



# Office of Review & Compliance

*Student Hearing Office*  
Van Ness Elementary School  
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OSSE  
STUDENT HEARING OFFICE  
2009 MAY 11 AM 7:51

## Confidential

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| <b>The Student Through their</b>                | ) | <b>IMPARTIAL</b>                               |
|   | ) | <b>DUE PROCESS HEARING</b>                     |
| <b>Parents,*</b>                                | ) |  |
| <b>Case No.:</b>                                | ) |  |
|   | ) | <b><u>DECISION AND ORDER</u></b>               |
| <b>Petitioner,</b>                              | ) |  |
|   | ) |  |
| <b>vs.</b>                                      | ) | <b>Due Process Compl. Filed: Mar. 26, 2009</b> |
|   | ) | <b>Due Process Hr'g Date: Apr. 30, 2009</b>    |
| <b>The District of Columbia Public Schools,</b> | ) | <b>Held at: Van Ness Elementary School</b>     |
| <b>Home School: School</b>                      | ) | <b>1150 5th Street, S.E., 1st Floor</b>        |
| <b>Attending: School</b>                        | ) | <b>Washington, D.C. 20003</b>                  |
|   | ) |  |
| <b>Respondent.</b>                              | ) |  |

**Counsel for the Parent/Student:** **Law Office of  
Donovan Anderson, P.C.  
Attorney at Law  
2041 Martin L. King Jr., Ave, S.E., #240  
Washington, D.C. 20020**

**District of Columbia Public Schools:** **Laura George, Esq.  
Assistant Attorney General  
Office of the General Counsel, OSSE  
825 North Capitol Street, N.E., 9th Floor  
Washington, D.C. 20002**

**Independent Hearing Officer:** **Frederick E. Woods**

**\* Party identification information is stated in Appendix A of this order and Appendix A shall be removed from this order before public dissemination.**

# **I. Case Background and Procedural Information**

## **A. JURISDICTION**

This Decision and Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, codified at 20 U.S.C. §§ 1400 -1482, 118 Stat. 2647; and its implementing regulations codified at 34 C.F.R. §§ 300.01 – 300.818; 5 D.C.M.R. §§ 3000 - 3033.

## **B. DUE PROCESS RIGHTS**

Before the hearing the parent had been advised of their due process rights.

## **C. FIVE-DAY DISCLOSURES**

Petitioner: Admitted, without objection, a disclosure letter filed on 04/23/09 that list three (3)-witnesses and attached five exhibits sequentially labeled and tabbed Parent-01 through Parent-05. Four witnesses were called to testify: (1) the student's father; (2) the student's mother; (3) the student's general education teacher; and (4) the School IEP coordinator.

Respondent: Admitted, without objection, a disclosure letter filed on 04/22/09 that list eight (8)-witnesses and attached five exhibits sequentially labeled DCPS-01 through DCPS-05. No witnesses were present or called to testify.

## **D. STATEMENT OF THE CASE**

The student, born \_\_\_\_\_ age \_\_\_\_\_-years 4-months, is a student with a disability who was to receive special education and related services, according to his 09/23/08 initial IEP, as a \_\_\_\_\_ grade, at least 38% of the school day outside of a general education classroom as a Specific Learning Disabled ("SLD") student now attending \_\_\_\_\_ located in Washington D.C. (R. at Parent-02; DCPS-04.)

While attending \_\_\_\_\_ School, a private school, the student's parents sought special education services for their son from DCPS. On 09/23/08 the student's MDT/IEP Team found the student eligible for special education services; developed his part time initial IEP; and proposed placement at \_\_\_\_\_. The parents rejected that placement at that 09/23/08 MDT/IEP Team Meeting and kept their son at \_\_\_\_\_. The parents now allege that the student needs a full time IEP and that the proposed placement was inappropriate for the 2008-09 school year.

Consequently, on 03/26/09 parent's counsel filed the student's 03/26/09 Due Process Complaint ("DPC") alleging that DCPS as the LEA violated the IDEA and denied the student a Free Appropriate Public Education ("FAPE") by doing two things: (1) failing to provide the student an appropriate IEP for the 2008-09 school year because the student needs a full time not part time IEP; and (2) failing to provide the student an appropriate placement to implement his 09/23/08 IEP during the 2008-09 school year when DCPS proposed because it did not have a grade. (R. at Parent-01.)

