

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
April 27, 2015

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|-------------------------------------|---|------------------------------|
| STUDENT, <sup>1</sup>               | ) |                              |
| through the Parent,                 | ) |                              |
|                                     | ) | Date Issued: April 25, 2015  |
| Petitioner,                         | ) |                              |
|                                     | ) | Hearing Officer: John Straus |
| v.                                  | ) |                              |
|                                     | ) |                              |
| District of Columbia Public Schools | ) |                              |
|                                     | ) |                              |
| Respondent.                         | ) |                              |
|                                     | ) |                              |

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**HEARING OFFICER DETERMINATION**

**Background**

The Petitioner, the Student’s mother, filed a due process complaint notice on February 10, 2015, alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

The Petitioner alleged that the District of Columbia Public Schools (“DCPS”) failed to provide an appropriate Individualized Education Program (“IEP”) for the Student. Specifically, the Petitioner argued the IEP lacks Occupational Therapy (“OT”) goals, sufficient present levels of performance in written expression and social-emotional functioning, measurable goals, Extended School Year (“ESY”) services, a dedicated aide, sufficient counseling services, and appropriate social emotional goals. The Petitioner also alleged that DCPS failed to implement the Student’s February 3, 2014, November 3, 2014 and January 26, 2015 IEPs from the Student’s date of admission in October 2014 to February 10, 2015, by failing to provide the student with OT services and behavior support services. A third allegation was DCPS failed to evaluate the Student to identify his special education and related services needs in a timely manner; specifically DCPS failed to conduct a clinical psychological assessment, speech and language assessment, and reading achievement assessment. A fourth allegation was DCPS failed to allow the parent to meaningfully participate in the IEP team meetings on November 3, 2014 and January 26, 2015 by failing to provide the parent and her counsel with sufficient notice and on February 6, 2015 by failing to allow the parent’s counsel to represent the parent at the meeting.

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Finally, the Petitioner alleges DCPS failed to provide the Petitioner an opportunity to review and inspect the Student's records within 45 days of Petitioner's September 26, 2014 written request; specifically, DCPS has not provided IEP service trackers, IEPs and meeting notes and progress reports.

The Petitioner requested the Hearing Officer order parental access to records; specifically IEPs, meeting notes progress reports and service trackers; funding of an independent clinical psychological assessment, a speech and language assessment, educational achievement assessment in Reading, and an observation to determine the necessity of ESY, a dedicated aide and compensatory services; develop an IEP with increased hours of special education services outside the general education setting and a Behavior Intervention Plan ("BIP") based on a Functional Behavioral Assessment ("FBA"); and convene an IEP meeting, to be scheduled through parent's counsel, to review the assessments, as necessary; review and revise the Student's IEP to provide measurable goals, baselines, OT goals, counseling, attendance contract, speech and language services, and discuss and determine placement.

DCPS asserted the following:

1. The Petitioner gave her permission for the IEP to be amended that the Student be given OT on a consultative basis and the IEP was amended the following day.
2. The present level sections in both areas are specific, individualized, and clear.
3. The Student's January 26, 2015 IEP contains three social/emotional goals, each of which are individually tailored to student's unique needs.
4. Petitioner provides no basis in her complaint for a need for an aide, and provides no evidence of any kind of a request for an aide that has gone unheeded.
5. DCPS stands by its decision to decrease the amount of counseling services, given the Student's improvement in class, the implementation of the new BIP, and the Student's lack of serious suspension during the year at Roosevelt.
6. DCPS possesses service trackers for both related services for all relevant months, and will be able to provide them to Petitioner upon request.
7. Student's IEP team based its decision to maintain the Student's classification as multiply disabled ("MD") on the results of multiple educational assessments referenced in the eligibility determination report, including a Scholastic Reading Inventory and the Aleks online data assessment tool. These assessments were administered in November 2014. There is no assertion in the complaint that Petitioner ever requested such an assessment be conducted or brought speech and language concerns to the staff at High School.
8. The first IEP team meeting was convened less than a month after the student first enrolled, on November 3, 2014. DCPS sent a letter of invitation to the Petitioner on October 20, 2014, and she confirmed her participation in the meeting via telephone on October 31,

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2014. Petitioner had ample time with which to “invite her counsel.” The High School staff reports that not once during the meeting did Petitioner even mention her supposed counsel. In fact, in a phone call shortly after that meeting, Petitioner’s counsel acknowledged to the High School staff that she was not even sure whether she still represented the Petitioner.

