District of Columbia

Office of the State Superintendent of Education

OSSE
Student Hearing Office
February 19, 2013

Office of Review and Compliance
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Confidential

Parent on behalf of the Student[1], Petitioners, v. District of Columbia Public Schools ("DCPS") and District of Columbia Department of Youth Rehabilitation Services ("DYRS") Respondents. Case # 2012-0791	HEARING OFFICER'S DETERMINATION Hearing Date: January 28, 2013 <u>Representatives:</u> Counsel for Petitioner: Elizabeth Jester, Esq. P.O. Box 1165 Great Falls, Virginia 22066 Counsel for DCPS: Maya Washington, Esq. Assistant Attorney General 1200 First Street, NW - WDC Counsel for DYRS: Lindsey O. Appiah, Esq. Cherie Cooley, Esq. Assistant General Counsel – DYRS 450 H Street NW 10th Flr. - WDC <u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened on January 28, 2013, at the District of Columbia Office of the State Superintendent of Education ("OSSE") Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age [redacted] and resides in the District of Columbia. The student has been determined eligible under IDEA with a disability classification of intellectual disability ("ID"). Pursuant to a June 19, 2009, Hearing Officer's Determination ("HOD") the student was placed at ("School A") a private full-time special education school. The student attended School A for the 2009-2010 school year ("SY") and most of SY 2010-2011. During SY 2010-2011 he was detained for a short while at the District of Columbia juvenile detention center, Youth Services Center ("YSC"), located on Mt. Olivet Road NE in the District of Columbia. District of Columbia Department of Youth Rehabilitation Services ("DYRS" operated YSC and DCPS is the local educational agency ("LEA') for the school operated at YSC.

While at School A during SY 2009-2010 the student's individualized educational program ("IEP") was developed on September 1, 2009. In September 2009 Petitioner had independent evaluations conducted of the student including a psychological evaluation, a vocational, and a speech language evaluation. In November 2009 a functional behavioral assessment ("FBA") was conducted. The evaluations were reviewed by an IEP and the student's IEP was updated on February 23, 2010, and the data from the independent evaluation was incorporated into the student's IEP. The IEP prescribed that the student be provided 25 hours per week of specialized instruction outside general education and the following weekly related services both to be provided outside general education: 1 hour of speech-language pathology and 1.5 hours of behavioral support services.

While the student was at YSC, on March 11, 2011, an IEP team at YSC reviewed the student's IEP and determined the student still required all his educational services to be provided outside general education. The student's hours of specialized instruction were reduced, however, by 1 hour to 24 hours per week, and the IEP no longer prescribed extended school year ("ESY") services for the student.

After being released from YSC the student returned to School A in May 2011, where he attended until the end of SY 2010-2011. The student did not attend ESY during summer 2011. He was subsequently arrested and this time placed at New Beginnings ("NB"), the juvenile detention center operated by DYRS located in Laurel, Maryland, at the start of SY 2011-2012. While the student attended the school at NB, DYRS convened an IEP meeting for the student on October 6, 2011, and the team changed the student's IEP to prescribe that the 24 hours of the student's

specialized instruction be delivered inside general education. The least restrictive environment ("LRE") page of the student's IEP reflected that his related services were to be provided outside general education.

The student was released from NB at the end of May 2012. Prior to his release a meeting was held with a DCPS representative present along with the student's grandmother ("guardian"). The student was not yet age 18 at the time. The student was not returned to School A. Rather, the student's guardian enrolled the student at ("School B") a public charter school for which DCPS is the LEA. The student attended School B for the first semester of SY 2012-2013. During that time the student's IEP that prescribed all specialized instruction inside general education remained in effect and was the IEP School B implemented. School B revised the student's IEP in November 2012 to prescribe some specialized instruction outside general education but most hours were still provided inside general education. The student had behavioral and academic difficulties while at School B and was suspended. School B held a manifestation determination review meeting ("MDR") and determined the student's behavior was a manifestation of his disability.

On November 26, 2012, Petitioner filed a complaint seeking the student's return to School A with DCPS and/or DYRS funding. The complaint alleged violations against both DCPS and DYRS. First, Petitioner alleged DYRS inappropriately changed the student's IEP while he was attending school at NB in order to deliver his specialized instruction in general education rather than outside general education.[2] Secondly, Petitioner alleged that when the student was released from NB, DCPS refused (in violation of the HOD) to return the student to School A.[3] Petitioner alleged the student was still in need of all services outside general education and School B could not implement such an IEP and was therefore an inappropriate placement for the student.

Petitioner also alleged the student's triennial evaluations were not conducted and should have been conducted by September 2012. Petitioner acknowledged that evaluations were conducted in 2011, but asserted they were court ordered evaluations and were not reviewed by an IEP team.

