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OSSE  
STUDENT HEARING OFFICE

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

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

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STUDENT, <sup>1</sup>	)	
through the Parent,	)	
	)	Date Issued: May 23, 2011
Petitioner,	)	
	)	Hearing Officer: Virginia A. Dietrich
v.	)	
	)	Case No:
District of Columbia Public Schools	)	
	)	Hearing Date: 05/03/11 Room: 2006
Respondent.	)	
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, the mother of Student, filed a due process complaint notice on 03/10/11, alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA").

Petitioner alleged that the District of Columbia Public Schools ("DCPS") had failed to provide year old Student with an appropriate placement at the public elementary school that he was attending. Petitioner did not challenge the goals or the number of service hours in Student's Individualized Education Program ("IEP") or the ability of the public elementary school to implement Student's IEP; rather, Petitioner alleged that Student's placement at the public elementary school was inappropriate because Student had contact with nondisabled peers, Student was not making sufficient progress with specialized instruction due to the lack of individualized attention, Student was not receiving classes that provided a small student to teacher ratio as was required by Student's IEP, and the public elementary school was too large and overwhelming for Student. Petitioner argued that in order for Student to receive educational benefit, he required placement in a nonpublic school solely for disabled peers with an Intellectual Disability ("ID").

DCPS asserted that Student had been provided with an appropriate IEP, that Student was receiving classes in a self-contained classroom setting and that Student's IEP was being

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<sup>1</sup> Personal identification information is provided in Appendix A.

## Hearing Officer Determination

implemented in the least restrictive environment at the public elementary school that Student was attending. DCPS further argued that if Petitioner was not challenging the substance of the IEP or the implementation of the IEP, then Petitioner was merely challenging the site location where services would be implemented. And, since site location was solely within the discretion of DCPS, DCPS argued that Petitioner was not entitled to relief because Petitioner had failed to state a legal basis upon which relief could be granted.

### **Subject Matter Jurisdiction**

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

### **Procedural History**

The due process complaint was filed on 03/10/11. This Hearing Officer was assigned to the case on 03/11/11. A resolution meeting took place on 03/25/11 at which time both parties indicated in writing that no agreement was reached by the end of the 30-day resolution period and that the case should proceed to a due process hearing. Thus, the 30-day resolution period ended on 04/09/11, the 45-day timeline to issue a final decision began on 04/10/11, and the final decision is due by 05/24/11. See 34 C.F.R. 300.510, 300.515.

The due process hearing was a closed hearing that took place on 05/03/11. Petitioner was represented by Alana Hecht, Esq. and DCPS was represented by Daniel McCall, Esq.. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in person throughout most of the hearing.

Petitioner presented five witnesses: Petitioner, who testified in person; Educational Advocate, who testified in person; Psychologist, who qualified as an expert in the administration of comprehensive psychological evaluations, testified by telephone; Occupational therapy ("OT") service provider, who testified by telephone; and Principal, National Children's Center, who testified by telephone.

DCPS presented two witnesses who both testified by telephone: DCPS Special Education Coordinator ("SEC"); and Student's Special Education Teacher ("SET").

Petitioner's disclosures dated 04/26/11, containing a witness list and Exhibits P-1 through P-42, were timely filed and admitted into evidence without objection. DCPS' disclosures dated 04/26/11, containing a witness list and Exhibits DCPS-1 through DCPS-3 (hereinafter referred to as R-1 through R-3), were timely filed and admitted into evidence without objection.

The parties stipulated to the following facts:

## Hearing Officer Determination

#1. On 02/10/11, the IEP team met pursuant to a Settlement Agreement dated 11/05/10 and reviewed an independent comprehensive psychological evaluation dated 12/08/10, an independent speech and language evaluation dated 11/30/10 and an independent physical therapy evaluation dated 12/08/10, and developed an IEP that prescribed 24.5 hours/week of specialized instruction outside of general education, 1 hour/week of speech and language services outside of general education and 1 hour/week of OT services outside of general education.

#2. The complaint contained no claims with respect to related services.

The sole issue to be determined in this Hearing Officer Determination is as follows:

Whether DCPS denied Student a FAPE by failing to provide him with an appropriate placement at \_\_\_\_\_ beginning on 02/10/11.

For relief, Petitioner requested a finding that Student had been denied a FAPE and that DCPS place and fund Student at National Children's Center.