9. The second meeting was held on January 26, 2015. DCPS went forward with this meeting without Petitioner, as she had confirmed her attendance at the meeting with student’s special education case manager on multiple occasions during the prior week. When DCPS was unable to reach Petitioner at the onset of the meeting, it went forward.
10. There was no actual legal requirement for the February 6, 2015 meeting. The High School staff were simply attempting to fill Petitioner in on what she missed. It would have made no sense to hold the meeting without Petitioner.
11. The High School LEA representative first became aware of a records request in early November 2014, during a phone call with someone claiming to be Petitioner’s counsel. During that phone call, the counsel stated she was no longer sure whether she still represented the Petitioner, and told the LEA representative she would get back to her about the records. No follow-up request was ever provided.

### **Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and 38 D.C. Code 2561.02.

### **Procedural History**

The due process complaint was filed on February 10, 2015. Neither Petitioner nor Respondent waived the resolution meeting. The resolution meeting took place on February 25, 2015, at which time, the parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on March 12, 2015. The 45-day timeline to issue a final decision began on March 13, 2015 and the final decision is due by April 26, 2015. *See* 34 C.F.R. §§ 300.510 and .515.

The due process hearing was held over two days on March 30 and 31, 2015. The due process hearing was a closed hearing.

Neither party objected to the testimony of witnesses by telephone. The Petitioner participated in person on both days.

Petitioner presented four witnesses: the Petitioner, Compensatory Education Expert, Psychologist, and an Educational Advocate. The Compensatory Education Expert and Psychologist were certified as expert witnesses. DCPS presented four witnesses: DCPS LEA

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Representative (“LEA”); DCPS Special Education Teacher (“SET”); DCPS Social Worker (“SW”); and DCPS Occupational Therapist (“DCPS OT”).

The Petitioner’s Disclosure Statement, filed and served on March 23, 2015, consisted of a witness list of nine witnesses and documents P-01 through P-43. The Petitioner’s documents were admitted into evidence without objection. The Respondent’s Disclosure Statement, filed and served on March 23, 2015, consisted of a witness list of four witnesses and documents R-1 through R-24. The Respondent’s documents were admitted into evidence without objection.

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

1. Whether DCPS denied the Student a FAPE by failing to provide an IEP on January 26, 2015, and after that was reasonably calculated to enable the student to receive educational benefit because the IEP lacks OT goals; sufficient present levels of performance in written expression and social-emotional functioning; measurable goals; ESY services; a dedicated aide; sufficient counseling services; and appropriate social emotional goals.
2. Whether DCPS denied the Student a FAPE by failing to implement the Student’s February 3, 2014, November 3, 2014 and January 26, 2015 IEPs from the Student’s date of admission in October 2014 to February 10, 2015, by failing to provide the student with OT services and behavior support services.
3. Whether DCPS denied the Student a FAPE by failing to evaluate the Student to identify his special education and related services needs in a timely manner; specifically DCPS failed to conduct a clinical psychological assessment, speech and language assessment, and reading achievement assessment.
4. Whether DCPS denied the Student a FAPE by failing to allow the parent to meaningfully participate in the IEP team meeting on November 3, 2014 and January 26, 2015 by failing to provide the parent and her counsel with sufficient notice and, on February 6, 2015, by failing to allow the parent’s counsel to represent the parent at the meeting.
5. Whether DCPS denied Student a FAPE by failing to provide the Petitioner an opportunity to review and inspect the Student’s records within 45 days of Petitioner’s September 26, 2014 written request; specifically, DCPS has not provided IEP service trackers, IEPs and meeting notes and progress reports.

The Petitioner made stipulations that DCPS did provide IEPs, IEP notes, and service trackers; however, IEP progress reports before November 3, 2014 and after January 23, 2015 for the 2014-2015 school year were not provided. The Petitioner also stipulated that the January 26, 2015 IEP has measurable Math goals and Writing goals; however, the Reading goals and Emotional, Social, and Behavioral Development goals were not measurable.

