

DECISION  
COVER SHEET  
DUE PROCESS HEARING

DOCKET NUMBER:	D18-013
RESPONDENT/SCHOOL DISTRICT (LEA):	██████████ County Schools
SCHOOL DISTRICT COUNSEL:	██
STUDENT:	████████████████████
PETITIONER/PARENT:	████████████████████
COUNSEL FOR STUDENT/PARENT	██
INITIATING PARTY:	Parent/Student
DATE OF DUE PROCESS COMPLAINT:	February 21, 2018
DATE OF HEARING:	April 12, 2018
PLACE OF HEARING:	██████████ County School Board Office
OPEN vs. CLOSED HEARING:	Closed
STUDENT PRESENT:	Yes (during ██████ testimony only)
RECORD:	Verbatim-Court Reporter
DECISION TYPE:	E-mail
DUE DATE FOR DECISION:	May 25, 2018
HEARING OFFICER:	James Gerl, CHO

# **DECISION**

## **DUE PROCESS HEARING**

Docket No.: D18-013

## **PRELIMINARY MATTERS**

On March 21, 2018, a prehearing conference by telephone conference call was convened herein. The order resulting from the prehearing conference is incorporated by reference herein.

Subsequent to that conference, the school district filed an unopposed motion to extend deadline for the hearing officer's final written decision to May 25, 2018. Said motion was granted. The hearing officer, at the request of counsel for Petitioner, agreed to telephone the lawyers for both parties the day after the hearing to provide an oral statement as to his decision concerning whether or not the law required the student's participation in the fieldtrip, and such oral ruling was provided to counsel on April 13, 2018.

The parties did not file a joint prehearing memorandum as ordered in this case, but they did submit a written list of stipulations of fact at the outset of the due process hearing. Said list of stipulations of fact is incorporated by reference herein.

At the due process hearing on April 12-13, 2018, the Parent offered the testimony of three witnesses (the parent, the student and the ROTC instructor) and seven exhibits, all of which were admitted into evidence. The Respondent offered the testimony of one witness (the vice principal) and fourteen exhibits, all of which were admitted into evidence, with the exception of R-11 which was withdrawn as redundant.

Because of the nature of the relief requested in this case concerning participation in a student fieldtrip, there was no time for the parties to file written briefs or proposed findings of fact. Instead, counsel provided oral argument at the end of the due process hearing. All arguments proposed by the parties have been considered. To the extent that arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments have been omitted as not relevant or not necessary to a proper determination of the material issues as present herein. To the extent that the testimony of the various witnesses is not in accord with the findings as stated herein, it is not credited.

NOTE: All personally identifiable information, including the names of parties, the names of counsel, schools and any similar information is provided on the cover sheet hereto, which should be removed prior to the distribution of this decision. FERPA, 20 U.S.C. § 1232g; and IDEA § 617(c).

## **ISSUE PRESENTED**

The issue presented in this due process hearing is: do the special education laws or regulations require that the student be permitted to participate in the April 2018 ROTC fieldtrip?

## **FINDINGS OF FACT**

Based upon the stipulations of fact presented by the parties at the outset of the due process hearing, the hearing officer has made the following findings of fact:

1. The student is eligible for special education and has been receiving special education services, along with supplementary aids and services and related services, from the school district. (Stip – 1)
2. The student is diagnosed with opposition defiance disorder, mood disorder, obsessive compulsive disorder, migraines and allergies. The most recent IEP for the student is dated October 26, 2017 and lists his exceptionality as behavior disorder. (Stip – 2)
3. From the beginning of the 2017 – 2018 school year and prior to a due process complaint filing in October 2017, the student exhibited behaviors which resulted in discipline referrals four times with the student being disciplined by exclusion from school and/or detention for nine days. (Stip – 3)

4. As a consequence of the student exposing ■■■ genitalia to other students on the school bus and a subsequent fight, the school district sought to expel the student from school. (Stip – 4)

5. The school district held a manifestation determination meeting on October 16, 2017 and determined that the behaviors of exposing ■■■self and fighting were manifestations of the student's disabilities. (Stip – 5)