After Petitioner rested her case in chief, DCPS moved for a directed finding, stating that Petitioner had failed to state a legal claim upon which relief could be granted. DCPS argued that absent a challenge to the sufficiency of the IEP goals or the ability of School to implement Student's IEP, Petitioner had failed to state a legal basis upon which relief could be granted since the selection of a location to implement Student's IEP was solely within the purview of DCPS. The Hearing Officer denied DCPS' motion because Petitioner had provided sufficient evidence with respect to Student's limited academic progress in the school placement to theoretically find for Petitioner on the issue of the inappropriate placement of Student at \_\_\_\_\_ School.

### Findings of Fact

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

#1. Student is a \_\_\_\_\_-year old special education student who has been attending \_\_\_\_\_ grade at \_\_\_\_\_ School in the District of Columbia since the beginning of the 2010-2011 school year.<sup>2</sup> \_\_\_\_\_ School services both disabled and nondisabled students.<sup>3</sup>

#2. On 12/08/10, Student was diagnosed with a Moderate Intellectual Disability, with an overall intellectual ability in the Extremely Low range and cognitive test scores in the Extremely Low range of functioning in the areas of Verbal Comprehension, Perceptual Reasoning, Working Memory and Processing Speed. Student's academic abilities fell in the Very Low range with Reading, Written Expression and Mathematics performance levels at the Kindergarten level or below.<sup>4</sup> Student's Extremely Low Working Memory ability adversely affects his ability to take in information, work on it and store it, and he might remember or might forget information from \_\_\_\_\_

<sup>2</sup> P-11; P-29.

<sup>3</sup> Testimony of SEC.

<sup>4</sup> P-4: Testimony of Petitioner's Expert Psychologist.

## Hearing Officer Determination

day to day.<sup>5</sup> Student's academic skills are commensurate with his Intelligence Quotient ("IQ") and his ability to think, reason and interact effectively within his environment is less than 0.99% of his same-age peers. Student's expected performance and needs in the classroom, based solely on his general intellectual ability, is that he will struggle without one to one support, he will need someone to break things down and clarify, and he will require excessive repetitions to learn.<sup>6</sup>

#3. On 02/10/11, an IEP was developed that classified Student with ID and prescribed 24.5 hours/week of specialized instruction outside of general education, 1 hour/week of speech and language services outside of general education and 1 hour/week of OT services outside of general education. The IEP required that specialized instruction be provided in a small, structured out of general education setting to accommodate Student's disability and the hours of services in the specified setting was the least restrictive environment that was necessary to accommodate Student's needs and enable him to access the general education curriculum.<sup>7</sup>

#4. IEP progress reports take into account Student's gains and regressions and give an overall picture of progress for the reported period. From 02/10/11 through 03/25/11, Student made minimal and inconsistent progress with his IEP goals, but he made progress in specialized instruction to the best of ability, based on his ability.<sup>8</sup> Student can now write his name, but in March 2010, he could not. Student cannot independently count from one to ten; on some days, he can do so with visual aides and/or prompting and on some days he cannot.<sup>9</sup> He can sometimes follow a three-step direction in the classroom because of the high degree of constancy and repetition of the same three-step direction, but generally he is only able to execute a one step command.<sup>10</sup> Student is one step above profoundly ID (previously known as Mentally Retarded) in terms of his skill level and has difficulty retaining information.<sup>11</sup> Although Student's measurable progress is very small, the progress is large for someone of his cognitive ability.<sup>12</sup>

#5. Beginning on 02/10/11, Student received 24.5 hours/week of specialized instruction outside of general education in a self-contained classroom of five students with one teacher and one aide and the children were broken into 2 groups for instruction.<sup>13</sup> Student interacts with nondisabled peers during recess under the supervision of the classroom aide, but receives art classes solely with disabled peers.<sup>14</sup> Petitioner never received any reports from the school about Student having any problems with nondisabled peers. Student has disabled friends in his class at school and nondisabled friends in his neighborhood.<sup>15</sup>

#6. Student enjoys being at \_\_\_\_\_ School and there is an increase in his ability to interact with others in the classroom and with school staff. Student, along with one

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<sup>5</sup> Testimony of Petitioner's Expert Psychologist, SET.