### **Findings of Fact**

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After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact<sup>2</sup> are as follows:

1. The Student is a resident of the District of Columbia who resides with the Petitioner. The Student attends High School. The Petitioner is the Student's mother.<sup>3</sup>
2. On January 11, 2007, the Student was administered the Wechsler Intelligence Scale for Children-Fourth Edition which yielded a Full Scale Intelligence Quotient of 67 or extremely low. On May 25, 2010, the Student received an Adaptive Behavior Assessment which yielded lower functioning skills.<sup>4</sup>
3. The Student's teacher completed the Behavior Assessment System for Children, Second Edition when the Student was ■ years old.<sup>5</sup>
4. On November 16, 2010, the IEP team reviewed the Adaptive Behavioral Assessment and, notwithstanding the low FSIQ and adaptive scores, determined the Student is not a student with mental retardation because the assessments were not an accurate measure of the Student's cognition and adaptive functioning.<sup>6</sup>
5. On November 13, 2012, the IEP team determined the Student required a speech and language assessment.<sup>7</sup>
6. The Student was administered the Woodcock Reading Mastery Test on December 15, 2010, December 20, 2011, and October 7, 2013. Each time, the assessments yielded very low academic achievement scores.<sup>8</sup>
7. On November 8, 2013, the IEP team at Nonpublic School convened and noted the Student has poor peer relationships, can be oppositional and defiant, and has difficulty managing his anger and frustration. Strategies used to support the Student's behaviors include isolating him from peers until he can be more focused for the classroom; afternoon breaks from his classroom to take a walk to expel excessive energies and being able to earn rewards for appropriate behaviors. The Student also utilizes his individual therapy session to process his behaviors and its impact on him academically. The Petitioner asked whether the Student requires a dedicated aide. The IEP team determined the Student did not require a dedicated aide. The speech and language pathologist reported the Student does not

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<sup>2</sup> Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>3</sup> Petitioner

<sup>4</sup> P-20

<sup>5</sup> P-23

<sup>6</sup> P-12

<sup>7</sup> P-25, P-30

<sup>8</sup> P-24

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engage or participate in speech therapy sessions and is rude and disrespectful. She stated the Student does not benefit from the time that they spend together and recommended the Student no longer receive speech and language therapy services. The IEP team agreed. The team determined the Student required 23.5 hours of specialized instruction per week outside the general education setting, 30 minutes of OT per week outside the general education setting, and 2.5 hours of behavioral support services per week outside the general education setting. The team also reviewed the impact of break in service on critical skills, degree of regression of critical skills, time required for recoupment of critical skills, analysis of data to support ESY services, ESY designation, and goals and eligibility for ESY transportation, and subsequently determined the Student required ESY services. Finally, the team determined the Student would remain at Nonpublic school.<sup>9</sup>

8. The Petitioner was not satisfied with the services at Nonpublic school and requested the Student be removed from Nonpublic school. On June 3, 2014, DCPS issued a prior written notice that stated the Student must remain at Nonpublic school. The Petitioner enrolled the Student in the neighborhood High School at the beginning of the 2014-2015 school year.<sup>10</sup>
9. On September 26, 2014, the Educational Advocate sent an email to the principal and former special education coordinator at High School and requested a copy of the Student's records and an IEP team meeting. A second request was sent via email to the principal and former special education coordinator on October 31, 2014; however, there was no waiver attached signed by the Petitioner for DCPS to release information to the Educational Advocate. On the same day, the LEA called the Petitioner regarding an IEP meeting scheduled for November 3, 2014. The Petitioner stated that she would need to call her job regarding her availability to participate. The LEA responded to the Educational Advocate via email on November 3, 2014.<sup>11</sup>
10. A Scholastic Reading Inventory, administered on October 29, 2014, stated the Student was at a 7<sup>th</sup> grade reading level.<sup>12</sup>
11. On November 3, 2014, the IEP team convened with the Petitioner but not with her attorney or advocate present. The team noted since his enrollment, the Student has experienced significant behavioral difficulties.

Aside from suspensions, the Student has been absent five times and arrives late daily. When in attendance, the Student is often observed being out of his assigned location. He is observed walking hallways or running from staff members attempting to return him to class. He has also been in verbal altercations with both staff and peers. The team determined the Student requires 23.5 hours of specialized instruction per week outside the general education setting and 120 minutes of OT per month outside the general education setting. The team reduced the Student's behavioral support services to 240 minutes of per

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<sup>9</sup> P-10, P-21, R-1

<sup>10</sup> R-3, Petitioner

<sup>11</sup> P-53, R-17, Petitioner, Educational Advocate

<sup>12</sup> R-21

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month outside the general education setting. The team determined they would discuss ESY eligibility at a later date.<sup>13</sup>

12. On December 18, 2014, the SW completed a FBA. The Student's teachers completed Ohio Scale reports that state the Student argues and has fits of anger most of the time, caused trouble for no reason and broke rules.

