

DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION  
State Enforcement and Investigation Unit  
Office of Review and Compliance

**STUDENT HEARING OFFICE**  
1150 5<sup>th</sup> Street, S.E., Washington, DC 20003  
Phone: (202) 698-3819 | Fax: (202) 698-3825

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STUDENT HEARING OFFICE  
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**CONFIDENTIAL**

In the Matter of:

STUDENT,

Petitioner,

v.

LOCAL EDUCATIONAL  
AGENCY,

Respondent.

Case No. (LSD)

**HEARING OFFICER  
DECISION**

**I. PROCEDURAL BACKGROUND**

Petitioner, by and through his parent, filed a due-process complaint on February 11, 2009. Petitioner waived the resolution session. Twelve days later, Respondent answered the complaint. I held a prehearing in this matter at which both counsel appeared.

On March 2, 2009, Petitioner moved to continue the hearing from March 13<sup>th</sup> to March 17<sup>th</sup> due to his counsel's unavailability. Because the motion was unopposed, I granted it.

So, on March 17<sup>th</sup>, I held a due-process hearing under the applicable sections of the Individuals with Disabilities Improvement Act of 2004 (*see* 34 C.F.R. §§ 300.1-300.718) and of the District of Columbia municipal regulations (*see* 5 DCMR §§ 2500-3033). At the hearing, both parties were represented by counsel. Petitioner entered into evidence, without objection, eight documents marked P-1 to P-8. Three witnesses, including his father, testified on

Petitioner's behalf. Respondent entered into evidence, without objection, six documents marked R-1 to R-6. Two witnesses testified on its behalf.

**II. ISSUES RAISED AND RELIEF SOUGHT**

In the due-process complaint, Petitioner alleged Respondent denied him a free and appropriate education ("FAPE") by failing to reevaluate him, develop an appropriate individualized education program ("IEP"), provide special-education services, and place him in an appropriate school.

For these lapses, Petitioner requests that Respondent reevaluate Petitioner, convene an multidisciplinary team to review and update his IEP based on the reevaluation results, place him at a nonpublic school outside of the District of Columbia, and award him compensatory education.

**III. FINDINGS OF FACT**

Based on the witnesses' testimony, the documentary evidence presented by the parties, the arguments made by counsel, and my own observations at the due-process hearing, I find:

1. Petitioner is a -year old student who attended School A until he was barred for disruptive behavior in January 2009. *See* Testimony of Petitioner's Father and Witness Two. Petitioner had been suspended more than ten times in the first half of this school year for various infractions, including fighting with male and female students, disrespecting school staff, and the strong-arm robbery of another student during school hours. *See* Testimony of Witness Two. It appears the robbery triggered his expulsion. *See* P-2. He already had missed more than fifty school days due to suspension, *see* Due-Process Complaint at 3, and he has not attended school since then. *See* Testimony of Witness Two.

2. Witness Two testified that, before Petitioner's expulsion, she had spoken with officials from School A and learned that Petitioner was not receiving the occupational therapy and speech/language therapy that his IEP required. On or about September 18, 2008, an official of School A promised that he would ensure Petitioner's received the services required by his then-current individualized education program.

3. Witness Two also testified that she attended a manifestation determination meeting regarding Petitioner at which it was determined that his "emotional issues" were not the reason for his poor academic performance. She strongly disagreed with this determination because Petitioner had been having difficulties from the day he started at School A.

4. While Petitioner was incarcerated in connection with the robbery, a multidisciplinary team at School A that included Petitioner's father met concerning Petitioner. They changed his disability classification from learning disabled to emotionally disturbed based on a reevaluation conducted on January 6, 2009, and increased the number of hours he is to receive special education and related services to full-time. The team took these actions occurred on February 6, 2009. *See* P-3.

5. On or shortly before February 27, 2009, Respondent involuntarily transferred Petitioner to School B. Witness Five testified that the transfer was a "safety transfer" because the multidisciplinary team had determined Petitioner needed a "more restrictive environment" than School A.