<sup>6</sup> Testimony of Petitioner's Expert Psychologist.

<sup>7</sup> Stipulation #1; R-1).

<sup>8</sup> R-3; Testimony of SEC, SET.

<sup>9</sup> Testimony of SET.

<sup>10</sup> Testimony of SET, Petitioner.

<sup>11</sup> Testimony of SEC, SET.

<sup>12</sup> Testimony of SEC.

<sup>13</sup> R-2; Testimony of SET.

<sup>14</sup> Testimony of SEC.

<sup>15</sup> Testimony of Petitioner.

## Hearing Officer Determination

other classmate, is a classroom messenger who takes notes to the main office and he successfully navigates the hallways and interactions with nondisabled peers under the watchful eye of the classroom aide.<sup>16</sup>

#7. At the IEP meeting on 02/10/11, DCPS indicated that would remain the site location for the implementation of Student's IEP and Petitioner disagreed.<sup>17</sup> Student's current IEP, dated 02/10/11, is being implemented at

### Conclusions of Law

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

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The sole issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement at \_\_\_\_\_ School beginning on 02/10/11.

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1. Free appropriate public education or FAPE means special education and related services that...include an appropriate school and are provided in conformity with an IEP that meets the requirements of the IDEA. 34 C.F.R. 300.17.

Each public agency must ensure to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled; and 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

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<sup>16</sup> Testimony of SEC.

<sup>17</sup> R-2.

<sup>18</sup> Testimony of SEC, SET.

## Hearing Officer Determination

regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114.

Likewise, each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. 300.115. And, 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, who is most familiar with the child and the placement decision is made in conformity with the least restrictive provisions of the IDEA, is determined at least annually, is based on the child's IEP, and is as close to the child's home as possible, and in selecting the least restrictive environment, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 C.F.R. 300.116.

At the IEP meeting on 02/10/11, DCPS indicated that School would remain the site location for the implementation of Student's IEP and Petitioner disagreed.<sup>19</sup> Essentially, Petitioner argues that when the IEP team met on 02/10/11, DCPS erred in keeping Student at School because Student was not making sufficient progress with specialized instruction for the following reasons: insufficient one to one instruction; commingling with nondisabled peers for Student's elective classes; the lack of a small teacher to student ratio as was required by Student's IEP; and a school size that was too large and overwhelming for Student.

Petitioner, with the burden of proof, failed to provide sufficient evidence in support of her claim that School was an inappropriate placement/school to implement Student's IEP or that Student wasn't making sufficient progress or that Student wasn't receiving educational benefit at J.O. Wilson Elementary School. Petitioner agreed that there was no challenge to the appropriateness of the goals in Student's IEP or to the implementation of services in Student's IEP. The thrust of Petitioner's evidence and argument was that a comparison of Student's IEP progress reports from year to year showed that Student's IEP goals had not changed and that Student was not making sufficient progress in mastering them, and because of this, Student required placement in a separate school solely for ID disabled peers in order to receive educational benefit.

What Petitioner's claim and argument failed to account for was that Student's academic performance was commensurate with his cognitive ability and although Petitioner would have liked for her child to demonstrate more academic progress, Student's academic performance and minimal progress were in line with what was to be expected for a child with his cognitive limitations. Petitioner did not have a problem with the goals in Student's IEP; rather, Petitioner had concerns that Student was not making progress towards achieving his goals because Student could not count to ten or write his name legibly. The evidence showed that Student's cognitive ability was commensurate with his achievement ability and the Hearing Officer concludes that Student was making progress towards his IEP goals to the best of his ability, based on the extent of his disability. This conclusion is supported by the credible testimony of Petitioner's own expert witness and the credible testimony of the SEC and SET.<sup>20</sup> This conclusion is also

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<sup>19</sup> Finding #7.

<sup>20</sup> Findings #2, #4.

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supported by the credible testimony of Student's OT provider who indicated that after seven sessions of working with Student, she was still working with Student on writing his name legibly near the line and this activity comprised 80% of the tutoring activities and was geared towards reinforcing skills identified in Student's IEP. The theme throughout all of the testimony was that Student required constant repetition in order to learn and due to an Extremely Low Working Memory, Student was not likely to retain information from day to day.