However the SW cautioned that the results may not be accurate due to the Student's reluctance to participate. Based on teacher interviews and direct observations, the SW noted the Student leaves class without permission and roams the hallway for the duration of the class period on a daily basis. As a result the Student is not receiving instruction. The SW hypothesized the behavior's function was to escape the structure of the academic environment and gain peer attention. The SW recommended the IEP team review the FBA, develop a BIP and receive behavior support services.<sup>14</sup>

13. On December 19, 2014, the SW completed a BIP for the Student.

The BIP states the Student's behaviors would be monitored using the "Classroom DOJO" behavior monitoring system. The system may be accessed online; however, the Petitioner has not received online access.<sup>15</sup>

14. On October 7, 2014, the DCPS OT was not available to provide OT services. The Student was absent on October 14 and 23, November 25 and December 16, 2015 and January 6, 2015, and did not receive services. On October 30, 2014, the Student received OT services. The Student refused OT services on November 4 and 20, 2014 and December 2 and 9, 2014 and January 13, 2015.<sup>16</sup>

15. On January 14, 2015, the Petitioner was notified, via telephone, that the Student's IEP would be amended from 120 minutes of OT per month to OT on a consultative business due to the Student's refusal to receive OT services. Consultative services were provided on February 27, 2015.<sup>17</sup>

16. On January 16 and 20, 2015, the Petitioner was notified by the SET, via telephone, regarding an IEP team meeting on January 26, 2015. The Petitioner stated she would check on her work for availability.<sup>18</sup>

17. On January 26, 2015, the IEP team convened without the Petitioner or her attorney. The team noted that the Student is responding to behavioral interventions that have been implemented in the Behavioral and Educational Supports ("BES") program. The team

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<sup>13</sup> P-9, R-4, R-5, Petitioner

<sup>14</sup> P-18, R-7, SW

<sup>15</sup> P-19, R-8, Petitioner, SW

<sup>16</sup> R-19, P-16, P-17

<sup>17</sup> R-9, R-19, Petitioner, DCPS OT

<sup>18</sup> R-17, Petitioner, SET

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further noted the Student is producing satisfactory class work; therefore, his behavioral services hours have been decreased due to improvement in his behavior. In written expression, the team noted the Student continues to rely heavily on the teacher and other staff members, requiring multiple prompts to stay on task and not to disrupt other classmates; however, he is producing satisfactory class work. The team determined the Student continues to be a student with a Specific Learning Disability and an Other Health Impairment under the IDEA. The team developed measurable goals for the Student. The team determined the Student requires 23.5 hours of specialized instruction per week outside the general education setting, 120 minutes of behavior support services per month outside the general education setting, and 30 minutes of OT per month. The team did not discuss the need for ESY services, but the Student did not regress during the winter break. The Petitioner received prior notice of the IEP team's decisions.<sup>19</sup>

19. The parties agreed to convene an IEP team meeting on February 6, 2015 at 12:30 PM. However, the Petitioner had an emergency and was not able to attend. Counsel for the Petitioner contacted the Petitioner via telephone and received verbal authorization to convene the meeting without her. However, the written authorization for information and representation executed by the Petitioner was not sent to the LEA until 1:24 P.M. that day.<sup>21</sup>
20. Between November 7, 2014 and February 20, 2015, the DCPS SW attempted to provide behavioral support services on fifteen occasions. However, the Student refused to participate in the sessions at least eleven times. There is no therapeutic rapport established between the Student and SW.<sup>22</sup>
21. On March 2, 2015, the Student was administered the Woodcock Johnson Test of Achievement-Third Edition, which yielded significantly below average scores in all areas of academic achievement.<sup>23</sup>
- 22.

The Petitioner has received a phone call from the Dean and was told that the Student may not return to school until the Petitioner meets with the Dean in person. No paperwork was provided to the Petitioner regarding the Student's suspension. The Student has been suspended in this manner on several occasions during the 2014-2015 school year.<sup>24</sup>

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<sup>19</sup> P-8, R-10, R-11, R-12, R-13, Psychologist, SW, SET

<sup>20</sup> P-50

<sup>21</sup> P-53, LEA

<sup>22</sup> R-20, P-16, P-17, SW

<sup>23</sup> R-16

<sup>24</sup> Petitioner, SW

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23. The Petitioner requests the Student receive 40 hours of behavioral support services, 120 hours of specialized tutoring, 6 hours of occupational therapy, 40 hours of speech and language therapy services, a speech and language assessment, and a clinical psychological assessment as compensatory services.<sup>25</sup>

### Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

“Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).

