

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS")</p> <p>Respondent.</p> <p>Case</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Dates of Hearing: July 24, 2009 & July 29, 2009</p> <p>Date of Complaint: June 25, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: John Straus, Esq. 1220 L Street, NW Washington, DC 20005</p> <p>Counsel for DCPS: Harsharen Bhuller, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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 ATTORNEY GENERAL
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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* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* ("IDEIA"), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened July 24, 2009, and concluded on July 29, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on June 25, 2009, alleging the issues outlined below. A pre-hearing conference was conducted on July 13, 2009, and a pre-hearing order was issued July 13, 2009.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1- 14 and DCPS Exhibits 1- 2) which were admitted into the record.

ISSUE(S):²

1. Did DCPS deny the student a free and appropriate public education by failing to provide an appropriate placement? Specifically, Petitioner alleges School B is an inappropriate placement for the student.
2. Did DCPS deny the student a free and appropriate public education by failing to provide the parent with meaningful participation in determining the student's educational placement and program?

FINDINGS OF FACT³:

1. The student is _____ years old, attended School A, a DCPS public middle school, and resides in the District of Columbia with her parent(s). (Parent's testimony)

² The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn.

³ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer will cite only one party's Exhibit.

2. On March 17, 2009, a Multidisciplinary Team ("MDT") determined the student is a student with a disability under the IDEA with disability classifications of Emotional Disturbance ("ED") and Learning Disability ("LD").⁴ The MDT determined the student requires 27.5 hours of special education instruction per week outside of general education and 30 minutes of behavioral support services per week outside of general education. The MDT determined the student should be placed in a full time therapeutic placement. The DCPS staff stated that DCPS would review possible placements and would propose a new placement for the student within ten school days and the parent would have an opportunity to visit the proposed placement(s). (Ms. Miskel's testimony, Petitioner's Exhibit 4)
3. While attending School A during the 2008-09 school year the student repeatedly engaged in disruptive behavior. There were a number of manifestation determination review meetings on proposed suspensions for the student's behavior. She was suspended for letting outside students into the school building to assist her in fighting other students in School A. (Parent's testimony, Ms. Miskel's testimony)
4. On April 23, 2009, the student was suspended for 36 days for allegedly allowing two unauthorized persons to enter the school building. On April 29, 2009, DCPS convened a manifestation determination meeting. There was a proposal for the student to attend an alternative placement during the suspension; however, the student's suspension was overturned by a hearing officer on May 7, 2009, due to concerns regarding placement of the student's possible placement at the School B. (Petitioner's Exhibit 7, 8 & 11)
5. On May 5, 2009, the student was accepted at School C, a private full time special education placement. On May 11, 2009, the parent, through counsel, requested DCPS place and fund the student at School C.⁵ (Petitioner's Exhibit 10)
6. On May 14, 2009, DCPS issued a Prior Notice Letter to the parent informing him the student would be placed at School B for the 2009-2010 school year. DCPS proposed a placement meeting for May 19, 2009, and parties agreed to convene the meeting June 2, 2009. (Petitioner's Exhibit 11 & 12)
7. The parent is disabled and needs days notice to make transportation arrangements to visit any proposed schools for the student. He attempted to visit School B but did not get a return call to plan a visit and cannot just come to the school unannounced because of his transportation arrangements. The parent attempted to call School B on several occasions

⁴ The student had been previously determined eligible with the LD classification. At this meeting based on a recent evaluation the ED classification was added.

⁵ Petitioner's counsel later filed a due process complaint alleging the student had not been provided an appropriate placement from the March 17, 2009, MDT meeting authorizing a full time placement for the student. During the pendency of the complaint DCPS proposed to place the student at School B. Petitioner's counsel withdrew the complaint and re-filed in order to challenge the appropriateness of School B. DCPS proposed and Petitioner accepted an offer of compensatory education for services missed from March 17, 2009, to the end of the 2008-09 school year. Therefore, the issue of compensatory education was not a subject of review and/or decision for this Hearing Officer.

to set up an appointment. None of his phone calls were returned. Consequently, he was unable to visit School B prior to the placement meeting. (Parent's testimony)