Petitioner sought as relief that the student be placed and funded by DCPS and/or DYRS at School A, that DCPS and/or DYRS be ordered to fund the following independent evaluations: psychological, adaptive, speech/language and FBA and convene a meeting to review the evaluations and update the student's IEP as appropriate, and fund an independent provider to review the student's records and propose appropriate compensatory education for the student once the independent evaluations have been completed and reviewed by an IEP team.

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[2] Petitioner also alleged no new evaluations were conducted that supported the change in the student's IEP and LRE when he was attending school at NB. Petitioner alleges the change was made to the IEP to fit the placement rather than to reflect the student's needs.

[3] Petitioner alleged the guardian asked that the student be returned to School A and DCPS allegedly refused. Petitioner alleges the guardian was not informed of her rights at the meeting including the right for student to be returned to School A.

On December 4, 2012,[4] Petitioner filed an amended complaint reasserting the claims against DCPS and DYRS and adding OSSE as a respondent alleging OSSE had failed to monitor DCPS and DYRS in provision of a FAPE to the student.[5]

DCPS filed a response to the complaint on December 6, 2012. DCPS asserted it did not deny the student a FAPE. DCPS acknowledged the student attended School A from the time he was placed there by the July 19, 2009, HOD until he was detained at YSC: December 10, 2010, to January 6, 2011. He returned to YSC on February 23, 2011 and stayed there until April 26, 2011, and was at NB from April 28, 2011, until May 6, 2011 and from August 27, 2011, until May 29, 2012.

DYRS filed a response to the complaint on December 14, 2012. DYRS asserted it did not deny the student a FAPE. DYRS asserted it is not a LEA and education at YSC and NB is provided under contracts between DYRS and DCPS and Forever Foundation at Maya Angelou Academy ("MAA") respectively. DYRS asserted that DCPS complied with the July 19, 2009, HOD but that placement was based on a December 15, 2008, IEP that was validly reviewed and modified during an annual review and the student's placement was changed by his subsequent detention.

OSSE filed a response to the complaint on December 14, 2012. OSSE denied each allegation of denial of FAPE to the student and asserted that as the state educational agency ("SEA") it has ultimate responsibility to ensure that IDEA is implemented. However, OSSE asserted that DCPS law requires that LEAs assume direct responsibility to provide students a FAPE and OSSE is not generally responsible for providing each student a FAPE and not responsible for every alleged failure of a LEA or other agency with educational responsibilities to students with disabilities.

The resolution meeting was held December 13, 2012, with all parties participating. The meeting was unsuccessful in resolving the issues. Petitioner desired to proceed directly to hearing, but no other party agreed. Thus, the full 30-day resolution period expired before the 45-day timeline began. Petitioner's counsel filed the amended complaint on December 4, 2012. Because the time line was measured based upon the amended complaint the 45-day period began on January 4, 2013, and ends (and the HOD is due) on February 17, 2013.

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[4] Along with the amended complaint on December 4, 2012 Petitioner's counsel filed a motion to invoke stay-put protections alleging that School A was the student's stay-put placement and that he should be immediately return to School A with DCPS &/or DYRS &/or OSSE funding. During the PHC DCPS counsel stated that DCPS was willing to return the student to School A. Thus, the Hearing Officer considered the motion for stay-put protections moot as reflected in the pre-hearing order ("PHO"). DCPS was to provide a prior notice by December 28, 2012, which was issued January 2, 2013, and is DCPS Exhibit 1.

[5] Petitioner alleged OSSE failed to provide proper oversight and monitoring of the actions of LEAs and/or DYRS in providing FAPE: (1) When students, including this student, are discharged from involuntary detention at NB, (2) By failing to ensure implementation of this student's IEP at School B and NB, (3) By failing to ensure this student was placed in an appropriate placement when he was discharged from NB, (4) By failing to ensure this student returned to School A upon his discharge from NB, (5) By failing to ensure this student's guardian was apprised of her rights, (6) by failing to ensure the student's triennial evaluations were conducted.

A pre-hearing conference ("PHC") in this matter was held on Thursday, December 20, 2012.[6] The conference was conducted by telephone. On December 29, 2012, the Hearing Officer issued a pre-hearing order ("PHO") stating the issue to be adjudicated and setting hearing dates.

On January 10, 2013, OSSE filed a motion to dismiss the claims against OSSE. On January 15, 2013, Petitioner's counsel filed a motion for additional time to file an opposition to the motion to dismiss. Petitioner's motion was granted over OSSE's objection and on January 21, 2013, Petitioner filed an opposition to the motion to dismiss. On January 22, 2013, the Hearing Officer issued an order granting OSSE's motion to dismiss the claims against OSSE.[7]

Petitioner and the remaining respondents, DCPS and DYRS, appeared at the hearing on January 28, 2013, and presented documentary evidence and Petitioner presented a single witness and the case was submitted to the Hearing Officer for a final decision of the issues to be adjudicated.