As relief, the parents want DCPS to place and fund the student to attend a private, full time, day special education school. (R. at Parent-01, 05.)

DCPS' 04/09/09 Response to the student's DPC was that (1) the student's 09/23/08 IEP that was signed by the mother agreeing with its content is appropriate; and (2) the parents rejected the FAPE that DCPS made available to their son at the 09/23/08 MDT/IEP Team Meeting. (R. at the 04/09/09 DCPS' Response to the DPC.)

The OSSE Student Hearing Office ("SHO") scheduled the due process hearing for 9:00 a.m. on Thursday, April 30, 2009 that convened at Van Ness Elementary School, 1150 5th Street, S.E., 1st Floor, Washington, D.C. 20003. The parties' waived their participation in a Resolution Session. And the parents selected to have a closed due process hearing that convened, as scheduled, 34-days after the 03/26/09 DPC was filed.

Assistant Attorney Generals Laura George and Linda M. Small appeared in-person representing DCPS. Attorney Donovan Anderson appeared in-person representing the student who was not present; and the student's parents who were present.

## **II. Issue**

Did DCPS, as the LEA, violate the IDEA and deny the student a FAPE by failing to provide the student a full time initial IEP when it developed a part time initial IEP; and by failing to provide him an appropriate placement when it proposed that was rejected by the mother without her saying why at the 09/23/08 MDT/IEP Meeting?

### **Brief Answer**

No. The student does not need a full time IEP. And albeit when was proposed as the student's placement it did not have a 6th grade, the parents never enrolled their son in nor did they enroll him in the second school DCPS offered that did have a 6th grade.

### III. FINDINGS OF FACT

1. The student, born \_\_\_\_\_ age \_\_\_\_\_-years 4-months, is a student with a disability who was to receive special education and related services, according to his 09/23/08 initial IEP, as a \_\_\_\_\_ grade, at least 38% of the school day outside of a general education classroom as a Specific Learning Disabled ("SLD") student now attending \_\_\_\_\_ located in Washington D.C. (R. at Parent-02; DCPS-04.)
2. According to the student's 09/23/08 initial IEP developed by DCPS while the student was enrolled in \_\_\_\_\_ he was to receive these special education services in a combination general education and special education resource room as an SLD student:
  - a. Specialized Instruction—12.5-hours/week in a Special Education Resource Classroom. (R. at Parent-02; DCPS-04.)
3. After the student's 09/23/08 MDT/IEP Team developed his initial IEP, the student's mother, who participated in developing that IEP signed it and agreed to its content as indicated by her placing a check mark on the line next to this statement—"I agree with the contents of the IEP." (R. at Parent-02; DCPS-04.)
4. According to the student's 09/23/08 IEP Team Meeting Notes:
  - i. The team agreed that the student would receive special education services in his less proficient areas and remain with his non-disabled peers in his strength areas;
  - ii. He did not need a full time placement;
  - iii. \_\_\_\_\_ was the proposed placement and DCPS issued a Prior Notice of Placement to \_\_\_\_\_
  - iv. The student's mother rejected the placement and said that she would not be transferring him to \_\_\_\_\_ and \_\_\_\_\_
  - v. No reason was specified in the Meeting Notes about why the mother rejected \_\_\_\_\_  
(R. at Parent-02, 04; DCPS-03, 04, 05.)
5. The student's 08/27/08 Psychological Evaluation Reports admitted into evidence did not specify the amount of services the student needed nor did it recommend the type of educational placement setting he needed. (R. at Parent-03; DCPS-02.)

6. The mother testified that she rejected the placement at the MDT Meeting because she believed the student needed more hours [of special education services] but she did not tell that to her other MDT/IEP Team members. Later, exactly when is not known, the parent visited and was told her son needed to enroll in because did not have a grade. The parents, however, did not attempt to enroll their son in or in (R. at the parents' testimony.)
7. There was no evidence presented about what additional services the parents believe their son needed and why; nor any evidence about why the student needed a full time initial IEP instead of a part time IEP.
8. Nor was there any evidence presented about how the student was harmed by DCPS proposing which did not have a sixth grade or evidence of harm when DCPS informed the parent that the correct school was School particularly since the parents never attempted to enroll their son in either school.
9. Based on these facts there is no finding that the student requires a full time IEP and a full time special education placement.
10. Therefore, DCPS did not deny the student a FAPE.

