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OSSE
Office of Dispute Resolution
December 11, 2014

Confidential

<p>Adult Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> <p>Date Issued: December 10, 2014</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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¹ Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to

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 November 24, 2014, and concluded on December 2, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2003.

BACKGROUND AND PROCEDURAL HISTORY:

The student attends “School A,” a D.C. public high school for which District of Columbia Public Schools (DCPS) serves as the local education agency (“LEA”). The student has been identified as a student with an emotional disturbance (“ED”) pursuant to the IDEA.

On March 8, 2013, the student’s individualized educational program (“IEP”) was updated during school year (“SY”) 2012-2013. The IEP required that the student receive 28 hours per week of specialized instruction outside of the general education setting, and 240 minutes per month of behavioral supports.

The student’s current IEP was developed on or about February 28, 2014. In accordance with the IEP the student is to receive 25 hours per week of specialized instruction outside of the general education setting and 240 minutes per month of behavioral supports and counseling services.

The student asserts that despite the requirements of his IEP he has been enrolled in inclusion and/or general education classes and has not received counseling support. The student alleges that his counselor stopped pulling him out from his classes for counseling sessions and that the counseling sessions became sporadic and he missed counseling services. The student further claims that School A placed him on an online special education program that became inoperable.

On September 26, 2014, Petitioner filed this due process complaint asserting: (1) DCPS denied the student a free appropriate public education (“FAPE”) by failing to implement the student’s March 8, 2013, IEP and by failing to continue the student’s online program; (2) by failing to fully implement his February 28, 2014, IEP and, (3) by failing to allow the student access to his complete educational records.

Petitioner seeks as relief that DCPS fund the student’s independent tutoring and credit recovery program for all courses the student failed to pass, as well as an award of compensatory education including independent counseling, credit recovery and tutoring. Petitioner has also requested that DCPS immediately provide petitioner with copies of the student’s records including truancy referral forms, evaluations and assessments.

DCPS filed a timely response to the complaint on October 8, 2014. DCPS denied any alleged violation(s) or denial of a FAPE. DCPS alleged School A fully implemented petitioner’s IEP

with fidelity and Petitioner received online program services (PLATO) through the conclusion of SY 2012-2013 and these services were never discontinued or inoperable. DCPS also asserted Petitioner's academic failure is due to his poor attendance during the second semester of SY 2012-2013. During the SY 2013-2014 Petitioner received all of his services in a self-contained classroom. DCPS further asserts that Petitioner and his parent signed a waiver to obtain sufficient credits to graduate in the current school year and the courses were provided with special education supervision and support.

A resolution meeting was held on October 10, 2014. The case was not resolved. The parties did not mutually agree to proceed to hearing. The 45-day period began on October 27, 2014, and ends [and the (Hearing Officer's Determination "HOD") is due] on December 10, 2014. The Hearing Officer convened a pre-hearing conference on October 16, 2014, and October 29, 2014, issued a pre-hearing order, outlining, inter alia, the issues to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Whether DCPS denied the student a FAPE by failing to implement the student's March 8, 2013, IEP and by failing to continue the student's online program.
2. Whether DCPS denied the student a FAPE by failing to fully implement his February 28, 2014 IEP.
3. Whether DCPS denied the student a FAPE by failing to allow the student access to his complete educational records.

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 35 and Respondent's Exhibits 1 through 15) that were all admitted into the record and are listed in Appendix A.³ Witnesses are listed in Appendix B.

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

³ Any items disclosed and not admitted or admitted for limited purposes was noted on the record and summarized in Appendix A.

FINDINGS OF FACT:⁴

1. The student _____ attends School A. The student has been identified as a student with an ED disability classification pursuant to the IDEA. (Petitioner's Exhibit 1-1)
2. On March 8, 2013, the School A reviewed the student's IEP for SY 2012-2013 and placed the student in self-contained special education classroom. The IEP required that the student receive 28 hours per week of specialized instruction outside of the general education setting, and 240 minutes per month of behavioral supports. The student remained in his self-contained classroom and took all classes there during the remainder of SY 2012-2013 following this IEP meeting. (Parent's testimony, Petitioner's Exhibits 1-7, 2)
3. On May 29, 2013, DCPS convened an IEP meeting for the student to review is eligibility. The team noted that the student's poor attendance had affected his academic progress and noted the student continued to be eligible for special education services. There was no mention in the notes from this meeting that the student was having any difficulty assessing his online special education program or that any of his classes were in being provided outside general education. (Respondent's Exhibit 1)
4. During SY 2012-2013 while the student was in 11th grade the student failed all his classes except one. The student had excessive absences that school year. The student was absent 68 days and present 112. During SY 2013-2014 the student passed all of his classes. However, he continued to have excessive absences. He was absent 62 days and present 113. (Petitioner's Exhibit 5-1)
5. The student's counseling service tracker logs that were disclosed by Petitioner reflect the following total minutes per month counseling services were provided to the student during 2013: January: 60 minutes, February: 180, March: 320, May:180 September:120, October: 240, November: 250 December: 180. During 2014 the following minutes per month: January: 250 February: 250 March: 355, April: 240 and August: 90. Petitioner's Exhibits 3, 7)
6. The student's School A counselor initially came to get the student from class for counseling services. However, the student later established a pattern of going to the counselor's office for counseling services. (Student's testimony)
7. At the start of SY 2014-2015 Petitioner requested School A provide him courses sufficient for him to graduate high school by the end of SY 2014-2015. The student was not necessarily slated to complete his high school diploma requirements by the end of SY

⁴ The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. 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.