With respect to Petitioner's claim that Student was receiving insufficient one to one instruction to make sufficient academic progress, Petitioner failed to meet her burden of proof. At

School, Student received specialized instruction in a self-contained setting with a 2.5 to 1 student to teacher ratio and this ratio comports with the general requirement of the IEP that Student receive classes in a small structured setting. There was no requirement in the IEP that Student receive one to one instruction at all times. And, although in this small setting Student was making minimal progress towards mastering his IEP goals, this minimal progress was large for someone of Student's cognitive ability.<sup>21</sup> The Hearing Officer concludes that Student received sufficient individualized attention to make academic progress.

With respect to Petitioner's claim that Student should not be commingled with nondisabled peers for his elective classes, Petitioner failed to offer any evidence that Student was commingled with nondisabled peers for his music and art classes and Petitioner failed to show any adverse effect of the supervised commingling of Student with nondisabled peers during physical education class.

With respect to Petitioner's claim that Student was not receiving classes in a small teacher to student ratio, Petitioner failed to meet her burden of proof. The IEP did not specify that Student receive one to one instruction; rather, it stated that specialized instruction was to be provided in a small, structured out of general education setting. Petitioner, with the burden of proof, offered no evidence that Student was not receiving classes in a small structured out of general education setting as of 02/10/11. The evidence showed that Student was receiving classroom instruction in a class size of five students with one special education teacher and one classroom aide. This student to teacher ratio easily comported with the IEP requirement for a small structured classroom setting.<sup>22</sup>

With respect to Petitioner's claim that receiving specialized instruction in a school that also serviced nondisabled peers was harmful or otherwise adverse to Student, Petitioner failed to meet her burden of proof. Not only did Petitioner fail to produce any evidence whatsoever on this claim, DCPS offered evidence that Student was well adjusted at School and that Student only had limited contact with nondisabled peers under the watchful eye of a classroom aide. Moreover, Petitioner testified that she had never received any reports from the school that Student had any negative interactions with nondisabled peers and in fact, Student was able to successfully interact with nondisabled peers as demonstrated by his ability to have nondisabled friends in his neighborhood.<sup>23</sup>

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<sup>21</sup> Findings #3, #4, #5.

<sup>22</sup> Findings #3, #5.

<sup>23</sup> Findings #5, #6.

## Hearing Officer Determination

The testimony of Petitioner's expert psychologist that Student could benefit from a school with all disabled peers was insufficient for the Hearing Officer to conclude that Student should be removed from School where he had contact with nondisabled peers. Petitioner's expert simply stated that Student *could* benefit from a separate school setting; she did not state that it was required for him to receive educational benefit. Petitioner's expert testified that based on her review of documents, Student required segregation due to his academic and cognitive functioning, but contact with nondisabled peers for lunch and recess was alright if supervised, and a commingling of Student with nondisabled students for art and music would depend on the level and type of instruction in the classes and if reading and writing were not required, commingling would not necessarily be inappropriate. This testimony implied that specialized instruction for core academic subjects must be provided in a segregated classroom; however, commingling for elective classes was negotiable based on the requirements of the classes. Moreover, the requirement of a separate school for solely disabled peers was not included in the recommendations of the 12/08/10 comprehensive psychological evaluation authored by the Petitioner's expert psychologist, and this witness had never met or observed Student at School.<sup>24</sup>

With respect to Petitioner's claim that the school size of School was too large and overwhelming for Student, Petitioner failed to meet her burden of proof. No evidence was presented by Petitioner that the school size was a problem for Student and DCPS offered cogent testimony from the SEC that Student's status as classroom messenger highlighted Student's success in navigating the hallways and contact with nondisabled peers.<sup>25</sup>

In summary, there was not a scintilla of evidence to support the removal of Student from School based on the allegation that the school was an inappropriate placement. This Hearing Officer determines that School was the least restrictive environment that Student could receive the services in his IEP and obtain some educational benefit, and the Hearing Officer concludes that the school was an appropriate placement. At School, Student was happy, well adjusted and making the expected amount of academic progress based on his cognitive ability. Without a challenge to the sufficiency of the goals of the IEP, without a challenge to the implementation of the IEP at School, and without a showing that the location that Student's IEP was being implemented deprived Student of an educational benefit, Petitioner's claim lacked merit. At the IEP meeting on 02/10/11, DCPS indicated that School would remain the site location for the implementation of Student's IEP and that determination by DCPS was appropriate.