6. The parent filed a due process complaint on behalf of the student seeking to block the exclusionary actions of the school district on the grounds that the student's IEP was not drafted to provide FAPE as it lacked behavior supports and positive behavior interventions for the student. During a resolution meeting held on October 24, 2017, the parties resolved the issue satisfactorily. A temporary behavioral intervention plan was to be put in place as a result of the resolution agreement on October 26, 2017. There are no substantive differences between the BIP put into place immediately after the manifestation determination on October 16, 2017 and the October 26, 2017 BIP. (Stip – 6)

7. The October 26, 2017 IEP requires adult supervision and behavior support in all locations and during transitions, electives, hallways and meals. (Stip – 7)

8. The IEP goals for behavior set a goal of appropriate behavior by the student 80% of the time. This includes specific language regarding an 80% goal in unstructured time. (Stip – 8)

9. According to a letter received by the student's mother dated February 1, 2018, the Air Force Junior ROTC fieldtrip was open to student who, in addition to fundraising, "have demonstrated proper behavior and responsibility" in the JROTC classroom. In addition, attendees must have attain at least an overall 2.0 overall GPA (C average). (Stip – 9)

10. According to the Air Force Junior ROTC syllabus, curriculum in action trips are open to cadets who have no disciplinary actions. In addition, the trip is only open to students who have obtained an overall 2.0 grade point average and a C or higher in Air Force Junior ROTC class. (Stip – 10)

11. During a resolution meeting in October 2017, it was agreed by the parties that Air Force Junior ROTC is a positive experience for the student in that ■ receives a positive behavior support from a structured environment of Air Force Junior ROTC which leads to better behavior in other settings. (Stip – 11)

12. Upon drafting and implementation of the October 26, 2017 IEP for the student, a school staff member began escorting the student during the unstructured hallway and transition times to prevent any behavior problems. (Stip – 12)

13. At some point, staff no longer escorted the student to class and during transition at unstructured times. (Stip – 13)

14. All the behaviors exhibited by the student since October 26, 2017 IEP were exhibited during transitions and unstructured times. (Stip – 14)

15. When the student's mother learned that the student was being denied participation in the fieldtrip, she inquired of the instructor the reasons for the denial. (Stip – 15)

16. During an e-mail exchange between the Air Force Junior ROTC instructor and the mother, the instructor indicated that the student was denied participation based upon ■ grades and any discipline issues and that failure to follow instructions on trips compromises the safety and welfare of the group. (Stip – 16)

17. The parent, on behalf of the student, filed the instant due process complaint on February 15, 2018 seeking to remedy the trip participation denial. (Stip – 17)

Based upon the evidence in the record, the hearing officer has made the following findings of fact:

18. The October 26, 2017 IEP for the student was created by a team that included a special education teacher, two administrators including the school vice principal, a special education specialist, the student's parent and a general education teacher who was the instructor for the Air Force Junior ROTC class. The IEP is for the student, who was currently in 9th grade in a high school in the district during that time. The IEP provides that the student is eligible for extended school year services because of significant regression during interruptions. The IEP notes that the student's

behavior impedes ■ learning or that of other students. The IEP includes a section on transition planning. At the IEP team meeting during which the IEP was created, the student's mother gave permission for a functional behavioral analysis. The IEP includes present levels concerning mathematics and English language arts. The IEP also includes behavioral goals for the student. The behavioral goals for the student require 80% compliance rate for the student. The IEP also includes a mathematics goal and three English language arts goals. The IEP provides for the following supplementary aids, services and program modifications: Adult supervision behavior support; alternate format for tests and assignments; behavioral intervention plan; extra time; nonviolent crisis prevention intervention techniques; retake failed tests up to one additional attempt; text to speech (excluding English language art passages). The IEP provides that the student will receive English language arts in a special education environment 225 minutes per week; math in a special education environment 225 minutes per week; science in a special education environment 225 minutes per week and social studies in a special education environment 225 minutes per week. The IEP lists the student as general education part time as 59% of ■ program is to be provided in the general education environment. (References to exhibits shall hereafter be referred to as "P-1," etc. for the Petitioner's exhibits; "R-1," etc. for the Respondent's exhibits; references to testimony at the hearing is hereafter designated as "T of \_\_\_\_\_") (P

- 2)