The issues adjudicated are:

Whether DCPS and/or DYRS denied the student a free and appropriate public education ("FAPE") by any of the following:

(1) Failing or refusing to place the student back at School A as required by the HOD and when he was released from interim detention at YSC and NB and when the guardian requested ?,

(2) Failing to conduct triennial evaluations,

(3) Failing to provide an appropriate placement for SY 2012-2013,

4) Failing or refusing to change the student's IEP to prescribe all services out of general education, and

(5) Failing to inform the student's guardian of her rights including the right to have the student returned to School A,

Did DYRS deny the student a FAPE by any of the following:

(6) Failing to include ESY services in his October 2011 IEP,

(7) Failing to issue a prior written notice of changes to the student's October 2011 IEP.

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[6] The pre-hearing conference was convened on the first date that all counsel were available following the resolution meeting.

[7] A decision to be rendered in claims involving OSSE within 45 days of the complaint being filed. Therefore, claims against OSSE should have been decided by January 19, 2013. However, Petitioner requested during the PHC and later requested by written motion that the claims against OSSE be continued so that they could track with the same timeline as the claims being adjudicated for the other respondents. On January 15, 2013, Petitioner filed the motion to continue and on January 18, 2013, the Chief Hearing Officer granted the motion.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witness and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-23 and DCPS Exhibit 1-5 and DYRS 1-4) that were admitted into the record and are listed in Appendix A. The witness is listed in Appendix B.

FINDINGS OF FACT: [8]

1. The student is age [redacted] and resides in the District of Columbia. The student has been determined eligible under IDEA with a disability classification of ID. (Petitioner's Exhibit 9-1)

2. The student did not begin formal schooling until he was transferred from his mother to his grandmother's care at age nine. He started school in third grade and began receiving special education shortly thereafter. Although the student made academic gains after starting school he remained significantly below grade level in his academic skills. The student attended a DCPS school through eighth grade until a June 19, 2009, HOD ordered DCPS to place the student at School A. (Petitioner's Exhibits 1-9, 14-3))

3. On June 25, 2009, DCPS issued a prior written notice per the HOD placing the student at School A. The student first attended summer school at School A and began ninth grade at the start of SY 2009-2010. (Petitioner's Exhibit 2-1, 14-1, 14-3)

4. While at School A during SY 2009-2010 the student's individualized educational program ("IEP") was developed on September 1, 2009. In September 2009 independent evaluations were conducted of the student including a psychological evaluation, a vocational, and a speech-language evaluation. In November 2009 a functional behavioral assessment ("FBA") was conducted. The independent comprehensive psychological evaluation determined the student had extremely low cognitive abilities and very low academic achievement. (Petitioner's Exhibits 4, 14-12, 14-13, 15, 16, 17)

5. An IEP team reviewed the independent evaluations and the student's IEP was updated on February 23, 2010, with the data from the evaluations. The IEP prescribed that the student be provided 25 hours per week of specialized instruction outside general education and the following weekly related services both to be provided outside general education: 1 hour of speech-language pathology and 1.5 hours of behavioral support services. (Petitioner's Exhibits 5-1, 5-9, 14, 15, 16, 17)

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[8] The evidence that is the source of the Finding of Fact 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.

6. The student attended School A all of SY 2009-2010 and part of SY 2010-2011. In December 2010 when the student was age 16, he was charged in a juvenile criminal matter in DC Superior Court. As a result, the student was detained for a short while at Youth Services Center ("YSC") located on Mt. Olivet Road NE in the District of Columbia. DCPS is the local educational agency ("LEA') for the school operated at YSC. (DYRS Exhibit 2-3)

7. The student was placed at YSC in December 2010 until early January 2011 when he was released to a youth shelter home and then released to return to his grandmother's home on February 10, 2011. The student resumed attending School A on January 7, 2011, and remained until February 17, 2011. The student was arrested on February 23, 2011, and returned to YSC where he remained until April 26, 2011. He was then transferred to NB where he remained from April 28, 2011, until May 6, 2011. (DYRS Exhibit 2-3, Petitioner's Exhibits 3-2, 22)

8. While the student was at YSC the Court ordered a psycho-educational evaluation of the student that was conducted in February 2011. The student was age 16 and in tenth grade at the time. The evaluation found the student's cognitive abilities to be very low with a full scale IQ of 67. The student's Woodcock Johnson III scores revealed he was operating at second level in reading and written expression and at fourth grade level in math. The Court also ordered a psychiatric evaluation. That evaluation diagnosed the student with Impulse Control Disorder and possible Mood Disorder and recommended the student for individual and family therapy. (DYRS Exhibit 2-1, 2-8, 2-11, 2-17, 2-24, 2-25)

