff and throwing objects. Student's behavior impacted his/her peer relations and his/her ability to work collaboratively with peers, his/her willingness to participate in non-preferred tasks, the amount of time he/she was able to stay engaged in a task, compliance with adult directives, and his/her safety and the safety of those around him/her. Student's overall cognitive ability profile and his/her previous academic performance showed that he/she had the ability to produce grade-level work. As his/her behavior significantly impacts his/her access to instruction, however, it was increasingly (negatively) impacting his/her educational performance. Psychologist recommended, *inter alia*, that Student would benefit from specialized instruction to address emotional regulation difficulties (including perceived triggers from others) and from self-calming/behavioral regulation strategies, and from being provided academic instruction in a smaller, more structured environment equipped to manage (and help Student manage) dysregulation as it arises. Exhibit P-8.

4. Student's April 9, 2020 City School IEP stated that Student's behavior impedes the learning of Student or of other children. The IEP identified Mathematics, Reading, Written Expression and Emotional/Social/Behavioral Development as IEP areas of concern for Student. The IEP provided for Student to receive 26.5 hours per

week of Specialized Instruction and 240 minutes per month of Behavioral Support Services, all outside of general education. The Least Restrictive Environment section of the IEP stated that Student's services would be best serviced outside the general education classroom due to his/her intensive needs. Exhibit R-2.

5. Student's March 17, 2021 City School IEP stated that Student's behavior impedes the learning of Student or of other children. The IEP identified Mathematics, Reading, Written Expression and Emotional/Social/Behavioral Development as IEP areas of concern for Student. The IEP provided for Student to receive 26.5 hours per week of Specialized Instruction and 240 minutes per month of Behavioral Support Services, all outside of general education. The Least Restrictive Environment section of the IEP stated that the outside of general education placement was in Student's best interest because of the behavioral manifestations of his/her emotional disturbance disability. Exhibit R-4.

6. Student's March 14, 2022 City School IEP stated that Student's behavior impedes the learning of Student or of other children. The IEP identified Mathematics, Reading, Written Expression and Emotional/Social/Behavioral Development as IEP areas of concern for Student. The IEP provided for Student to receive 26.5 hours per week of Specialized Instruction and 240 minutes per month of Behavioral Support Services, all outside of general education. The Least Restrictive Environment section of the IEP stated that the outside of general education placement was in Student's best interest because of the behavioral manifestations of his/her ED disability. Exhibit P-10.

7. Student's November 30, 2022 City School IEP stated that Student's behavior impedes the learning of Student or of other children. The IEP identified Mathematics, Reading, Written Expression and Emotional/Social/Behavioral Development as IEP areas of concern for Student. The IEP provided for Student to receive 26.5 hours per week of Specialized Instruction and 240 minutes per month of Behavioral Support Services, all outside of general education. The Least Restrictive Environment section of the IEP stated that the outside of general education placement was in Student's best interest because of the behavioral manifestations of his/her ED disability. Exhibit P-11.

8. In the 2021-2022 school year, the City School social worker provided Student approximately 16 1-hour sessions of Behavioral Support Services. Assuming a 36 week school year, under Student's IEP, the child should have received some 36 hours of services. According to the DCPS service trackers, most services were missed due to "Student Unavailable." On some 15 service dates, the service trackers reported "Provider Unavailable." Some of those missed services were made up by the provider. Exhibit R-20, Testimony of School Social Worker.

9. DCPS did not provide IEP Behavioral Support Services to Student in the 2022-2023 school year due to gaps in staffing at City School. Representation of DCPS' Counsel.

10. Beginning June 28, 2023, Law Firm sent email requests to City School for copies of Student's education records. Exhibit P-40. No response to these request were

received from City School. On or about August 17, 2023, Law Firm repeated its records request to DCPS' "Sped Records Request" office. On August 24, 2023, that office provided law firm with a link to Student's records. Exhibit P-45. That link provided access to some of Student's IEP progress reports, incident reports and IEPs. Testimony of Legal Assistant. Law Firm also made a request to Public Charter School for Student's education records. Public Charter School sent the records in its possession, but the charter school did not have the past DCPS education records for Student which Law Firm was seeking. Testimony of Educational Advocate.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Parent in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the child's IEP or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence. *See*

D.C. Code § 38-2571.03(6). The Parent holds the burden of persuasion on her claims in this proceeding.

#### ANALYSIS

- Did DCPS deny Student a FAPE by failing to provide, fully provide, or timely provide access to Student's educational records following the June 28, 2023 written request?

On June 28, 2023, Law Firm, on behalf of the Parent, made an email request to City School for copies of Student's education records. Law Firm did not receive a response from City School. On August 17, 2023, Law Firm repeated its records request to DCPS' central "Sped Records Request" office. On August 24, 2023, that office provided Law Firm with an electronic internet link to Student's records. From that link, Law Firm was only able to access a few of Student's education records. Petitioner contends that DCPS' failure to provide access to all of Student's education records was a denial of FAPE. For the reasons below, I find that Petitioner did not meet her burden of persuasion on this claim.

Under the IDEA and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, a child's local education agency (LEA) must permit parents to inspect and review any education records relating to their child with a disability, that are collected, maintained, or used by the agency. *See 34 C.F.R. §§ 300.613(a), 300.501(a); Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C. 2006). The DCMR provide that the parent of a child with a disability shall be given the opportunity to inspect, review, and copy all of the child's

records relating to the identification, evaluation, and educational placement, and the provision of FAPE. *See 5A DCMR § 3030.1.*

Petitioner's expert witness, Educational Advocate, a part-time employee of Law Firm, testified that there were education records for Student not provided in DCPS' August 2023 response to Law Firm's records request, including multidisciplinary team (MDT) meeting notes, 2022-2023 service trackers and any paper work for discipline suspensions in the 2021-2022 and 2022-2023 school years. Educational Advocate pointed out in her testimony that in DCPS' prehearing disclosures, there were education records for Student that had not been included in DCPS' response to Law Firm's record requests.