19. A functional behavioral assessment of the student was conducted between November 9, 2017 and December 11, 2017. The analysis was done by a Board certified behavior analyst. The Board certified behavior analyst used an ABC analysis and direct observation, as well as an informal interview and a parent interview in conducting the analysis. The analysis determined that the student was more likely to engage in problem behaviors when an adult was not in close proximity or during less structured periods during the school day. In addition, ■ has more problems in the afternoon. The consequences that were determined for the student's behavior, such as Saturday school, after school detention and out of school suspension, were noted as effective punishers for challenging behaviors. The purpose of the student's bad behaviors was to gain social attention, escape conflict with peers or escape the nonpreferred instruction. The analysis recommended that the strategies currently being used with the student were effective in decreasing ■ challenging behaviors, and the functional behavior assessment concluded that there were no indications making any changes in the school environment that would increase ■ success. (P - 3)

20. After the functional behavioral analysis, the student's behavioral intervention plan was reviewed by a team consisting of the student's mother, the Board certified behavior analyst, two school administrators including the vice principal, and a general education teacher who was also the student's Air Force Junior ROTC instructor. Although the contents of the previous behavioral intervention plan were retained,

certain additions to the document were included under the intervention plan providing adult supervision was added. Under positive reinforcement providing a choice of NHS block as positive academic behavior increases was added to the positive reinforcement section and to the planned consequences NHS block location chosen for ■■■ was added to the plan consequences. NHS is an acronym for Nurture - Help – Support. The NHS block is the last 20 minutes of the day. If a student is failing a class, then they go to those classes for 20 minutes. If they are passing, they get a gold pass and they don't have to stay for the 20 minutes. (R - 6; P – 4; T of student's mother; T of vice principal)

21. The student really enjoyed the Air Force ROTC class ■■■ wanted to be a better student and to abide by school rules because ■■■ liked ROTC so much. (T of mother; T of student; T of ROTC instructor)

22. On September 14, 2017, the student was disciplined for insubordination for failing to put ■■■ phone away when asked by a teacher. ■■■ received one day of Saturday school as a consequence. (P - 5)

23. On September 28, 2017, the student was disciplined with a five day out of school suspension for pulling down ■■■ pants and exposing ■■■ genitalia to two students in art class. (P - 5)

24. On October 5, 2017, the student was disciplined for defacing school property when ■■■ threw a lunch tray and smashed it on the ground during lunch because

■ was made at another student. The student received three days after school detention.

(P - 5)

25. On October 6, 2017, the student was involved in a fight on the school bus. The student had exposed ■ genitalia to the other student prior to the fight. The school district recommended expulsion for the student's behavior, but the manifestation determination review concluded that the student's behavior was a manifestation of ■ disability. The student was not disciplined for this incident, but the team recommended a more restrictive placement. (P - 5; R - 7; T of student's mother; T of vice principal)

26. On approximately November 1, 2017, the student's mother contacted the school and stated that the aide walking the student to class was being too involved and that the aide should not walk the student to class as this is ■ social time. (R - 14)

27. On December 4, 2017, the student smacked another student in the ear while walking by her. As a consequence, the student was given one day of Saturday school. (P - 5)

28. On February 16, 2018, the student was tardy to ■ third period class. As a result, ■ was required to attend morning Lab. (P - 5)

29. On March 13, 2018, the student was passing a female student, who was also an Air Force Junior ROTC classmate, in the hall and shoved her into a locker. The female student who was shoved into the locker was not a friend of the student and said

that the incident came out of nowhere. As a consequence, the student was assigned two days of Saturday school and at the student's mother's request, the student was permitted to serve the Saturday school requirement a month later because of a planned family trip. (P – 5; T of ROTC instructor; T of vice principal)

30. The student's March 15, 2018 report card included the following grades: Art – B; Math – B; Earth Sciences – C; English – B; Health Sciences – B; Junior ROTC – F; Learning Skills – B; World Studies – C. For the 2017 – 2018 second semester, the student was absent from Junior ROTC class 33 times and late six times. (R -12; T of ROTC instructor)

31. The fieldtrip in question is a trip to Wright – Patterson Air Force Base in Ohio. The trip also included a stop at the United States Air Force Museum nearby and a trip to Kings Island Amusement Park and include a one night overnight motel stay at the Ramada Plaza – Dayton Hotel in Dayton, Ohio. The destination of the fieldtrip included a military base and a sensitive museum so strict adherence to the rules and good behavior are critical requirements. Forty students are scheduled to participate in the field trip, along with nine adults (seven chaperones plus two ROTC instructors). The trip is scheduled for April 20 – 21, 2018. (T of ROTC instructor; R - 10)