6. Petitioner's father testified that he never received any written notice from Respondent regarding his son's involuntary transfer to School B. But an official of School A in an email to Petitioner's attorney claimed to have informed Petitioner's father of the transfer orally on February 27, 2009. *See* P-2.

7. Witness Four testified that School B offers an emotionally disturbed cluster program that can serve the special needs of Petitioner. She said that School B has special-education teachers who are certified in their subject matters, that the class-size is ten students per teacher and aide, that the school has two social workers and a speech therapist on staff, and that the school can offer all the Carnegie Units Petitioner needs to graduate on time. She noted that virtually all of the students in the program who choose to finish graduate. The program is full-time that is maintained in its own two sections of School B. She stated that School B could implement Petitioner's current individualized education program.

8. Witness One testified that School C, which is located outside of the District of Columbia, primarily serves emotionally disturbed students. He said that it is a four-year high school at which Petitioner could receive a District of Columbia diploma. He also said that there are between six and nine students to a class and that the school maintains a staff of at least four social-work counselors. He testified that School C could implement Petitioner's current individualized education plan.

#### **IV. CONCLUSIONS OF LAW**

Petitioner shoulders the burden of proof in this due-process proceeding, *see* 5 DCMR § 3030.3, and must carry it by a preponderance of the evidence. *See* 20 U.S.C. § 1415 (i)(2)(c).

Under the Individuals with Disabilities in Education Improvement Act, Petitioner is entitled to a FAPE consisting of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982). That entitlement does not mandate Respondent "maximize the potential" of Petitioner. *See Kerkam v. McKenzie*, 882 F.2d 884 886 (D.C. Cir. 1988) (noting the

Supreme Court stressed the lack of any such requirement four separate times in *Rowley*). On the contrary, Respondent is charged only with providing Petitioner a “basic floor of opportunity.” *See id.*

Respondent is not held to a standard of perfection in meeting its obligations under the Individuals with Education Disabilities Improvement Act. *See Kruvant v. District of Columbia*, 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (petitioner denied relief because, while respondent failed to timely assess petitioner, petitioner could show no harm resulting from that error).

In the face of a procedural violation, a hearing officer can find Petitioner was denied a FAPE only if the violations impeded Petitioner’s right to a FAPE, significantly impeded Petitioner’s parent’s opportunity to participate in the decision-making process regarding provision of a FAPE, or caused the child a deprivation of educational benefits. *See* 20 U.S.C. § 1415 (f)(3)(E)(ii); *see also Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (technical violations must interfere with substantive rights).

Respondent must provide a student’s parent with written notice whenever it proposes or refuses to change a student’s educational placement. That notice must describe the action taken or not taken by Respondent, explain the reason for Respondent’s act or omission, describe the other options considered by Respondent, identify the information used to justify the act or omission, and indicate how a copy of the procedural safeguards may be obtained. *See* 34 C.F.R. § 300.503.

When Respondent removes a student with a disability from their current placement for more than ten school days, that removal is deemed a change in placement that requires a manifestation review. *See* 34 C.F.R. § 300.530(e). In that review, Respondent may determine that a student’s behavior was not a manifestation of that student’s disability only if a

multidisciplinary team finds that (1) the student's IEP and placement were appropriate and the required special education services were provided in accordance with the IEP, (2) the student's disability did not prevent the student from understanding the consequences of the student's offense, and (3) the student's disability did not prevent the student from controlling the behavior constituting the offense. *See* 25 D.C. Code § 2510.9. If the team finds a manifestation, the student is returned to the last placement. *See* 34 C.F.R. § 300.530(f). If no manifestation is found, then the student may be placed elsewhere to continue to receive a FAPE. *See* 34 C.F.R. § 300.530(c). In the event of the latter, written notice is required before the change in placement occurs.

*Failure to Evaluate and Inappropriate IEP*

Respondent demonstrated that, before Petitioner filed his due-process complaint, it had comprehensively evaluated Petitioner on January 6, 2009, and had developed a new IEP for him on February 6, 2009, that changed his disability classification and upped his special-education services to full-time. It was, therefore, proper for Petitioner to abandon the issues raised in his due-process complaint regarding the alleged failure to evaluate him and to develop an appropriate IEP for him.