9. The student's academic scores placed him far below grade level in all academic areas assessed. The student had the following scores on the Woodcock Johnson III ("WJ3) DYRS administered in February 2011:

   (DYRS Exhibits 2-11)

	Standard Score	Percentile Rank	Grade Equivalency
Broad Reading	43	<1	2.4
Math Calculations Skills	69	2	4.8
Written Expression	56	<1	2.6
Academic Skills	48	<1	3.1
Academic Fluency	62	<1	3.7

10. On March 11, 2011, an IEP team and YSC reviewed the student's IEP and determined the student still required all his educational service provided in the IEP to be delivered outside general education. The student's hours of specialized instruction were reduced by 1 hour to 24 hours per week. The present levels of performance in the student's IEP were based upon the student's September 2009 psychological evaluation. The student's

services remained out of general education but the IEP did not prescribe that the student should received ESY services as his previous IEP did. (Petitioner's Exhibits 5-9, 5-11, 6-1, 6-10, 6-11, 6-13 (Petitioner's Exhibits 6-10, 14-8)

11. Although the court ordered evaluations were conducted in February 2011, the reports for the evaluations were not completed until April 2011. Therefore, the March 2011 IEP developed at YSC did not reflect the information and data from that evaluation. (Petitioner's Exhibit 6-3, 6-4)

12. The student's grandmother (guardian) attended an IEP meeting at YSC in March 2011. She remembers that meeting but does not remember whether any formal evaluation reports for the student were discussed. (Guardian's testimony)

13. The student returned to School A on May 10, 2011, and continued to attend until June 10, 2011. The student earned the following grades in the following subjects at YSC during the second half of ninth grade during SY 2010-2011: (Petitioner's Exhibit 3-2, DYRS Exhibit 4-1)

Subject	**Grade**
English 1	D

During the same school year while at School A the student earned the following grades in the following subjects:

Subject	**Grade**
Algebra 1	C
Biology 1	D
Career Tech	F
English 2	C
Spanish 1	D
Work History 2	D

The student earned a total of 5.5 credits toward his high school diploma during SY 2010-2011.

14. The student did not return to School A for SY 2011-2012. He was marked with unexcused absences for the first few days of that school year. (Petitioner's Exhibit 3-2, 3-3)

15. The student was again detained by the juvenile justice system sometime near the start of SY 2011-2011 and was sent to the New Beginnings ("NB"), the DYRS juvenile dentition center in Laurel, Maryland. NB operates a school for its juvenile residents. While the student was at NB, DYRS conducted a WJ3 assessment for the student on September 15, 2011. (DYRS 2-27, 2-28)

16. The student's academic scores placed him far below grade level in all academic areas assessed. The student had the following scores on the WJ3 DYRS administered on September 15, 2011:

    (DYRS Exhibits 2-28)

	Standard Score	Percentile Rank	Grade Equivalency
Broad Reading	61	.5	2.8
Reading Fluency	70	2	3.2
Passage Comprehension	49	<.1	2.1
Letter Word Identification	58	.3	3
Broad Math	69	2	4.6
Math Fluency	80	2	3.2
Math Calculation Skills	73	4	5.3
Calculation	71	3	4.8
Applied Problems	73	4	3.8

17. While the student attended the school at NB, DYRS convened an IEP meeting for the student on October 6, 2011, and the team changed the student's IEP to prescribe that the 24 hours of the student's specialized instruction be delivered inside general education. The student's least restrictive environment ("LRE") page of the IEP reflected that only the student's related services were to be provided outside general education. The NB school used a teaching model in with a low student to teacher ratio (of no more than ten students with two classroom teachers and one special education case manager) where the general education teacher co-taught with special education teacher. "The co-teacher model allowed him to have his special education needs met in the general education setting." (Petitioner's Exhibits 7-8, 7-9, 8)

18. The student's October 2011 IEP that was developed while he was at NB reflects the data from the WJ3 conducted at NB in September 2011. The emotional social and behavioral development present levels and goals, however, were the same as the previous March 2011 IEP. The student's IEP math goals were continued from the March 2011 IEP; however his reading goals were revised to reflect the data from the September 2011 WJ3. (Petitioner's Exhibit 7-2, 7-3

19. The student attended that school while detained at NB and remained at NB until May 31, 2012, when he was discharged and released to a group home. The student earned the

following grades in the following subjects while in tenth grade at NB during SY 2011-2012: (DYRS Exhibits 3-1, 4-1)

Subject	**Grade**
Art	B+
English I	B
Extended Literacy 9	B-
Health and Physical Education 10	C
Integrated Math	B+
World History	B-

The student earned a total of 6 credits toward his high school diploma during SY 2011-2012.