- 1. DCPS did not deny the Student a FAPE by failing to provide an IEP on January 26, 2015 and after that was reasonably calculated to enable the student to receive educational benefit except the IEP lacks sufficient counseling services.**

As described by the U.S. Supreme Court, the IEP is a comprehensive statement of the educational needs of a child with a disability and the specially designed instruction and related services a district will employ to meet those needs. *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 556 IDELR 389 (U.S. 1985). A district's obligation to provide FAPE to a student with a disability is satisfied when the district provides the student with the personalized educational program necessary to allow the child to derive an educational benefit from that instruction. In other words, the FAPE requirement of the IDEA demands access to educational opportunity only, not the specific achievement of educational results. *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982). The IEP does not operate as a contract offering guarantees that a student will achieve a certain amount of academic proficiency. *Coale v. State Dept. of Educ.*, 35 IDELR 149 (D. Del. 2001). *See also, Schaffer v. Weast*, 554 F.3d 470 (4th Cir. 2009).

- a. The IEP has measurable goals.**

The Petitioner stipulated that all of the January 26, 2015 IEP Math goals and Written Expression goals are measurable; therefore, the Petitioner only challenges the Reading and the social/emotional goals. The goals lack of definite frequency and variability but the goals are measurable. Each Reading goal is measured based on daily work samples, teacher observation and practice and drill. For example, Reading Goal 1 involves identifying what, when, and where with respect to reading passages on the Student's reading level and the student to be able to do this with 80% accuracy.

- b. The IEP has sufficient present levels of performance in written expression and social-emotional functioning.**

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<sup>25</sup> P-51, Compensatory Education Expert

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The IDEA requires that IEPs include a statement of present levels of academic achievement and functional performance. This statement is the foundation upon which the IEP team builds the remainder of the IEP. *See* 71 Fed. Reg. 46,662 (2006). Each IEP must contain a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children) 34 C.F.R. § 300.320(a)(1)(i). This section of the IEP must be all-encompassing, so as to provide a baseline that reflects the entire range of the child's needs, including both academic (reading, math, communication, etc.), and nonacademic (daily life activities, mobility, etc.) areas. This statement should provide relevant background information about the child's areas of need, strengths, interests, and learning style. 34 C.F.R. § 300.324(a). The levels of performance is individualized and clear. The information is derived from both formal and informal assessments and anecdotes and it is in each area of concern.

**c. The IEP has appropriate social/emotional goals.**

The Social/Emotional goals are tied to the targeted behaviors in the BIP. For example, the first goal discusses the need for student to use kind words and keep hands to himself when interacting with peers. This is directly connected to the identified behaviors of aggression and making disrespectful comments. The second goal is about the Student taking breaks when becoming frustrated but remaining in location. This is directly connected to the identified behavior of inappropriately being in the hallways during instruction time. The final goal discusses addressing stressful situations that negatively impact his social skills and anger management. The genesis of this goal too can be found in the BIP.

**d. The Student does not require a dedicated aide.**

The student has never before had a dedicated aide on his IEP. The Student is no longer required to have a behavioral tech shadow him when he leaves the BES classroom. The Petitioner has never requested a dedicated aide during the 2014-2015 school year even though she did request one at his previous school. The Student does not require an aide to facilitate adaptive living skills.

**e. The IEP team did not err by not determining a need for ESY services.**

ESY means special education and related services that are provided to a child with a disability beyond the normal school year of the public agency; in accordance with the child's IEP; and at no cost to the parents of the child 34 C.F.R. § 300.106(b)(1). Under the IDEA, ESY must be provided only if a child's IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child. 34 C.F.R. § 300.106(a) *See also Letter to Harkin*, 213 IDELR 263 (OSERS 1989). It is true that the student's previous IEPs have included ESY services and ESY goals. The Student has received ESY services during the past summers. Normally, a determination for needed ESY services is made in the Spring prior to the beginning of the summer break. *See Reusch v. Fountain* 21 IDELR 1107 (D. Md. 1994). *See also Reinholdson v. School Bd. of Indep. Sch. Dist. No. 11*, 46 IDELR 63 (8th Cir. 2006, unpublished) (A district should evaluate a student's needs for ESY services in a timely fashion when it becomes aware that the student may need such services).