8. DCPS convened the placement meeting on June 2, 2009. The parent attended the meeting with his educational advocate. The DCPS representative stated at the meeting that the student would be placed at School B and DCPS did not accept the parent's proposed placement at School C. The DCPS representative stated that School B could meet the student's needs. The parent did not accept the placement at School B and filed the current due process complaint. (DCPS Exhibit 1, Petitioner's Exhibit 1)
9. The parent believes he did not have participation in the decision process of what school the student would attend. The parent is concerned that an appropriate placement for the student must be able to prevent the student from walking out of class and leaving the school building. The student has the tendency to wander in and out of her classrooms and schools. (Parent's testimony)
10. The student gets into fights with other children in her neighborhood and feels threatened by them. There are some of the students with whom the student has ongoing disputes and who attend School B. There is a court stay-away order for some of the students in the neighborhood who the parent believes attend School B. The parent is receiving rap around services which includes therapy and mentoring services outside of school. The parent feels as though he cannot trust the student in the neighborhood and takes precautions to make certain the student does not leave the house unattended because of the difficulties with other students in the neighborhood. (Parent's testimony)
11. For the 2009-2010 school year School B will be a combination of two former DCPS special education programs. School B is designed primarily for students with ED classification from grades three through eight. School B can implement a full time special education program and provide the academic and therapeutic supports the student's IEP requires. The school has certified special education teachers and licensed related service providers. For the 2009-2010 school year there will be 8 to 10 students in a classroom. (Dr. Mosely's testimony)
12. The student has been interviewed by and admitted to School C, a full time private special education school located in Largo, Maryland that serves students with an ED classification. The school has 73 students and has a certified special education teachers and certified related service providers. The school provides a therapeutic setting where students received a full complement of therapy and support services. (Ms. Wilson's testimony, Petitioner's Exhibit 9)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §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 IDEIA §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.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief.⁶ 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.

1. Did DCPS deny the student a free and appropriate public education by failing to provide an appropriate placement? Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence.

DCPS, as the local and state education agency, is to make certain that the educational placement, for each child with a disability within its jurisdiction, is able to implement the student's Individualized Educational Program. Pursuant to 34 C.F.R. § 300.17,

Free appropriate public education or FAPE means special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)..."

DCPS shall implement an IEP for each student with a disability. Pursuant to D.C. MUN. REGS. title 5, § 3010.2 (2003), DCPS "shall implement an IEP as soon as possible after the meeting where the IEP is developed..." Pursuant to 34 C.F.R. § 300.115(a), DCPS "must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."

The student's IEP requires 27.5 hours of special education instruction per week outside of general education and 30 minutes of behavioral support services per week outside of general education. Dr. Mosely credibly testified that School B is a therapeutic setting and can provide the services prescribed by her IEP. Although the parent's educational advocate testified about concerns regarding the level of supervision and staff at School B, the Hearing Officer did not find her testimony more convincing than Dr. Mosley's. Therefore, the Hearing Officer concludes Petitioner did not meet the burden of proving that School B is an inappropriate placement for the student.

2. Did DCPS deny the student a free and appropriate public education by failing to provide the parent with meaningful participation in determining the student's educational placement and

⁶ 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 that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

program? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

According to 34 C.F.R. Sec. 300.116(a)(1), "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." [emphasis added] DCPS is to make certain that the parent's or complainants are a part of the decision making process when it comes to the student's educational placement. *Honing v. Doe*, 484 U.S. 305, 327 (1988) (In *Honing* the Supreme Court of the United States concluded that the clear intent of Congress was to make parental involvement the cornerstone of the placement process under the IDEA.

In so finding, the Court stressed the importance of a parent's right to be not only notified of each step of a child's educational development, but also involved in the placement decision making process: "Envisioning the IEP as the centerpiece of the statute's education system for disabled children, and aware that schools had all too often denied such children appropriate educations without in any way consulting the parents; Congress repeatedly emphasized through the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness. Accordingly, the Act establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decision they think inappropriate." *Id.* at 311-12; *Burlington School Comm. v. Massachusetts Dept. of Education*, 471 U.S. 359, 373 (1985).

Ms. Miskell credibly testified that the MDT and DCPS staff in the March 17, 2009, meeting that the parent would be given an opportunity to visit and observe the proposed placement(s) prior to a placement decision being made. Nonetheless, a prior notice of placement was issued by DCPS before a placement meeting was held. Although the parent participated in the June 2, 2009, placement meeting, based on the meeting notes there was little discussion regarding the proposed placement and it appears from the testimony and documents the placement was pre-determined prior to the meeting and the parent had no meaningful participation in the placement decision.

The parent in his testimony raised credible concerns about other students who possible attend School B who may have ongoing disputes and possibly a stay-away order from the student. Dr. Mosley acknowledged she had not had an opportunity to meet the parent or student and allow the parent an opportunity to address his concerns and observe the placement. DCPS denied the parent a meaningful opportunity to participate in the placement process. DCPS issued a prior notice to School B without providing the parent with an opportunity to visit the program. Consequently, the Hearing Officer concludes DCPS significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE

ORDER:

1. DCPS shall, within ten (10) business days of the issuance of this Order, allow the parent an opportunity to visit the proposed placement(s) and shall convene a multidisciplinary team (MDT) meeting to review the student's existing evaluations, academic and behavior

concerns, and the parent's concerns regarding the student's placement at School B, and determine an appropriate placement for the student in full compliance with the provisions of 34 C.F.R. 300.116, 300.501 and 300.322, and 300.503.

2. The parental visit/observation and the MDT meeting shall be scheduled through counsel for the student and parent.
3. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

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. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: August 8, 2009