20. Upon discharge from NB YSC noted in the document that the student required an educational placement with small class size with a therapeutic setting with full time special education services available. No new prior notice was issued when he was released from NB and his IEP was not amended. (Petitioner's Exhibits 7, 8)

21. The student was released from NB at the end of May 2012. Prior to his release a meeting was held with a DCPS representative present along with the student's grandmother ("guardian"). The student was not yet age 18 at the time. The student's guardian enrolled the student at ("School B"), a public charter school for which DCPS is the LEA. The student was not returned to School A. (Guardian's testimony)

22. After the student's release from NB to the group home he was engaged in a summer program for which he received a stipend. A DYRS worker helped to ensure the student was enrolled at School B for SY 2012-2013. (DYRS Exhibits 3-1, 4, 5)

23. The student's guardian participated in a meeting in the group home once the student was released from NB. At that meeting the guardian did not specifically request any school for the student to attend upon his release. She talked with staff at School A about the student returning to School A, but did not mention to DCPS or DYRS about him returning to School A. There was some consideration given to the student attending Options Public Charter School; however, based on her own information about School B, she chose to enroll the student at School B. The student was okay when he first began attending School B but then began to develop behavior problems. (Guardian's testimony)

24. The student attended School B for the first semester of SY 2012-2013. During that time the student's IEP that prescribed all specialized instruction inside general education remained in effect and was the IEP School B implemented. School B revised the student's IEP on November 15, 2012 to prescribe some specialized instruction outside general education but most hours were still provided inside general education. The student had behavioral and academic difficulties while at School B and was suspended.

School B held a manifestation determination review meeting (MDR) and determined the student's behavior was a manifestation of his disability. (Petitioner's Exhibit 9-1,9-13, 9-14, 18, 19)

25. On October 1, 2012, the student was sent home from School B because of fighting with another student and informed he could not return unless and until his parent returned with him so he could be readmitted. (Petitioner's Exhibit 18-1, 18-2)

26. On October 9, 2012, the student had a FBA and School B held a manifestation determination review ("MDR") meeting. During that meeting the student's counselor at School B noted that the student "not being able to compete with his peers academically causes low self-esteem." The student was out of school for 10 days. It appears that at School B there was no 30-day review the student had not met with a clinician because the clinician was no longer at the school. The student's behavior was determined to be a manifestation of his disability. The meeting notes indicate that both the guardian and the student did not want the student to return to the school because of "safety concerns and fear of retaliation, bullying and [the student] not be[ing] able to keep up with the rigor in an inclusion setting." The notes went on to state: "This school may not be the best placement for the student and an alternate school should be considered such as …[School A]." The guardian was provided the procedural safeguards and signed as having received them. (Petitioner's Exhibits 18, 19-1, 19-2, 19-3, 19-5)

27. On January 2, 2013, DCPS issued a prior written notice placing the student at School A. The student was able to return to School A on January 7, 2013, the first day of school for the second semester of SY 2012-2013. However, the student began attending School A the week of January 21, 2013. (Guardian's testimony, Petitioner's Exhibit 21)

28. In November 2012 DCPS, DYRS and OSSE signed a Memorandum of Agreement ("MOA") delineating the respective responsibilities of each agency to ensure students who are detained by DYRS receive appropriate educational services and there is communication and coordination of services between the agencies when a student leaves DYRS custody and is returned to the community and returned to a DCPS or other school. This agreement was not in place at the time the student was released by DYRS from NB. (Petitioner's Exhibit 23)

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. [9] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

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

ISSUE: Whether DCPS and/or DYRS denied the student a free and appropriate public education ("FAPE") by any of the following:

(1): Failing or refusing to place the student back at School A as required by the HOD and when he was released from interim detention at YSC and NB and when the guardian requested.

Conclusion: Petitioner failed to sustain the burden by preponderance of the evidence on this issue.

Although the June 19, 2009, HOD required that DCPS immediately place the student at School A, the HOD did not require that the student remain at School A for the duration of his years in school. This Hearing Officer takes administrative notice that a student's placement unless so otherwise designated is to be reevaluated each school year.[10] The student did not attend School A at all during SY 2011-2012[11] and it was, therefore, reasonable to conclude that the student could be placed when leaving NB at any appropriate educational placement. Therefore, the Hearing Officer does not conclude that the placement location designated in June 19, 2009, HOD

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[9] 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.

[10] …[T]he public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

[11] FOF #s 6 & 14

remained in effect indefinitely. Once the student was placed at NB and in the custody of DYRS his placement was no longer School A until DCPS issued the new prior notice placing him there on January 2, 2013.