In this case, Law Firm initially sent its records request to City School, not to DCPS. Moreover, by the time Law Firm requested Student's records from DCPS in August 2023, Student was in the process of transferring out of DCPS to enroll in Public Charter School for the 2023-2024 school year. A parent must request the child's education records from the child's LEA. *See Accessing Student Education Records, available at <https://osse.dc.gov/publication/accessing-student-education-records>* (OSSE November 2019). At the hearing in this case, the Parent did not establish whether as of August 17, 2023, when Law Firm made the records request to DCPS, the requested records were then maintained by DCPS or by Public Charter School – or whether DCPS or Public Charter School was the child's LEA. I conclude that the Parent did not meet her burden of persuasion that DCPS denied Student a FAPE by not timely providing

access to the requested education records.

- Did DCPS deny Student a FAPE by failing to provide the student with all of his/her IEP Behavioral Support Services during the 2021-2022 or the 2022-2023 school years?

Student's City School IEPs for the 2021-2022 and 2022-2023 school years provided for Student to receive 240 minutes per month of Behavioral Support Services, outside of general education. Assuming a 36-week school year, the child should have received some 36 hours of direct behavior services per year. In the 2021-2022 school year, it appears from the records in evidence that the City School social worker provided Student approximately 16 1-hour sessions of Behavioral Support Services. According to the DCPS service trackers, approximately 20 hours of scheduled services were missed due to "Student Unavailable." On some 15 service dates, the service trackers reported "Provider Unavailable," but School Social Worker made up some of the missed dates. Under DCPS policy, there is no requirement to make up missed service sessions due to student absence or refusal to participate. *See Missed Related Services and Untimely Assessment Guidelines* (DCPS, April 2017).

Assuming that DCPS is responsible for not implementing at least half of the 18 hours of missed services in the 2021-2022 school year, I find that it is probable that DCPS failed to implement some 9 hours of Behavioral Support Services that school year. For the 2022-2023 school year, due to staffing gaps at City School, Student was not provided any of the 34 hours of IEP Behavioral Support Services prescribed by the child's IEP team. I find that Petitioner established that it is more likely than not that

DCPS failed to provide Student a total of some 43 hours of Behavioral Support Services over the 2021-2022 and 2022-2023 school years.

U.S. District Judge Rudolph Contreras explained in *Middleton v. District of Columbia*, 312 F. Supp. 3d 113 (D.D.C. 2018), that a material failure to implement substantial or significant provisions of a child's IEP may constitute a denial of FAPE.

A school district "must ensure that . . . special education and related services are made available to the child in accordance with the child's IEP." 34 C.F.R. § 300.323(c)(2). A material failure to implement a student's IEP constitutes a denial of a FAPE. *Johnson v. District of Columbia*, 962 F.Supp.2d 263, 268–69 (D.D.C. 2013). To meet its burden, the moving party "must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Beckwith v. District of Columbia*, 208 F.Supp.3d 34, 49 (D.D.C. 2016) (quoting *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)). "Generally, in analyzing whether a student was deprived of an educational benefit, 'courts . . . have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.' " *Id.* (quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011)).

*Middleton* at 144.

Student's City School IEP teams noted that Student's behavior impeded the learning of Student or of other children and that the full-time special education setting was in Student's best interest because of the behavioral manifestations of his/her ED disability. Clearly Behavioral Support Services were required to assist Student to benefit from special education. See 34 C.F.R. § 300.34(a) (Definition of "Related Services"). I conclude that DCPS' failure to provide the majority of Student's Behavioral Support Services over the 2021-2022 and 2022-2023 school years was a failure to implement

substantial and significant provisions of Student's IEPs. This was a denial of FAPE.

For relief for this failure to implement behavior services, Petitioner's expert, Educational Advocate, recommended that Student be awarded compensatory education in the form of 30 hours of counseling and 30 hours of mentoring. When a hearing officer finds a denial of FAPE, he has "broad discretion to fashion an appropriate remedy, which can go beyond prospectively providing a FAPE, and can include compensatory education. . . . [A]n award of compensatory education 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."

*B.D. v. District of Columbia*, 817 F.3d 792, 797-98 (D.C. Cir. 2016) (internal quotations and citations omitted.)

Educational Advocate estimated that Student had missed some 58 hours of behavior services in the 2021-2022 and 2022-2023 school years, but she had incomplete service tracker records. Based on my finding that DCPS failed to provide some 43 hours of services over the two school years, I will adopt Educational Advocate's recommended award, adjusted downward by 25%, and order DCPS to provide Student 45 hours compensatory behavioral services.

### **ORDER**

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

1. As compensatory education for the denial of FAPE found in this decision,

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DCPS shall promptly issue funding authorization to the Parent for Student to receive 45 hours of independent counseling, mentoring or other behavior support services. These services shall be provided by a qualified social worker, counselor or other professional experienced with working with individuals with emotional disabilities.

2. All other relief requested by the Petitioner herein is denied.

Date: *Date in Caption* \_\_\_\_\_ s/ Peter B. Vaden \_\_\_\_\_  
Peter B. Vaden, Hearing Officer

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**NOTICE OF RIGHT TO APPEAL**

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

cc: Counsel of Record  
Office of Dispute Resolution.