**f. The lack of OT goals is not a denial of FAPE.**

The OT goals were removed from the IEP on January 26, 2015 due to a clerical error. Therefore, the OT goals should be added to the IEP. DCPS argues that it has tried to convene an IEP meeting with the Parent to put those goals back onto the IEP. DCPS further argues the Petitioner failed to prove that the IEP not having the OT goals for a less than two month period caused the student any substantive harm necessitating relief because no additional concerns in OT were reported that led the DCPS OT to the conclusion that the Student only started making progress in OT once the service delivery was switched to consultation. The Hearing Officer finds that the removal of the OT goals was merely procedural error and not a denial of FAPE.

**g. DCPS denied the Student a FAPE by failing to provide an IEP on January 26, 2015, and after that was reasonably calculated to enable the student to receive educational benefit because the IEP lacks sufficient counseling services.**

DCPS argues that counseling services were reduced due to three considerations; his behavioral incidents in the classroom have decreased, he is resistant to attending individual counseling sessions anyway, and his IEP team has determined that he should remain in his classroom to the maximum extent possible, given that he makes far more progress in that setting than he does in the individual related services sessions. The November 3, 2014 IEP team reduced the Student's counseling hours from 2.5 hours per week to 240 minutes per month, not because the Student's behavioral progress warranted reduction at the time, but because 240 minutes per month was all that the High School could accommodate. This pattern continued when on January 26, 2015, the Student's behavioral support hours were further reduced to 120 minutes per month. The IEP team erred in decreasing the hours of counseling services. This error was a denial of FAPE.

**2. DCPS' failure to provide the student with OT services and behavior support services.**

After the IEP is written and an appropriate placement determined, the district is obligated to provide the student with the special education and related services as listed in the IEP. 34 C.F.R. § 300.323(c). That includes all supplementary aids and services and program modifications that the IEP team has identified as necessary for the student to advance appropriately toward the established IEP goals, to be involved in and progress in the general curriculum, and to participate in other school activities. DCPS, as the local and state education agency, is to make certain that the educational placement, for each child with a disability within its jurisdiction, is able to implement the student's Individualized Educational Program. Pursuant to D.C. Mun. Regs. tit. 5, § 3010.2 (2003), DCPS "shall implement an IEP as soon as possible after the meeting where the IEP is developed..."

The November 3, 2014 had 240 minutes of behavior support services per month and 120 minutes of OT services per month respectively. The January 26, 2015 IEP team reduced the services hours to 120 minutes of behavior support services per month and 30 minutes of OT services per month respectively.

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**a. DCPS did not deny the Student a FAPE by failing to provide OT services from the Student's date of admission in October, 2014 to February 10, 2015.**

A district must implement a student's IEP with all required components. 34 C.F.R. § 300.323(c). This implementation mandate does not mean that a district must perfectly implement a student's IEP in order to provide the student with FAPE. A minor discrepancy between the services provided and the services required under the IEP is not enough to amount to a denial of FAPE. See *T.M. v. District of Columbia*, 64 IDELR 197 (D.D.C. 2014) (The "short gaps" in the student's services did not amount to a material failure to provide related services). However, the failure to implement a *material* portion of the IEP amounts to a denial of FAPE. See *Sumter County Sch. Dist. 17 v. Heffernan*, 56 IDELR 186 (4th Cir. 2011) (emphasis added); *A.P. v. Woodstock Bd. of Educ.*, 55 IDELR 61 (2d Cir. 2010, unpublished); *Van Duyn v. Baker Sch. Dist. 5J*, 47 IDELR 182 (9th Cir. 2007), reprinted as amended, 107 LRP 51958 (9th Cir. 09/06/07); *Houston Indep. Sch. Dist. v. Bobby R.*, 31 IDELR 185 (5th Cir. 2000), cert. denied, 111 LRP 30885, 531 U.S. 817 (2000); *Neosho R-V Sch. Dist. v. Clark*, 38 IDELR 61 (8th Cir. 2003); *Woods v. Northport Pub. Sch.*, 59 IDELR 64 (6th Cir. 2012); and *Turner v. District of Columbia*, 61 IDELR 12 (D.D.C. 2013).