Petitioner submitted insufficient evidence from which the Hearing Officer could conclude that when the student was released from NB, DCPS was obligated to return the student to School A. The testimony of the student's guardian was that she talked with the personnel at School A, and did not mention anything about the student returning to School A to anyone from DCPS or DYRS. [12]

Although there was no prior notice issued changing the student's location from School A, or from NB, the guardian enrolled the student at School B of her own accord. Petitioner failed to establish that there was a right for the student to be returned to School A, therefore, any failure by DCPS and/or DYRS to tell the guardian that she had the right for the student to be returned there is misplaced and inaccurate.

(2): Failing to conduct triennial evaluations.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence on this issue.

34 C.F.R.§ 300.303 provides:

> (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with Sec. Sec. 300.304 through 300.311--
> (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
> (2) If the child's parent or teacher requests a reevaluation.
> (b) Limitation. A reevaluation conducted under paragraph (a) of this section--
> (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
> (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

Independent evaluations were conducted of the student in September 2009 and those evaluations were reviewed by an IEP team and incorporated into the student's IEP in February 2010.[13] Thus, the earliest that the student's triennial evaluations would have been conducted was September 2012. The evidence demonstrates that court ordered evaluations were conducted of the student in February 2011 and a WJ3 assessment was conducted in September 2011 when the student was

[12] FOF #s 21, 22, 23
[13] FOF # 5

detained at NB.[14] The evidence is clear that at least the WJ3 assessment was reviewed by an IEP team and incorporated in the student's IEP.[15]

Although there was no specific evidence that the other court ordered evaluations were reviewed by an IEP team, Petitioner did not present sufficient evidence to conclusively prove that these evaluations were not reviewed by an IEP team at any of the schools the student attended at YSC and or NB. Even if they had not been so reviewed, Petitioner failed to present any evidence that would indicate that the student was harmed by the evaluations not being reviewed or other reevaluations having not been conducted by September 2012.

Absent some specific evidence of harm to the student, the failure to conduct reevaluations, even if it could be proved to have occurred, is a procedural violation and does not rise to the level of a denial of a FAPE. 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) The Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

(3): Failing to provide an appropriate placement for SY 2012-2013.

Conclusion: The evidence demonstrates that School B was an inappropriate placement for the student. Petitioner sustained the burden of proof by a preponderance of the evidence on this issue.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity with the LRE provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

The decision to place the student at School A was a location of services decision that was within the discretion of DCPS. Courts hold that school district may designate schools for students as long as the District assigns a school that may appropriately implement a student's IEP. *T.Y. v. New York City Department of Education*, 584 3d 412 (2d Cr. 2009)

Although the student's IEP at the time he was released from NB indicated the student's specialized instruction could be delivered in a general education setting, and it was reasonable perhaps for the staff at School B to presume that it could meet the student's needs, the facts behind this provision in the student IEP should have been clear to both DCPS and DYRS at the time the student was discharged from NB. The evidence demonstrates that DYRS was aware that the student required placement with small class size and with a therapeutic setting that could provide the student full time special education services.[16]

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[14] FOF # 8
[15] FOF # 10
[16] FOF #s 17 & 20

In addition, it should have been clear to DCPS looking at the present levels of performance in the student's IEP that reflected that he was operating on a second to fourth grade level academically that the student would have difficulty competing in a general education classroom.[17] Once the student arrived at School B he immediately encountered difficulties that resulted in disruptive behaviors. By the time of the student's manifestation meeting in October 2012, it was clear to the staff at School B that the inclusion setting that the student was in at School B was inappropriate for him.[18] At that point DCPS as the LEA should have acted promptly to find a more suitable placement for the student. The failure to place the student in an appropriate educational placement when he was released from NB and to ensure he was in an appropriate placement by the start of SY 2012-2013 was a denial of a FAPE to the student and the Hearing Officer concludes it was responsibility of both DCPS and DYRS to ensure the student was properly placed.[19]

4): Failure or refusing to change the student's IEP to prescribe all services out of general education.

Conclusion: Petitioner sustained the burden of proof on this issue by a preponderance of the evidence.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also *Scott v. District of Columbia*, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

20 U.S.C. 1414(a)(i) defines IEP as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed as a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

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[17] FOF #s 16 & 17

[18] FOF # 26

[19] Although the November 2012 MOA was not in effect at the time the student was released from NB, based upon the facts of this case equity requires that both agencies share in this responsibility as the student was being transitioned from one educational agency to another, thus DYRS is directed to participate in the order below in providing relief to the student and its counsel acknowledged during the hearing the agency's willingness to fund the student's independent psychological evaluation.