#### **IV. DISCUSSION and CONCLUSIONS OF LAW:**

##### **I**

**DCPS is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.**

The IDEA codified at 20 U.S.C. §§ 1400 - 1482, and 5 D.C.M.R. § 3000.1 requires DCPS to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide them with special education and related services through an appropriate IEP and Placement.

DCPS met its legal obligation under the IDEA. Here is why.

1. "If a child's initial evaluation suggests [s/he] is entitled to a FAPE, IDEA then requires the school district to create and implement an IEP, which is the 'primary vehicle' for implementing the Act." Hoing v. Doe, 485 U.S. 305, 311 (1988).
2. According to the IDEA at 34 C.F.R. § 300.306 (a)(1)-(b)(2), Determination of Eligibility, "Upon completion of the administration of assessments and other evaluation measures—(1) a group of qualified professional and the parent of the child determine whether the child is a child with a disability ...

in accordance with paragraph (b) of this section and the educational needs of the child. ... (b) A child must not be determined to be a child with a disability if ... the child does not otherwise meet the eligibility criteria under § 300.8, [Child with a Disability].”

3. Pursuant to 5 D.C.M.R. § 3002.1, LEA Responsibility, “[t]he services provided to the child must address all of the child’s identified special education and related services needs and must be based on the child’s unique needs and not on the child’s disability.”
4. Pursuant to 5 D.C.M.R. § 3013.1(e), Placement, “[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child’s IEP.”
5. Pursuant to Initial Evaluations at 34 C.F.R. § 300.301 (a): “Each public agency shall conduct a full and individual initial evaluation in accordance with § 300.305 and § 300.306 before the initial provisions of special education and related services [are provided] to a child with a disability under this part [Part B of the IDEA].”
6. Pursuant to Initial Evaluations at 34 C.F.R. § 300.304 (c)(4): “Each public agency must ensure that ... (4) “the child is assessed in all areas related to the suspected disability, including, if appropriate ... [their] social and emotional status.”
7. Pursuant to Initial Evaluations at 34 C.F.R. § 300.304 (c)(6): “Each public agency must ensure that ... (6) “in evaluating each child with a disability under §§ 300.304 - 300.306, the evaluation is sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.”
8. Pursuant to 20 U.S.C. § 1414 (c)(1), “initial evaluation shall consist of procedures to determine whether a child is a child with a disability ... within 60-days of receiving parental consent for the evaluation, or if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe.” The District of Columbia’s established evaluation timeline codified at D.C. Code Ann. § 38-2051(a) was [within 120-days of receipt of the referral].
9. To ensure that each eligible student receives a FAPE, the IDEA requires that an IEP be developed to provide each disabled student with a plan for educational services tailored to that student’s unique needs. See 20 U.S.C. § 1414 (d)(3).

10. Pursuant to 34 C.F.R. § 300.321 (a)(5), IEP Team, “[t]he public agency must ensure that the IEP Team for each child with a disability includes—an individual who can interpret the instructional implications of evaluation results.”
11. Pursuant to 34 C.F.R. § 300.116 (a)(1), Placements, “[i]n determining the educational placement of a child with a disability, each public agency shall ensure the placement decision is made by a group of persons, including the parent, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.”
12. Pursuant to 34 C.F.R. § 300.501(c), Parental Involvement in Placement Decisions, “[e]ach public agency shall ensure the parents of each child with a disability are members of any group that makes decisions on the education placement of their child.”
13. Pursuant to 5 D.C.M.R. § 3025, Procedural Safeguards—Prior Written Notice, DCPS shall provide written notice to the parent of a child with a disability before it proposes...an educational placement of the child.
14. Pursuant to 34 C.F.R. §§ 300.323(a), (c)(2), IEP Must be in Effect, each public agency must provide special education and related services to a child with a disability in accordance with the child’s IEP.
15. In this case, DCPS complied with those cited IDEA requirements when the student’s 09/23/08 MDT/IEP Team that included his mother as a team member did these things: (1) they had already referred the student for an initial evaluation; (2) they convened his MDT/IEP Meeting on 09/23/08 to review his assessment reports; (3) based on that review they found the student was eligible for special education services; (4) they developed the student’s 09/23/08 initial part time IEP; and (5) they issued a Prior Notice of Placement to the parents placing the student at his neighborhood school Green ES. (R. at DCPS-02, 03, 04, 05; Parent-02, 03, 04.)
16. And there was no persuasive evidence presented that the student required a full time IEP and placement. In fact the overwhelming credible evidence is to the contrary. Here is why.
17. According to the student’s 09/23/08 IEP Team Meeting Notes:
  - a. The team agreed that the student would receive special education services in his less proficient areas and remain with his non-disabled peers in his strength areas;
  - b. He did not need a full time placement;