2014-2015. As result of and in response to the student's request School A convened a meeting on August 29, 2014, and prepared a schedule that would allow the student to complete the courses he needed to obtain sufficient credits and otherwise meet the requirements for high school graduation. School A had the student sign a document in which he consented to the schedule of classes and waived seven hours of special instruction in the special education setting until the next multi-disciplinary team ("MDT") meeting met in October 2014. (Student's testimony, Witness 3's testimony, Respondent's Exhibit 5-1, Petitioner's Exhibit 24)

8. The student was aware that if he did not sign the waiver document he could not graduate within the time he wanted. It was put plain and simple and the student understood. (Student's testimony)
9. During the August 29, 2014, meeting the School A staff reviewed the student's transcript and letter of understanding and what classes he would need to fulfill the graduation requirements. Varied options were discussed as to what courses he would take and if he was not going to graduate. The student was adamant and said he would take anything that was required including the fulfilling the foreign language requirement. (Witness 3's testimony, Respondent's Exhibit 4-1)
10. During the August 29, 2014, DCPS informed the student and his parent that the student could continue to attend School A to complete his high school requirements through age 22. The student and his parent were informed that the student would be allowed to take a general education course needed for him to graduate (French 1) and he could do the work for the class with the assistance of his special education teacher. (Parent's testimony)
11. The student is currently enrolled in the following courses: Business Communications, D.C. History & Government, French I, and Algebra & Trigonometry. The student is slated to take the following courses during the remainder of SY 2014-2015: U.S. Government, U.S. History, Environmental Science, Probability & Statistics and French 2. (Petitioner's Exhibit 5-10)
12. The student is in need of 9.5 credit hours to complete the requirements for high school graduation. If the student successfully completes the courses he is currently enrolled in and scheduled to take during the remainder of SY 2014-2015 the student would be in need of 2.5 credits to complete his high school diploma requirements. In addition, the student would need to complete his remaining 96 hours of community service in order to graduate. (Petitioner's Exhibit 23-1)
13. Initially in the student's self-contained special education program at School A the students in the program remained in the same classroom and the teachers rotated to the students. However, now the student rotates classrooms but he has always been and continues to be in a special education setting, except for the student's current French class in which he has the option to attend the general education class and do the work from that class with the help and in his special education teacher's classroom. The

student's online special education program was completely functional for the student had all other students during SY 2012-2013. (Witness 4's testimony)

14. During SY 2014-2015 the student has been absent 16 days of the 55 days between the start of the school year and November 17, 2014. (Petitioner's Exhibit 15-1)
15. The student has trouble sleeping that interferes with his ability to attend school regularly. The student had a skateboard injury in October 2014 that restricted his walking and caused him to miss some school. (Parent's testimony)
16. The student is provided counseling services on average of 1 hour per week. Despite the student's sporadic school attendance his School A counselor still tries to provide the student the number of required minutes. When the student is absent from school for two or three days the counselor will call the student's parent and ask for the reason and when he will return. The counselor tries to make up any missed services. Most time when the student does not come to school is because of an injury, illness or some appointment he has to make outside school. (Witness 2's testimony)
17. The student's counselor sometimes goes to the student's classroom to support him in the class to assist the student in negotiating with teachers in clarifying and fulfilling the work requirements. Lately the counselor has been conducting small group sessions with the student to assist him with peer relationships. There is an unwritten rule that the student should report to his counselor before going to his first period class each day to help set the student's mood for day. During SY 2013-2014 the student participated in structured group counseling of 60 to 90 minutes per week for 10 to 12 weeks. The student's counselor has a regularly scheduled session with the student but he doesn't follow it because of the student's sporadic attendance. (Witness 2's testimony)
18. The student meets with his School A counselor regularly including in the mornings for a group sessions on the days the student attends school. However, the student is not certain that he meets with the counselor the required amount of time each week. (Student's testimony)
19. The student's educational advocate requested the student's educational records from School A. Some records were missing and the advocate conferred with the School A special education coordinator but was unable to obtain all the desired records. A Woodcock Johnson assessment was mentioned in some of the student's records but has not been provided to the educational advocate and some of the requesting counseling logs were not provided. (Witness 1's testimony)
20. The student's educational records were provided by School A to the student's educational advocate and represent all the educational records that School A has available for the student. There is no Woodcock Johnson assessment that was conducted in 2013, as an error was made in the date of the assessment in one of the student's educational documents. There was only a 2012 Woodcock Johnson completed. The classroom based assessments that were conducted on PLATO are no longer accessible to school A. If any

truancy referrals for the student were initiated those records are not maintained by the School A special education coordinator. (Witness 3's testimony, Respondent's Exhibit 4-1)