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

Although the facts of this case demonstrate that the student's IEP was changed while he was at NB so that the student's specialized instruction could be provided in general education, the facts also demonstrate that while at NB the student received his instruction in a small class size, with multiple teachers including a special education case manager in the classroom.[20] While the student attended school at NB the student earned some of the best grades of his recent educational career and earned 6 credits toward his high school diploma. [21] Thus, the Hearing Officer concludes that rather than being harmed by the change in the IEP while the student attended school at NB, he benefited. However, the LRE in the student's IEP when he left NB belied the student's true needs for what NB noted was a need for a therapeutic setting where the student would have access to full time special education services.

Although there is no indication that anyone made a request to change the LRE of the IEP or that either DYRS or DCPS refused to do so, there was obviously, no conscientious efforts by either agency to make the needed change to the IEP and as a result the student wound up at an inappropriate placement at School B where he was placed in inclusion general education classes and struggled. As discussed above the student was clearly in an inappropriate program and placement at School B and the failure to change the student's LRE in the IEP was a direct cause. Consequently, the Hearing Officer concludes Petitioner sustained the burden of proof on this issue and that the student was denied a FAPE and both agencies were liable the lapse.

(5): Failing to inform the student's guardian of her rights including the right to have the student returned to School A.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence.

DCMR §5-E3020.1[22] provides that a copy of the procedural safeguards be made available to the

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[20] FOF # 17

[21] FOF # 19

[22] 3020.1 (a) Copy To Parents - A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only one (1) time a year, except that a copy also shall also be given to the parents:
(i) upon initial referral or parental request for evaluation;
(ii) upon the first occurrence of the filing of a complaint for a due process hearing as described in this Chapter; and
(iii) upon a request by a parent.

(b) Internet Website - A local educational agency may place a current copy of the procedural safeguards notice on its Internet website.

parents of a child with a disability only one (1) time a year.

The evidence indicates that the student guardian was provided the procedural safeguards when she attended the meeting at School B. [23] Although there is evidence that the guardian received and signed for the procedural safeguards at a meeting at School B, there was insufficient evidence presented by Petitioner that she was not provided those rights at any meeting earlier at YSC, School A or when the student was discharged from NB. The guardian's testimony did not address this issue.

Petitioner has the burden of proof on this issue and the lack of any direct evidence that indicates she was not provided the notices then the Hearing Officer must conclude that Petitioner failed to sustain the burden of proof on this issue (sentence…). As discussed above, the Hearing Officer has concluded that there was no right for the student to be placed back at School A when he was released from NB and thus, any failure by DCPS and/or DYRS to make her aware of such a right is misplaced and inaccurate.

Did DYRS deny the student a FAPE by any of the following:

(6): Failing to include ESY services in his October 2011 IEP.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence.

Pursuant to 34 C.F.R. §Sec. 300.106

> (a) (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
> (2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with Sec. Sec. 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.
> (3) In implementing the requirements of this section, a public agency may not--
> (i) Limit extended school year services to particular categories of disability; or
> (ii) Unilaterally limit the type, amount, or duration of those services.
> (b) Definition. As used in this section, the term extended school year services means special education and related services that--
> (1) Are provided to a child with a disability--
> (i) Beyond the normal school year of the public agency;
> (ii) In accordance with the child's IEP; and
> (iii) At no cost to the parents of the child; and (2) Meet the standards of the SEA.3017

DCMR §5-E3017 provides:

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[23] FOF # 26

3017.1 The LEA shall ensure that extended school year services are available as necessary to provide FAPE to a child with a disability.

3017.2 Extended school year services must be provided only if a child's IEP team determines, on an individual basis (in accordance with § 3007, Individualized Education Program (IEP) Development), that the child needs those services in order to receive FAPE.

The evidence demonstrates that the student's IEP while he attended School A during SY 2010-2011 prescribed ESY services. However, the IEP created at YSC in March 2011 did not provide for those services.[24] After the student returned to School A in May 2011, there certainly was an opportunity for School A to have reviewed the students IEP to determine if ESY services were warranted. Because the student attended School A in prior summers for ESY one might presume that the staff at School A, had they thought the student required ESY services during the summer of 2011, would have prescribed them. There was no evidence, however, presented by Petitioner that there was a failure by School A and/or DCPS to consider the student for ESY that summer. It is just as reasonable to conclude, absent any evidence on this issue, that the School A staff concluded the student did not warrant ESY services.

There is no evidence that DCPS conducted a review to determine if the student was in need of ESY services at the end of SY 2010-2011. Despite the fact that there is no evidence that such a review was made Petitioner did not put forth any evidence to demonstrate that the student was in need of ESY services or that the student was harmed by no such determination being made.[25] A violation must negatively affect a student's substantive rights. See *Lesesne v. District of Columbia* 447 F. 3d 828 (D.C. Cir. 2006). Based on the factors discussed above, the Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student was denied a FAPE by DCPS and/or DYRS not making the ESY determination for SY 2010-2011.