- c.                was the proposed placement and DCPS issued a Prior Notice of Placement to
  - d. The student's mother rejected the placement and said that she would not be transferring him [the student] to                and
  - e. No reason was specified in the Meeting Notes about why the mother rejected                 
(R. at Parent-02, 04; DCPS-03, 04, 05.)
18. Further, the student's 08/27/08 Psychological Evaluation Reports admitted into evidence did not specify the amount of services the student needed nor did it recommend the type of educational placement setting he needed. (R. at Parent-03; DCPS-02.)
19. So there was no testimony or documentary evidence presented at the due process hearing regarding what additional related service or specialized instruction subject area the student needed let alone a specific amount of such additional services that when tallied would result in a full time IEP.
20. So the parents did not prove that the student needed a full time IEP.
21. Consequently, without a full time IEP the student does not need a full time special education placement.
22. According to the IDEA at 34 C.F.R. §§ 300.114(a)(2)(i), LRE Requirements, "[e]ach public agency must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions are educated with children who are non-disabled."
23. The student's 09/23/08 initial IEP developed by DCPS while the student was enrolled in Naylor RS, a private school, he was to receive these special education services in a combination general education and special education resource room as an SLD student:
- b. Specialized Instruction—12.5-hours/week in a Special Education Resource Classroom. (R. at Parent-02; DCPS-04.)
24. The student's mother, who participated in developing that IEP signed it and agreed to its content as indicated by her placing a check mark on the line next to this statement—"I agree with the contents of the IEP." (R. at Parent-02; DCPS-04.)



25. And the student's IEP Team agreed that the student did not need a full time placement. The mother, however, rejected the placement and testified that she did not tell her other team members why she was rejecting the placement. (R. at DCPS-03; Parent-02, mother's testimony.) So the parents presented no evidence about why the proposed placement was inappropriate on 09/23/08. (R. at mother's testimony.)
26. Subsequent to the 09/23/08 meeting, the mother visited the proposed placement— At that visit she learned that did not have a sixth grade. But she was told to enroll her son in The parent testified that she never attempted to enroll her son in either school. (R. at mother's testimony.)
27. So the 09/23/08 Notice of Placement issued by DCPS placing the student in a school that did not have the grade level the student was to enroll in albeit corrected by informing the parent of another school placement to enroll their son in— results in a procedural violation of the IDEA. But that procedural violation did not result in a denial of a FAPE.
28. That is because issuing a defective prior written notice of placement is a procedural violation of the IDEA but is not a *per se* denial of a FAPE. Here is why.
29. According to the IDEA at 20 U.S.C. § 1414 (E) (ii), and 34 C.F.R. § 300.513 (a) Decision of a hearing officer on procedural issues, states that, "[i]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education [FAPE] only if the procedural inadequacies—
- (I) impeded the child's right to a free appropriate public education;
  - (II) significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
  - (III) caused a deprivation of educational benefits."
30. And pursuant to 34 C.F.R. § 300.513 (3) Hearing Decisions, "[n]othing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements."