The DCPS OT approached the Student for individual sessions, only to be swiftly and rudely rebuffed. Her efforts were met with strong resistance from the Student, and she was unable to provide him with the services due to his refusal. Between November 7, 2014 and February 20, 2015, the DCPS SW attempted to provide behavioral support services on fifteen occasions. However, the Student refused to participate in the sessions at least eleven times. On October 7, 2014, the DCPS OT was not available to provide OT services. The Student was absent on October 14 and 23, November 25, and December 16, 2014 and January 6, 2015, and did not receive services. On October 30, 2014, the Student received OT services. The Student refused OT services on November 4 and 20 and December 2 and 9, 2014 and January 13, 2015. As a result, the OT followed the DCPS policy on missed related services. The DCPS OT met with the SET, LEA representative and Petitioner to develop a consultative option. The OT began to provide consultative services in February 2015 because the IEP change was made in late January. The OT testified that she discussed all of the goals that were contained on the previous IEP, and that Student's teachers had no concerns regarding the Student's OT skills. The Hearing Officer finds that the actions of the OT did not result in a material failure to provide services. Therefore, there was no denial of FAPE.

**b. DCPS denied the Student a FAPE by failing to provide behavioral support services from the Student's date of admission in October 2014 to February 10, 2015.**

The Student was not added to the SW's caseload until November 2014. Given that the Student began at High School in mid-October, DCPS concedes it could be plausibly argued that two one-hour sessions of counseling were missed. From November 2014 to February 2015, the Student often did not receive behavioral support services due to unavailability, attendance, and refusal to participate in services due to lack of therapeutic rapport. The Student was placed on suspension, formal and informal, resulting in the student's unavailability. Therefore, all behavioral supports were not rendered, and DCPS did not attempt to makeup the services or switch the student to an alternative social worker. The Student and the Social Worker did not develop a therapeutic

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rapport. The Student's socio-emotional progress was "inconsistent" on the service tracker logs, which reflect no mastery. The evidence indicates the Student continues to require behavioral support services. "The failure of a student to cooperate with school staff in attaining goals and objectives in the student's IEP does not relieve school officials of the responsibility to provide FAPE to that child. . . [T]he student's failure to cooperate with school staff may be an indication of the need for reevaluation, a revision to the child's IEP, or change in the child's educational placement." *Letter to Borucki*, 16 EHLR 884 (U.S. Dept of Educ. Off. of Sp. Ed. Programs 1990). Therefore, DCPS should have found another service provider to provide in school counseling services.

### **3. DCPS' failure to conduct a clinical psychological assessment and speech and language assessment.**

Pursuant to D.C. MUN. REGS. Tit. 30, § 3005.7, DCPS shall ensure that "the child is assessed in all areas related to the suspected disability [and] in evaluating each child with a disability...the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs..."

#### **a. DCPS did not deny the Student a FAPE by failing to conduct a speech and language assessment.**

DCPS argues a speech and language assessment is not required because the Petitioner agreed to the removal of speech from the IEP in November 2013, and that the Petitioner has not requested any speech assessment. However, on November 13, 2012, the IEP team determined the Student required a speech and language assessment. Yet there is nothing in the record that indicates the assessment has been completed. However, this claim is outside the two year statute of limitations because this instant complaint was filed on February 10, 2015 which is outside the statute of limitations that does not allow claims that are older than February 10, 2013. Therefore, the Hearing Officer will not order DCPS to conduct a speech and language assessment.

#### **b. DCPS denied the Student a FAPE by failing to conduct a clinical psychological assessment.**

DCPS should conduct a psychological assessment for the Student. A psychological assessment includes cognitive, academic, and social/emotional components, as well as adaptive components. The need for a psychological assessment comes from the most recent assessment results. The FBA did contain a GAIN which is a behavior rating scale obtained from a Student interview. However, the results of the assessment may not be a true representation of the Student due to his reluctance to be evaluated. However, the SW used Ohio Scale reports that provided information from his teachers.

The Student requires a cognitive component because there is no reliable cognitive assessment data for the IEP team. DCPS argues that the 2009 psychological assessment has cognitive scores and those scores are still a valid measure of the Student's cognitive functioning. However, the November 16, 2010 IEP team determined the Student is not a student with mental retardation because assessments were not an accurate measure of the Student's cognition and

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adaptive functioning. In light of the Student's significantly below average scores in all areas of academic achievement on March 2, 2015, the Student should be fully evaluated to determine the reason for his poor academic achievement.