(7): Failing to issue a prior written notice of changes to the student's October 2011 IEP.

Conclusion: Petitioner failed to sustain the burden of proof by a preponderance of the evidence on this issue.

DCMR §5-E3024.1 provides:

3024.1 Consistent with 20 U.S.C. § 1415(b)(3), the LEA shall provide written notice to the parent of a child with a disability before the LEA proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child.

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[24] FOF # 10

[25] Extended school year services are only necessary to a FAPE when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he/she is not provided with an educational program during the summer months. (See *M.M. School District of Greenville County* 37 IDELR 183 (United States Court of Appeals 4th Circuit (2002))

Petitioner alleges there was no prior notice issued to the guardian for the change in the student's IEP and LRE to prescribe specialized instruction inside general education. Although the student's IEP at the time he was at NB indicated the student's specialized instruction could be delivered in a general education setting the facts behind this provision in the student IEP, it was clear from the evidence that while at NB the student received his instruction in a small class size, with multiple teachers including a special education case manager in the classroom. While the student attended school at NB the student earned some of the best grades of his recent educational career and earned 6 credits toward his high school diploma. Thus, the Hearing Officer concludes that rather than being harmed by the change in the IEP while the student attended school at NB, he benefited. [26]

A violation must negatively affect a student's substantive rights. See *Lesesne v. District of Columbia* 447 F. 3d 828 (D.C. Cir. 2006). Based the factors discussed above, the Hearing Officer concludes Petitioner did not sustain the burden of proof by a preponderance of the evidence that the student was denied a FAPE by DYRS failing to issue a prior notice of the change to the student's IEP. Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of proof by preponderance of evidence on this issue.

Appropriate Relief:

IDEA authorized District Courts and Hearing Officers to fashion "appropriate" relief, e.g., 20 U.S.C. § 1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations." *Florence County Sch. Dist. For v. Carter*, 510 U.S. 7, 15-16; *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005).

Petitioner has requested as relief the following: the student be placed and funded by DCPS and/or DYRS at School A, that DCPS and/or DYRS be ordered to fund the following independent evaluations: psychological, adaptive, speech/language and FBA and convene a meeting to review the evaluations and update the student's IEP as appropriate, and fund an independent provider to review the student's records and propose appropriate compensatory education for the student once the independent evaluations have been completed and reviewed by an IEP team.

As noted, DCPS agreed to place the student at School A, has issued a prior notice to that effect and the student has already begun attending. Thus, the Hearing Officer concludes that this remedy sought has already been granted. The Hearing Officer hereby determines that it is equitable and warranted as a remedy for the denials of FAPE to the student that the desired independent evaluations be provided. Thus, in the order below both DCPS and DYRS are directed to fund specific evaluations. However, as to compensatory education, Petitioner did not set forth any specific request for compensatory services beyond the request for funding of an independent provider to review the student's records and propose appropriate compensatory

[26] FOF # 19

education. Petitioner put forth no evidence as to cost of such a provider and amount of time needed to fashion such a proposal.

Compensatory Education

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

Petitioner failed to present evidence of how any award would be reasonably calculated to provide the educational benefits that likely would have accrued had the student been in an appropriate educational placement at the start of SY 2012-2013.

However, when a denial of FAPE has been proven it is inequitable for the student to be provided nothing. Consequently, the Hearing Officer will order, based on equitable considerations, and as compensatory education, that DCPS provide the student a nominal amount of independent tutoring or mentoring services as compensation for the denial of a FAPE determined herein.

ORDER:

1. DYRS shall, within thirty calendar days of the issuance of this order, fund a comprehensive psychological evaluation for the student at the OSSE designated and approved rate.

2. DCPS shall convene, within 30 calendar days of the issuance of this order, an IEP meeting at School A, to review and update the student's IEP and determine if any additional evaluation(s) should be conducted.

3. DCPS shall fund the following independent evaluations at the OSSE designated and approved rates: Adaptive, Speech-Language, and Functional Behavioral Assessment.

4. Within twenty school days of the receipt of the independent evaluations funded pursuant to this order, DCPS shall convene an IEP meeting at which the evaluations will be reviewed and the student's IEP updated.

5. As compensatory education for the denials of FAPE determined herein DCPS shall provide the student ten (10) hours of independent tutoring or independent mentoring, whichever Petitioner chooses, at the OSSE approved rate(s). This award must be used by the August 31, 2013.

APPEAL PROCESS:

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

/S/ *Coles B. Ruff*

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Coles B. Ruff, Esq.
Hearing Officer
Date: February 17, 2013