32. The student's compliance with the ROTC requirement that ■ wear ■ uniform one day a week and that the uniform be worn correctly was sporadic. The ROTC instructor permitted the student to make up improper or bad uniform

inspections, but the student failed to take advantage of the opportunity. (T of ROTC instructor; T of vice principal; R-13; P - 8)

33. The ROTC instructor volunteered to give up his lunch period so that the student could eat lunch with the instructor, as well as the other ROTC instructor and various other ROTC cadets, in the ROTC room after the October 26, 2017 IEP. (T of ROTC instructor)

34. The ROTC instructor and the Board certified behavior analyst walked the student to class from time to time after the October 26, 2017 IEP. On two occasions during these ROTC lunches, the student requested to go to the bathroom and did not return. In one of those two instances, the ROTC instructor found the student bullying another student with a disability. (T of ROTC instructor; T of student's mother; P -6)

35. The ROTC instructor told the student in October 2017 that ■ did not need to participate in the fundraising project for the fieldtrip because it was not going to be going on the fieldtrip. The student offered to work on the fundraising project anyway. (T of ROTC instructor; T of vice principal)

36. Twelve students with disabilities participate in the Air Force Junior ROTC class. Of the 12, four elected not to go on the fieldtrip. Two students with disabilities, including the student in this case, did not qualify for the fieldtrip. Six of the 12 students with disabilities in the Air Force Junior ROTC class are going on the fieldtrip. (T of ROTC instructor)

37. The student intends to continue participating in Air Force Junior ROTC classes in coming years. There will be opportunities for ■■■ to participate in other Air Force Junior ROTC fieldtrips in the future if ■■■ meets the eligibility requirements for the fieldtrips. (T of ROTC instructor; T of student)

38. In addition to opportunities to make up uniform inspection violations, the student was provided the following supplementary aids and services in order to help ■■■ succeed in the Air Force Junior ROTC class: The ROTC instructor, whom the student found to be a settling force, as well as an aide, walked the student to and from class; the ROTC instructor volunteered to give up his lunch period to have the student eat lunch in the ROTC classroom with him and the other ROTC instructor and occasionally some ROTC cadets; the student was permitted extended time to finish assignments and tests; the two instructors for the ROTC class did reteaching when the student did not learn an item the first time; and ■■■ was allowed to have open-book tests. (T of ROTC instructor)

39. The school district has not denied the student a free appropriate public education by refusing to permit him to participate in the Air Force Junior ROTC fieldtrip. (Record evidence as a whole)

40. The school district has offered the student a placement in the least restrictive environment that is appropriate for the student despite the district's refusal

to permit [REDACTED] to participate in the Air Force Junior ROTC fieldtrip. (Record evidence as a whole)

### **CONCLUSIONS OF LAW**

Based upon the arguments of the parties, all of the evidence in the record, as well as my own legal research, the hearing officer has made the following conclusions of law:

1. As part of the FAPE considerations that an IEP team must consider in developing an IEP, the IEP team must include on the IEP a statement of special education and related services and supplementary aids and services to be provided to a job with a disability to enable the child to participate in extracurricular and other nonacademic activities. IDEA § 614(d), (Individuals With Disabilities Education Act 20 U.S.C. § 1400, et. seq) (hereinafter sometimes referred to as "IDEA"); 34 C.F.R. § 300.320(a)(4)(ii) (hereafter sometimes referred to as "federal regulations"); Policy 2419, Chapter 1, § 2(E), Regulations for the Education of Students with Exceptionalities (West Virginia Department of Education, effective September 15, 2014) (hereafter sometimes referred to as "Policy 2419").

2. Part of the requirement that the student be educated in the least restrictive environment includes the requirement that a child with a disability must be permitted

to participate with nondisabled children in extracurricular activities to the maximum extent appropriate for the child. A school district must provide appropriate supplementary aids and services to be determined by the IEP team as may be necessary for the student to participate in nonacademic settings. IDEA § 612(a); 34 C.F.R. § 300.117; Policy 2419, Chapter 5, § 2(G) and (J).