*Failure to Provide Services/Implement IEP*

Petitioner argues somewhat inconsistently that Respondent failed to provide the special-education services called for in his previous IEP while arguing at the same time that his IEP was inappropriate for him. It is unclear why someone would want the services called for in an inappropriate IEP. I reconcile these claims by concluding Petitioner is arguing, not that the services recommended in the IEP are inappropriate, but that the amount of those services is. To

the extent Petitioner was not receiving sufficient special-education services, that has been rectified by the February 6<sup>th</sup> IEP, which increased his services from part-time to a full-time.

Petitioner offered no evidence of the harm he suffered from Respondent's failure to provide Petitioner with occupational therapy and speech/language therapy as required by his last IEP. Even if he had made such a showing, Petitioner also failed to offer any individualized, fact-specific remedy for the alleged harm as required under *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). Witness Two's testimony that Respondent failed to provide Petitioner with his needed therapy was un rebutted. But Petitioner's two witnesses were not occupational or speech/language therapists. They, thus, could not credibly testify to whether and to what extent Petitioner has been harmed by Respondent's failure to provide him with the two related services during the first part of this school year.

This same failure of evidence applies to Petitioner's claim that the period of time he spent out of school beginning in January, when he was expelled, to today has harmed him. For part of that period Petitioner was incarcerated and likely could not have received the educational benefit that is his right. In addition, after being released, Petitioner did not present himself for enrollment at School B before or after he filed his due-process complaint in February.<sup>1</sup> It is unclear from the evidence what part, if any, of Petitioner's inability to receive educational benefit due to absence—whether or not voluntary—is attributable to Respondent's alleged failure to develop an appropriate IEP or implement his IEP or had an adverse affect on his academic performance.

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<sup>1</sup> I note that, while Respondent's notice regarding Petitioner's transfer was deficient, I have not concluded Respondent's decision to expel and transfer him was inappropriate. He should have gone to School B until his transfer from School A was resolved. Not only would this have allowed Petitioner to mitigate his damages, it may have bolstered his claim that School B was inappropriate if he had attended one day of school there and made some specific observations about the inappropriateness of the program.

Finally, Petitioner made no attempt to correlate an appropriate remedy with the schooldays he missed in January, February, and March.

*Inappropriate Placement*

What is crystal clear, however, is that Respondent failed to give Petitioner written notice before transferring him to School B. Despite Respondent's argument that the February 27<sup>th</sup> email constitutes notice within the meaning of the Act, the facts indicate otherwise. The email's author states that Petitioner "has been transferred to [School B]... I spoke to his father today and he's going to pick up his enrollment package from here on Monday." This statement indicates that Petitioner's involuntary transfer either had already occurred or occurred simultaneously with the author's notification to Petitioner's father. It also shows that none of the required information under 34 C.F.R. § 300.503 was included in the so-called email notice. Most important, however, is that notice occurring after or at the same time of the relevant event is no notice at all. In any event, the author says she "spoke" with Petitioner's father, which is not written notice. Thus, the involuntary transfer was improper because of deficient notice.<sup>2</sup> On this issue, Petitioner prevails.

V. **ORDER**

It is this 20<sup>th</sup> day of March 2009—

**ORDERED** that Respondent shall permit Petitioner to return to School A until such time as proper written notice can be provided to his parent before transferring him to School B, and it is further

**ORDERED** that, within fifteen school days of Petitioner's transfer to School B, School B shall convene a multidisciplinary team to review the appropriateness of his IEP and determine

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<sup>2</sup> Petitioner did not challenge the manifestation review by Respondent, so I make no finding on the correctness of the multidisciplinary team's determination that Petitioner's offense was not a manifestation of his disability.

whether he requires additional related services in light of his absence from school, and it is further

**ORDERED** that this shall be a FINAL DECISION from which the parties have ninety days from today to file an appeal in a court of competent jurisdiction, and it is further

**ORDERED** that this matter is closed for all purposes.



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Hearing Officer Latif Doman

Copies to: Counsel for the Parties  
Student Hearing Office