31. The student was not denied a FAPE because there was no evidence presented by the parent that a procedural inadequacy impeded the student's right to a FAPE nor deprived the student of educational benefit since parent's counsel made no effort to demonstrate—much-less demonstrated—that the student's education was affected by any alleged procedural violation that DCPS may have committed. Particularly since the student's mother rejected the FAPE DCPS made available to their son and kept their son in the parents' selected private school placement. (R. at mother's testimony.)
32. Additionally, it did not impede the parent's opportunity to participate in the decision making process regarding the provision of a FAPE because the mother was present at her son's 09/23/08 MDT/IEPT Meeting where his initial IEP was developed, its content agreed to, and then signed by the mother. (R. at Parent-02; DCPS-04.) Moreover, if the parents wanted to make changes to the student's IEP, that can be done without a formal MDT/IEP Team Meeting.
33. That is because according to the IDEA at 20 U.S.C. § 1414 (d)(3)(D), Agreement, "in making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purpose of making such changes, and instead may develop a written document to amend or modify the child's current IEP." The parents never requested changes to their sons IEP.
34. So there is no FAPE denial because there is no evidence whatsoever to establish a nexus between the levels of services the student now receives and a resulting educational harm or an impediment to the parents' role in decision making process regarding a FAPE to the student.
35. Moreover, the D.C. Circuit Court held that: "only those procedural violations of the IDEA which result in a loss of educational opportunity or seriously deprive parents of their participation rights are actionable." Lesesne v. District of Columbia, 447 F.3d 828, 834 (D.C. Cir. 2006) (citing Kruvant v. District of Columbia, 99 F. App'x 232, 233 (D.C. Cir. 2004) (holding that procedural flaws do not automatically render an IEP defective; and that although DCPS admits it failed to satisfy its responsibility to assess the student within 120 days of the parents' request, the parents have not shown harm resulted from that error).
36. "Procedural violations are not an automatic violation of FAPE. In many cases a plaintiff must demonstrate "substantial harm" resulting from a procedural violation to establish a denial of FAPE. In cases where a student is seeking a reevaluation, but is already in a placement, a court may not find delay substantially harmed the child." Simmons v. District of Columbia, 355 F. Supp. 2d 12, 18 (D.D.C. 2004).

37. The ultimate goal is to provide for the child and if the school system complies, a violation of the IDEA does not occur. Shaw v. District of Columbia, 238 F. Supp. 2d 127, 136 (D.D.C. 2002).
38. So based on this hearing record and the law, the student had an IEP and placement at the time of the alleged violation. And there is no evidence supporting the parent's claim that the student was denied a FAPE because the parent rejected the FAPE that DCPS made available to their son. And an incorrect school placement written in the 09/23/08 Prior Notice of Placement, alone, did not constitute "substantial harm" resulting in a denial of FAPE since the parents never even attempted to enroll their son in either the DCPS proposed or the corrected placement.
39. So based on this hearing record, there does not exist evidence supporting the parents' claims that the student was denied a FAPE because the claims alleged did not result in a *per se* denial of a FAPE to their son.
40. And pursuant to 5 D.C.M.R. § 3030.3, "The burden of proof shall be the responsibility of the party seeking relief; either the parent/guardian of the child or the LEA. 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 a Free Appropriate Public Education (FAPE)."
41. The parents, who filed the Due Process Complaint, had and did not meet their burden of proof in this case because the parents:
  - a. Failed to prove that DCPS denied the student a FAPE by not providing him a full time initial IEP; and
  - b. Failed to prove that the student requires a full time educational placement to implement his initial part time IEP.

So in consideration of the hearing record, there is no finding that the student was denied a FAPE because the parents did not meet their burden of proof under the IDEA by proving their alleged violations of the IDEA; and even if true, the parent did not prove that the alleged violations rose to the level to deny the student a FAPE. Ergo, based on the evidence and governing law the hearing officer issues this—

## ORDER

1. The parent's 03/26/09, Due Process Complaint ("DPC") in Case No.:  
is dismissed, with prejudice—meaning that the issues that were or could have been raised in the 03/26/09 DPC based on the same facts against the same parties or privies that arise from the same time period that formed the

basis for the 03/26/09 DPC that is resolved herein by a final judgment on the merits cannot be relitigated. See Apotex, Inc. v. FDA, 393 F.3d 210, 217 (D.C. Cir. 2004).

2. There is no finding that the student was denied a FAPE.
3. This Order resolved all issues raised in the student's 03/26/09 Due Process Complaint in Case Number \_\_\_\_\_ that is dismissed with prejudice.
4. And the hearing officer made no additional findings.

**This is the final ADMINISTRATIVE DECISION. An appeal can be made to a court of competent jurisdiction within ninety (90)-days from the date of this Decision and Order pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B); 34 C.F.R. § 300.516 (b).**

*/s/ Frederick F. Woods*  
Frederick E. Woods  
Hearing Officer

May 10, 2009  
Date