3. The requirements of IDEA and Policy 2419 pertaining to participation by a student with a disability in extracurricular activities are not a standalone requirements; instead they are part of the requirements that a school district provide a child with a disability a free appropriate public education in the least restrictive environment. IDEA § 615(b)(6)(A); 34 C.F.R. § 300.507(a)(1); Policy 2419, Chapter 11 §4; Sneitzer v. Iowa Dept. of Educ., et al., 796 F. 3d 942, 66 IDELR 1 (8th Cir. 2015); Jefferson County Bd. of Educ. v. SB, 788 F. Supp. 2d 1347, 56 IDELR 300 (N.D. Ala. 2011); Meares v. Rim of the World School District, 66 IDELR 39 (C.D. Calif. 2015); Meares v. Rim of the World School District, 69 IDELR 38 (C.D. Calif. 2016); Lyon v. Illinois HS Assn., 60 IDELR 161 (N.D. Ill. 2013).

4. The United States Supreme Court has established a two-part test for determining whether a school district has provided a free appropriate public education to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in IDEA and an analysis of whether the individualized educational plan (hereafter sometimes referred to as “IEP”)



is reasonably calculated to enable a child with a disability to make progress in light of the child's circumstances. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (1982); Endrew F. by Joseph F. v. Douglass County School District RE-1, 137 S. Ct. 988, 69 IDELR 174, 580 U.S. \_\_\_\_ (2017); ML by Leiman v. Montgomery County Bd. of Educ., 867 F. 3d 487, 70 IDELR 142 (4th Cir. 2017).

5. To the extent that violations of IDEA are procedural violations, they are actionable as a denial of FAPE only when they cause educational harm to the student or seriously impede the parent's right to participate in the IEP process. IDEA § 615(f)(3)(E)(ii); Policy 2419, Chapter 11, § 4(M); Gadsby v. Gransmick, 109 F. 3d 40, 25 IDELR 621 (4th Cir. 1997); In re Student with a Disability, 58 IDELR 270 (SEA WV 2012). In the instant case, to the extent that the school district did not specify in the student's IEP how ■ would participate in extracurricular activities, any procedural violation is harmless.

6. A school district must "...to the maximum extent appropriate (ensure that) children with disabilities...are educated with children who are nondisabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily." IDEA § 612(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Policy 2419, Ch 5, §2(J); Hartman by Hartman v. Loudon County Board

of Education, 118 F.3d 996 (4th Cir. 1997); In re Student With a Disability 116 LRP 25097 (SEA WV 6/18/15.)

7. The school district has not denied the student a free appropriate public education by refusing to permit [REDACTED] to participate in the Air Force Junior ROTC fieldtrip.

8. The school district has offered the student the least restrictive environment appropriate for the student.

### **DISCUSSION**

Issue: do the special education law or regulations require that the student be permitted to participate in the April 2018 ROTC fieldtrip?

The Individuals With Disabilities Education Act and the federal regulations address extracurricular activities in two places. First, the federal regulations provide that the individualized educational program of a student with disabilities must include a statement of the special education and related services and supplementary aids and services that will be provided to enable the child to... be involved in and make progress in the general education curriculum... and to participate in extracurricular and other nonacademic activities. 34 C.F.R. § 300.320(a)(4)(ii).

In addition, the least restrictive environment provisions of the law require that in a school district ensure that a child with a disability participate with nondisabled

children in extracurricular activities to the maximum extent appropriate to the needs of the child and that supplementary aids and services necessary for the child to participate in nonacademic settings be provided. 34 C.F.R. § 300.117.

The West Virginia Regulations mention extracurricular activities in three places. First, the section entitled “FAPE Considerations” states that a school district must ensure that students with exceptionalities are afforded an equal opportunity to participate in extracurricular services and activities. Policy 2419, Chapter 1, § 2(E). Second, the section on IEP development provides that each student’s IEP must describe special education and related services and supplementary aids and services to enable the student to “...have an equal opportunity to participate in extracurricular and nonacademic activities.” Policy 2419, Chapter 5, § 2(G). Third, the IEP development chapter includes least restrictive environment provisions that require that the IEP team determine the supplementary aids and services necessary for the student to participate with students without disabilities in nonacademic and extracurricular services and activities to the maximum extent appropriate. Policy 2419, Chapter 5, § 2(J).