Both Petitioner and Respondent supported their positions with the same following reference to the Comments to the Federal Register, Vol. 71, No. 156 p.46588-46589, that distinguishes "placement" from "location of services." Historically, "placement" is referred to as the points along the continuum of placement options available for a child with a disability, and "location" as the physical surrounding, such as the classroom in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not

<sup>24</sup> Testimony of Petitioner's Expert Psychologist.

<sup>25</sup> Finding #6.

## Hearing Officer Determination

have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's social education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that the determination is consistent with the decision of the group determining placement. While public agencies have an obligation under the IDEA to notify parents regarding placement decisions, there is nothing in the IDEA that requires a detailed explanation in children's IEPs of why their educational needs or educational placements cannot be met in the location the parents' request.

### Conclusion

In the present case, Petitioner's disagreement with the location of services at School became the basis of Petitioner's claim that School was an inappropriate placement for Student's IEP to be implemented.

The evidence showed that Student is only making minimal progress on his IEP goals at School, but that in and of itself, is not a sufficient basis for the Hearing Officer to conclude that School is an inappropriate placement or school. Student's limited progress is commensurate with his limited cognitive ability and the small amount of measurable progress he is making is within the reasonable range of achievement expectations. Student's 02/10/11 IEP is being implemented at School<sup>26</sup> and the Hearing Officer determines that has been an appropriate placement and school for Student since 02/10/11. Petitioner failed to prove that School was not the least restrictive environment where Student's IEP could be implemented or where Student could receive a FAPE. Petitioner, with the burden of proof, presented no evidence that Student's interaction with nondisabled peers at School was harmful or caused any type of social problems or academic regression. Therefore, a removal of Student from School to a more restrictive educational environment is not warranted by the facts of this case.

Petitioner failed to meet her burden of proof that Student was denied a FAPE by DCPS' placement of Student at School beginning on 02/10/11.

### ORDER

The complaint is **DISMISSED** with prejudice.

**IT IS SO ORDERED.**

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<sup>26</sup> Finding #7.

Hearing Officer Determination

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

Date: May 23, 2011

*/s/ Virginia A. Dietrich*

Hearing Officer

Copies to:

Petitioner (U.S. mail)

Petitioner's Attorney: Alana Hecht, Esq. (electronically)

DCPS' Attorney: Daniel McCall, Esq. (electronically)

DCPS (electronically)

SHO (electronically)

**APPENDIX A**

Eugene Anderson v. District of Columbia Public Schools  
Case No: 2011-0245

Student	Eugene Anderson
Date of Birth	July 30, 2000
Student ID Number	9109336
Attending School	J.O. Wilson Elementary School
Petitioner, parent	Fatima Harper
Expert Psychologist for Petitioner	Natasha Nelson, Ph.D.
Occupational therapy service provider for Student	Allyson Marvin
Educational Advocate	Lawrencia Cole
Principal, National Children's Center	Sakinah Rasheed
Special Education Coordinator at J.O. Wilson Elementary School	Taiya Gregory
Special Education Teacher at J.O. Wilson Elementary School	Janet Greene

**Owens, Tawanda (OSSE)**

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**From:** admin@dcsho.i-sight.com  
**Sent:** Monday, May 23, 2011 10:48 AM  
**To:** ahecht@jeblaw.biz; McCall, Daniel (DCPS-OGC)  
**Cc:** Due, Process (OCTO); Student Hearing Office (OSSE); Dietrich, Virginia (OSSE-Contractor)  
**Subject:** DCSHO: Re: Case # 2011-0245, CORRECTED HOD From <Virginia.Dietrich@dc.gov>  
**Attachments:** 2011-0245 HOD.pdf

\*\* NOTE: Please do not modify subject line when replying \*\*

\*\* This email was sent by Virginia Dietrich [mailto:[Virginia.Dietrich@dc.gov](mailto:Virginia.Dietrich@dc.gov)] \*\*

Re: Eugene Anderson

Issuance of Corrected HOD. This version simply redacts the name of the occupational therapist from page 2 of the HOD. All other aspects of the HOD issued minutes ago remains the same.

Thank you.

Virginia A. Dietrich  
Hearing Officer  
[Virginia.Dietrich@dc.gov](mailto:Virginia.Dietrich@dc.gov)  
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