

<p>STUDENT¹, by and through his Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date of Hearing: September 4, 2009</p> <p>Date of Complaint: July 1, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Roberta Gambale, Esq. 1220 L Street, NW Suite 700 Washington, DC 20005</p> <p>Counsel for DCPS: Nia Fripp, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002</p> <p><u>Hearing Officer:</u> Coles B. Ruff, Esq.</p>
---	---

OSSE
STUDENT HEARINGS OFFICE
2009 SEP 15 AM 8:12

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* (I.D.E.I.A.), 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 September 4, 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 July 1, 2009, alleging the issues outlined below.

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 1-36 and DCPS Exhibits 1-17) which were admitted into the record.

ISSUE(S):²

Did DCPS deny the student a free and appropriate public education by failing to provide an alternate placement and/or services following his expulsion from School B?

FINDINGS OF FACT³:

1. The student is _____ years old, resides in the District of Columbia and has been determined eligible for special education services. (Petitioner's Exhibit 4)
2. The student's most recent Individualized Educational Program ("IEP") was developed on or about April 9, 2009, and provides for placement in a full time out of general education program. The IEP prescribes specialized instruction, behavior support services, speech-language services and transition services. The IEP also prescribes that the student be provided Extended School Year ("ESY") services. (Petitioner's Exhibit 4)

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.

3. During the 2008-09 School Year ("SY") the student attended School A where he was initially placed unilaterally and later placed on an interim basis pursuant to a Hearing Officer's Determination ("HOD") issued December 10, 2008. (Petitioner's Exhibit 33)
4. In April 2009 DCPS proposed a compensatory education plan for the student offering transition counseling services. The compensatory education plan was not agreed to and the student has not availed himself of any of the offered services. (DCPS Exhibit 16)
5. The student left School A sometime during the second semester of SY 2008-09 and began attending School B. The student was expelled from School B in May 2009. DCPS did not schedule a placement meeting or identify a suitable alternate placement after the student was expelled. The only option presented to the student was to return to his neighborhood school, School C. (Stipulation)
6. The student considered the option of returning to his neighborhood school but ultimately declined to do so out of concern that he would be at risk due to the propensities resulting from his disability. (Statements of the student)
7. As a result of the student not being provided an alternative placement the student missed the last few weeks of SY 2008-0, missed ESY services during the summer of 2009 and missed the first two weeks of SY 2009-10. Thus, the student was not provided any of the services prescribed by his IEP during that period. (Petitioner's Exhibit 4)
8. On July 1, 2009, Petitioner filed the current due process complaint seeking a placement for the student. (DCPS Exhibit 1)
9. On August 19, 2009, DCPS issued a Prior to Action Notice placing the student at School D for SY 2009-10. (DCPS Exhibit 4)
10. The December 10, 2008, HOD concluded that the student's previous placement at School D was inappropriate. The HOD stated: "it is clear from the record that the student was not going to attend [School D] because of the transportation problems. Placement is supposed to be as close to the student's home as possible. Requiring that a perpetually truant student travel over an hour each way to school is a recipe for failure. See, 34 CFR §300.116(b)(3) For all of these reasons the Hearing Officer finds that DCPS' proposed placement [at School D] did not provide FAPE to the student." (Petitioner's Exhibit 33)

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.⁴ 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.

Did DCPS deny the student a free and appropriate public education by failing to provide an alternate placement and/or services following his expulsion from School B? Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence.

34 C.F.R. §300.530 (d) provides:

(1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must--

(i) Continue to receive educational services, as provided in Sec. 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

(3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

(4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under Sec. 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in Sec. 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

(5) If the removal is a change of placement under Sec. 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section.

The student's expulsion from School B and DCPS' failure to provide the student an alternative placement and convene meeting promptly following the expulsion caused the student a deprivation of educational benefits and was a denial of a FAPE.

34 C.F.R. § 300:116 provides:

" In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that—

⁴ 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.

- (a) the placement decision—
 - (1) Is made by a group of persons, including the parents, and persons knowledgeable about the child, the meaning of evaluation data, and the placement options; and
 - (2) Is made in conformity with the LRE provisions of this subpart, including 300.114 through 300.118—
- (b) The child's placement —
 - (1) Is determined at least annually;
 - (2) Is based upon the child's IEP; and
 - (3) Is as close as possible to the child's home.....”

Although DCPS after the complaint was filed issued a prior notice offering a placement for the student, the placement was not determined pursuant to the requirements cited above. There was no placement meeting and the placement offered had already been determined to be inappropriate for this student. The public agency has an obligation to provide an appropriate placement and the failure provide the placement pursuant to the requirements cited above impeded the student's opportunity to participate in the decision making process regarding provision of FAPE and caused him a deprivation of educational benefits.

ORDER:

1. If DCPS has not already done so pursuant to the Interim Order issued in this matter on September 4, 2009, DCPS shall within fifteen (15) school days of the issuance of the Interim Order convene an IEP/MDT Placement meeting to determine an appropriate placement for the student for the 2009-10 School Year.
2. The parties shall confer prior to the meeting on the possible placements so that the MDT/IEP Placement meeting when it is convened is productive in determining a placement where the student will be successful and is willing attend.
3. DCPS shall, within forty-five calendar days of the student's placement as determined by the MDT pursuant to the provision above, convene a MDT meeting to review the student's progress in his new placement.
4. As compensation for the missed services the student incurred in not having been provided an alternative placement DCPS shall continue to fund 10 hours of independent tutoring per week for the student to be provided by Newlen Educational Services, at the DCPS approved rate, until the forty-five day review of the student's new placement, pursuant to the provision above, is completed.
5. 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: September 14, 2009