There is not much case law interpreting the provisions of IDEA or Policy 2419 that relate to extracurricular activities. The parties have cited a number of cases that are inapposite because either they pertain to Section 504 and not IDEA or else they are not relevant to the facts of this case. Each party provides one case that needs to be discussed. The school district cites Jefferson County Bd. of Educ. v. S.B., 788 F. Supp.

2d 1347, 56 IDELR 300 (N.D. Ala. 2011), which holds that the nonacademic activity of participation in graduation is not a part of or required by the duty of the school district to provide a free appropriate public education.

The parent, on the other hand, cites Independent School District v. Minnesota Dept. of Educ., 788 N.W. 2d 907, 55 IDELR 140 (Supreme Court Minn. 2010), which holds that the duty under IDEA of a school district to provide for participation by children with disabilities in extracurricular activities is a standalone requirement that is independent of the requirement of a free appropriate public education.

The only circuit Court of Appeal to address the issue extracurricular activities under IDEA is the 8th Circuit. In Sneitzer v. Iowa Dept. of Educ., et al., 796 F. 3d 942, 66 IDELR 1 (8th Cir. 2015), the 8th Circuit determined that the school district provided FAPE to the student and that participation in the extracurricular activity of show choir was not necessary for FAPE. Similarly, the other cases interpreting extracurricular activity requirements under IDEA generally utilize an analysis as to whether or not FAPE has been provided or whether or not the services provided to the student were consistent with the least restrictive environment requirement of IDEA. See Meares v. Rim of the World School District, 66 IDELR 39 (C.D. Calif. 2015); Meares v. Rim of the World School District, 69 IDELR 38 (C.D. Calif. 2016); and Lyon v. Illinois H.S. Assn., 60 IDELR 161 (N.D. Ill. 2013).

Thus, the bulk of the existing case law is more consistent with the Alabama District Court case cited by the school district than it is with the Minnesota state case cited by the parent. It is concluded that the Alabama federal case cited by the school district is better reasoned than the Minnesota state case cited by the parent. There are four specific areas that can give rise to a due process complaint for an IDEA violation: denial of FAPE; placement (which includes least restrictive environment violations); evaluation and identification. IDEA § 615(b)(6)(A); 34 C.F.R. § 300.507(a)(1); Policy 2419, Chapter 11 §4. Accordingly, in order to prove a violation of IDEA, a parent must assert a violation of the law that falls into one of those four categories. To the extent that the Minnesota state decision cited by the parent provides relief for a violation that is not in one of the four categories specified by the Act, it is not consistent with provisions of IDEA.

It is concluded, therefore, based on the majority of the relevant case law, as well as the statutory provisions concerning the four specific areas of violations of IDEA that may be remedied with a due process hearing, that for a parent to prevail, she must prove a violation of one of the four categories cited above concerning the extracurricular activities at issue in a particular case. It is concluded therefore that the school district is not required to provide extracurricular activities as a standalone requirement of IDEA but rather as part of the duty to provide a free appropriate public education or the duty to offer services in the least restrictive environment.

The Supreme Court of the United States has established a two-part test for determining whether a school district has provided FAPE to a student with a disability. There must be a determination as to whether the school district has complied with procedural safeguards as set forth in IDEA and an analysis of whether the student's IEP is reasonably calculated to enable the child to make progress in light of the child's circumstances. Bd. of Educ., etc. v. Rowley, 458 U.S. 178, 102 S. Ct. 3034, 553 IDELR 656 (U.S. 1982); Andrew F. by Joseph F. v. Douglass County School District RE-1, 137 S. Ct. 988, 69 IDELR 174, 580 U.S. \_\_\_\_ (U.S. 2017); M.L. by Leiman v. Montgomery County Bd. of Educ., 867 F. 3d 487, 70 IDELR 142 (4th Cir. 2017).

In the instant case, the parent has not made an argument that the student has been denied FAPE. Indeed, there is no testimony in the record concerning the student's progress, other than a vague reference to ■ overall grade point average being just above a C average. Moreover, to the extent that the school district's failure to mention the student's participation in extracurricular activities in the IEP may be construed to be a procedural error, it is clearly harmless here where there has been no showing that the student's education has been adversely affected by the procedural violation or that the parents' participation rights were significantly impaired. See, IDEA § 615(f)(3)(E)(ii); Policy 2419, Chapter 11, § 4(M); Gadsby v. Gransmick, 109 F. 3d 40, 25 IDELR 621 (4th Cir. 1997); In re Student with a Disability, 58 IDELR 270 (SEA WV 2012).