21. The student's educational advocate proposed a compensatory education plan to compensate the student for any missed counseling services and for any time the student was without instruction in a special education setting. The advocate proposed the student be provided 3.5 recovery credits (at a cost of \$300 per half credit or \$350 per full credit) and 80 hours of individualized tutoring for each credit hour and 15 hours of independent counseling. (Witness 1's testimony, Petitioner's Exhibits 34)

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.⁵ *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,

⁵ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

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 DCPS denied the student a FAPE by failing to implement the student's March 8, 2013, IEP and by failing to continue the student's online program.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student was denied a FAPE by School A failing to implement the student's March 8, 2013 IEP and by failing to continue the student's online program.

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). Although the District of Columbia Circuit has not directly addressed what standard applies to failure-to-implement claims, the consensus among federal courts has been to adopt the standard articulated by the Fifth Circuit. E.g., *S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 67 (D.D.C. 2008). In *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000), the Fifth Circuit held that "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the ... authorities failed to implement substantial or significant provisions of the IEP." *Id.* at 349; see also *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 822 (9th Cir. 2007)

("[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 the services required by the child's IEP."). "[C]ourts applying [this] standard 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." *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). What provisions are significant in an IEP should be determined in part based on "whether the IEP services that were provided actually conferred an educational benefit." *Bobby R.*, 200 F.3d at 349, n. 2.

The evidence in this case demonstrates that School A provided student the required special education and related services pursuant to his March 8, 2013, IEP and that the online special education program was never unavailable to him or inoperable. Although the student testified that he had classes in the general education setting it was unclear from his testimony what year and in what courses the student allegedly was in general education classes.

The Hearing Officer did not find the student's testimony credible based on the student's demeanor. The student simply expressed his dissatisfaction with teaching methods or the behaviors of other students in his classes. However, the student's descriptions of how his classes are conducted, the number of teachers and students in the classroom was not inconsistent with a description of a special education setting. The student could not remember the classes that the PLATO program did work in and which it did not. The student equivocated in his testimony.

The Hearing Officer found the special education teacher's testimony far more credible. The special education teacher was emphatic and believable that the student PLATO program was always operable and that neither the student nor any other students had any thing other than rare

incidental problems with the Plato program. In addition, the Hearing Officer found the special education teacher's testimony credible that all the student's classes at School A have been provided outside general education.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to fully implement his February 28, 2014 IEP.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that School A failed to fully implement his February 28, 2014, IEP.

The evidence demonstrates that student agreed and waived the requirement that he be provided seven hours outside general per week in order to fulfill his graduation requirements during SY 2014-2015. The evidence indicates the student was given the option of delaying his graduation and not waiving any services but he was adamant about graduating this school year. The Hearing Officer concludes the student knowingly waived services. In addition, School A agreed to provide the student special support in order to complete the one course he was taking outside special education. Under these facts the Hearing Officer concludes that there has been no denial of a FAPE to this student.

As to his counseling services, although there appears to be evidence that all the student's counseling services have not always been provided to him the evidence demonstrates that this is not due to a lack of willingness and availability to provide the student the services by his School A counselor. The evidence demonstrates that services the student has missed have been the result of his poor attendance. Under these facts the Hearing Officer concludes that there has been no denial of a FAPE to this student.

ISSUE 3: Whether DCPS denied the student a FAPE by failing to allow the student access to his complete educational records.

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence that DCPS denied the student a FAPE by failing to allow him access to his complete educational records.

34 C.F.R. §300.501(a) provides:

- (a) The parents of a child with a disability must be afforded, in accordance with the procedures of Sec. Sec. 300.613 through 300.621, an opportunity to inspect and review all education records with respect to--
 - (1) The identification, evaluation, and educational placement of the child; and
 - (2) The provision of FAPE to the child.

The student is an adult and afforded under IDEA the rights that would otherwise be that of the parent to examine his educational records.⁶ The facts of this case reveal that Petitioner's

⁶ 34 C.F.R. 300.520

educational advocate requested certain records from School A on the student's behalf and School A has provided all the requested records that are available. Any requested records that have not been provided were not provided because they do not exist or School A can no longer access them. The Hearing Officer concludes any failure by DCPS to provide the student any requested educational records is at best a procedural violation that does not rise to the level of a denial of a FAPE.⁷

ORDER:

The due process complaint is hereby dismissed with prejudice and all requested relief is denied.

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

Coles B. Ruff, Esq.
Hearing Officer
Date: December 10, 2014

⁷ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)