### **4. The Petitioner's meaningful participation in the IEP team meetings.**

Parents are mandatory members of the IEP team. 34 C.F.R. § 300.321(a)(1). The IDEA requires that the district provide notice to parents early enough to ensure that parents have an opportunity to attend the meeting. 34 C.F.R. § 300.322 (a)(1). Districts must make substantial efforts to secure parent attendance at the IEP meeting. The IEP meeting notice must indicate the purpose, time, and location of the meeting and who will be in attendance; and inform the parents of the participation of other individuals on the IEP team who have knowledge or special expertise about the student. *See Letter to Constantian*, 17 IDELR 118 (OSEP 1990) (Stating that as a general matter, districts must make every effort to provide parents with notice of an IEP team meeting enough in advance for the parents to make arrangements to attend.)

#### **a. DCPS did not deny the Student a FAPE by failing to allow the parent to meaningfully participate in the IEP team meeting on November 3, 2014 by failing to provide the parent and her counsel with sufficient notice and, on February 6, 2015, by failing to allow the parent's counsel to represent the parent at the meeting.**

The Petitioner attended the November 3, 2014 IEP team meeting and fully participated. Therefore, there was no denial of FAPE. Further, the Hearing Officer finds that the lack of a waiver regarding the Petitioner's attorney's participating at the IEP meeting on February 6, 2015 without the Petitioner present made it reasonable for the IEP team to refuse to meet.

#### **b. DCPS denied the Student a FAPE by failing to allow the parent to meaningfully participate in the IEP team meeting on January 26, 2015.**

Although there is no specific timeline, districts must notify parents of the IEP meeting early enough to ensure that parents have an opportunity to attend. 34 C.F.R. § 300.322(a)(1). The IDEA requires districts to schedule IEP team meetings "at a mutually agreed time and place." 34 C.F.R. § 300.322(a)(2). The failure to schedule the IEP meeting at a mutually agreeable time and place may amount to a denial of FAPE. *Mr. and Mrs. M v. Ridgefield Bd. of Educ.*, 47 IDELR 258 (D. Conn. 2007). The Petitioner was informed of the January 26, 2015 IEP team meeting via telephone on January 16 and 20, 2015. The Petitioner was at work on both occasions and was not able to record the meeting date. She requested that she check her work schedule before committing to the meeting date. The IEP team convened without her. The January 26, 2015 IEP was drafted without the input of the Petitioner in the instant case, who asserts she did not attend and was not properly invited to the meeting. The Petitioner, as parent, is a necessary member of the IEP team, according to the IDEA. 34 C.F.R. § 300.321(a)(1). The Petitioner did not receive a copy of the January 26, 2015 IEP until well after this instant complaint was filed. The Petitioner never waived her right to participation.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a

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child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). The hearing officer finds that DCPS' failure to provide the parent with the purpose, time, and location of the meeting, and who will be in attendance a denial of FAPE because calling the parent did not allow the parent to receive the information she requires under the IDEA before beginning the meeting.

**5. DCPS denied Student a FAPE by failing to provide the Petitioner an opportunity to review and inspect the Student's records within 45 days of Petitioner's September 26, 2014 written request; specifically, DCPS has not provided IEP service trackers, IEPs, meeting notes and progress reports.**

The Petitioner stipulates she was provided full access to the Student's records up to January 23, 2015. The Petitioner states that she did not receive some of the Student's service tracker. The instant complaint was filed February 10, 2015. There are very few possible service trackers that may exist between January 23, 2015 and February 10, 2015. Therefore, the Hearing Officer finds the Petitioner's complaint regarding this issue *de minimus*. There is no denial of FAPE.

### **ORDER**

1. DCPS shall fund an independent psychological assessment, including a cognitive battery and any other batteries the evaluator deems necessary;
2. Within ten school days of the receipt of the independent psychological assessment, DCPS shall convene an IEP team meeting to review the independent psychological assessment, determine which additional assessments are necessary, if any, review and revise the IEP, as necessary and discuss and determine a placement where the IEP may be implemented;
3. The IEP team meeting shall be scheduled through the Petitioner's counsel;
4. For every day of delay by the Petitioner, DCPS shall have one day to convene the IEP team meeting;
5. No compensatory education is awarded; but it may be reserved based on the result of the psychological assessment; and
6. No further relief is granted.

**IT IS SO ORDERED.**

### **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).

Date: April 25, 2015

*/s/ John Straus*  
John Straus  
Independent Hearing Officer