Concerning the least restrictive environment requirement, a school district must to the maximum extent appropriate permit students with disabilities to participate with nondisabled students in extracurricular activities and must provide an equitable opportunity to participate in extracurricular activities. 34 C.F.R. § 300.117; Policy 2419, Chapter 5, § 2(G) and (J). In the instant case, the parent makes no argument that the school district has violated the LRE requirement. The student's IEP places ■ in general education – part time, with the student in the general education environment 59% of ■ school day. The student has a lot of interaction with ■ non-disabled peers.

Also, the record is clear that the school district provided an equal opportunity for children with disabilities and their nondisabled peers to participate in this fieldtrip. It was the uncontradicted testimony of the ROTC instructor that 12 children with disabilities participate in ROTC, four of them elected not to go on the fieldtrip, and two, including the student, were determined to be not eligible. Six children with disabilities will be going on the fieldtrip and participating in this extracurricular activity. Thus, the record evidence indicates that nondisabled students clearly had an equitable opportunity to participate in this fieldtrip.

Moreover, even if one were to accept the parents' argument that the extracurricular activities requirements of IDEA were separate and distinct from the FAPE and least restrictive environment requirements of IDEA, it is concluded in this case that the school district provided appropriate supplementary aids and services to

permit the student to be able to participate in the extracurricular fieldtrip that is at issue. The credible testimony of the ROTC instructor was that the student was provided with numerous supplementary aids and services in order to permit [REDACTED] to succeed in the ROTC class and thus be eligible for the fieldtrip. Among these supplementary aids and services were the following: multiple opportunities to “make up” uniform inspection violations; the ROTC instructor and a classroom aide walked the student to class on a number of occasions; the ROTC instructor volunteered to give up his lunch period in order to provide the student with an opportunity to eat lunch with the ROTC instructors and various other ROTC students; the student was provided with extended time on assignments and tests; the instructor provided reteaching on a number of occasions; and ; and [REDACTED] was allowed to have open-book tests. The student’s mother testified on direct examination that the student was not provided with supplementary aids and services or accommodations in [REDACTED] ROTC class, but she backed off concerning this testimony during cross-examination. Given the mother’s demeanor and the inconsistent nature of the mother’s testimony, it is concluded that the testimony of the ROTC instructor is more credible and persuasive than that of the parent concerning this point.

One additional argument raised by the parent needs to be addressed. The parent contends that the 80% target rate for the student’s behaviors in the behavior goals section of the student’s IEP should have been used to determine the student’s eligibility



for the fieldtrip, rather than the 100% lack of disciplinary incidents needed for eligibility for the fieldtrip. The parent provides no legal authority to support its argument that annual goals as to behavior should be applied to discipline requirements for extracurricular field trips. The argument is rejected. First, it should be pointed out that the parents' argument misconstrues the requirement for the fieldtrip; it does not require that the student exhibit good behavior all the time, but rather that he not receive disciplinary referrals during the school year. Even assuming *arguendo*, however, that the parents' argument accurately stated the requirement, as has been noted above, the parent has not shown that by excluding the student from the fieldtrip either that the student has been denied FAPE or that the school district has violated the least restrictive environment provisions of the Act. Accordingly, since the extracurricular activities portion of the law is not a standalone requirement, the parent has not articulated an actionable violation of IDEA. The parents' argument that the 80% target should have been employed with regard to disciplinary behaviors is rejected.

It is concluded that the school district's exclusion of the student from the fieldtrip at issue did not violate IDEA, the federal regulations or Policy 2419.

## **ORDER**

Based upon the foregoing, it is HEREBY ORDERED that all relief requested in the instant due process complaint is hereby denied, and the Complaint filed herein is dismissed.

## **APPEAL RIGHTS**

Any party aggrieved by the findings and decisions made herein has a right to 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 of the issuance of this decision. Policy 2419, Chapter 11, § 4(N).

ENTERED: May 25, 2018

*James Gerl*

James Gerl, Certified Hearing Official

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing DECISION  
by e-mailing a true and correct copy thereof as follows:

[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]

on this 25th day of May, 2018

*James Gerl*

James Gerl, Certified Hearing Official  
Hearing Officer

[REDACTED]  
[REDACTED]  
[REDACTED]