

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
April 20, 2015

STUDENT, ¹)	
through PARENTS,)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioners,</i>)	
)	
v.)	
)	Date Issued: April 17, 2015
District of Columbia Public Schools,)	
Office of State Superintendent of Education)	
<i>Respondents.</i>)	
)	

Hearing Officer Determination

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; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

PROCEDURAL BACKGROUND

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 et seq.

The DPC was filed on February 2, 2015 by Petitioners (Student’s parents), residents of the District of Columbia, against Respondents, District of Columbia Public Schools (“DCPS”) and Office of State Superintendent of Education (“OSSE”). On February 12, 2015, Respondent DCPS and Respondent OSSE filed their timely Responses, each Respondent denying that it had denied Student a free appropriate public education (“FAPE”).

The parties convened for a Resolution Session Meeting (“RSM”) on February 12, 2015.² The parties did not reach an agreement during the February 12, 2015 meeting, but they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties

² Petitioners dispute that the February 12, 2015 meeting constituted an RSM, in that Petitioners assert that the meeting did not meet the requirements of 20 U.S.C. § 1415(f)(1)(B), and that it was not a procedurally valid RSM, satisfying IDEA requirements, as stated in *Eley v. District of Columbia*, Civil Action No. 11-309 (BAH) (AK) (D.D.C., November 20, 2013, op. at 39-41). The parties did, however, sign an RSM disposition form dated February 12, 2015.

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agree that the 45-day timeline for the Hearing Officer's Determination ("HOD") in this matter began to run on March 5, 2015, and the Hearing Officer Determination is due on April 18, 2015.

The undersigned Impartial Hearing Officer ("IHO" or "Hearing Officer") held a Pre-hearing Conference ("PHC") on March 3, 2015, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by March 12, 2015 and that the DPH would be held on March 19, 2015 and March 25, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the "PHO"), an amended version of which was issued on March 15, 2015.

The DPH was held on March 19, 2015 and March 25, 2015 at the Office of Dispute Resolution, 810 First Street, NE, . Petitioners elected for the hearing to be closed.

On February 4, 2015, counsel for OSSE filed a motion for continuance, seeking to align the DPC timeline for OSSE (the state education agency, which the Individuals with Disabilities Act does not require to have resolution period) with the DPC timeline for DCPS (the local education agency, for which IDEA provides a 30 day resolution period, unless mutually waived by the parties). Neither party objected to OSSE's motion for continuance, and on March 3, 2015, OSSE's motion for a continuance was granted, meaning the final decision as to OSSE is April 18, 2015 – the same day the final decision is due for DCPS. On February 4, 2015, Respondent OSSE filed a motion to dismiss the DPC, as to OSSE, to which Respondent DCPS did not file a written response, and to which Petitioners filed an opposition on February 18, 2015. The motion was denied on March 5, 2015. On February 24, 2015, Petitioners filed a motion in *liminae*, to which Respondent DCPS filed an opposition on February 27, 2015 and Respondent OSSE did not file a written response. The motion in *liminae* was denied on the record at the DPH on March 19, 2015, as the Hearing Officer received, considered and ruled on objections to specific exhibits, rather than limiting evidence in advance of the DPH. On March 11, 2015, Respondent DCPS filed a partial motion to dismiss the DPC, to which Respondent OSSE consented on March 11, 2015, and to which Petitioners filed an opposition on March 16, 2015. The Hearing Officer has had the partial motion to dismiss under advisement, and the decision on the motion is included within this HOD. On March 12, 2015, Petitioners filed a motion for summary disposition, to which Respondent DCPS filed an opposition on March 17, 2015, to which Respondent OSSE filed an opposition on March 17, 2015, and for which Petitioners filed a reply on March 18, 2015. The partial motion for summary disposition was denied on the record during the DPH on March 19, 2015, so that the parties would have the opportunity to offer testimonial evidence for the Hearing Officer's consideration. On March 17, 2015, Respondent OSSE filed a renewed motion to dismiss the DPC, to which Respondent DCPS did not file a written response or make an oral response, and which Petitioners opposed orally on the record during the DPH, as the response period had not yet lapsed at the time the DPH convened. The Hearing Officer has had the renewed motion to dismiss under advisement, and the decision on the motion is included within this HOD.

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Petitioners' and Respondent DCPS' and Respondent OSSE's disclosures were timely filed. At the DPH, Petitioner's exhibits P-1 through P-84 were admitted without objection. Respondent DCPS' exhibits DCPS R-2; DCPS R-7 through DCPS R-15, DCPS R-17, DCPS R-19 through DCPS R-30, DCPS R-32, DCPS R-35, DCPS R-36 through DCPS R-39, and DCPS R-45 were admitted without objection. Respondent OSSE's exhibits OSSE R-1 through OSSE R-4, OSSE R-7 through OSSE R-11, OSSE R-19 through OSSE R-26, OSSE R-33 through OSSE R-34, OSSE R-37 through OSSE R-42, and OSSE R-44 were admitted without objection. DCPS R-1, DCPS R-3 through DCPS R-6, DCPS R-16, DCPS R-18, DCPS R-31, DCPS R-33, DCPS R-34, DCPS R-40 through DCPS R-44 and DCPS R-46 through DCPS R-54 were admitted over Petitioner's objection. Respondent OSSE's exhibits OSSE R-1 through OSSE R-4, OSSE R-7 through OSSE R-11, OSSE R-19 through OSSE R-26, OSSE R-33 through OSSE R-34, OSSE R-37 through OSSE R-42, and OSSE R-44 were admitted without objection. Respondent OSSE's exhibits OSSE R-5, OSSE R-6, OSSE R-12 through OSSE R-18, OSSE R-27 through OSSE R-31, OSSE R-35, OSSE R-36, OSSE R-43, OSSE R-45, and OSSE R-46 were admitted over Petitioner's objection. Respondent OSSE's exhibit R-32 was withdrawn by Respondent OSSE.

Petitioners called the following witness at the DPH:

- (a) Petitioner/Parent³

Respondent DCPS called the following witness at the DPH:

- (a) DCPS Program Manager

Respondent OSSE called the following witness at the DPH:

- (a) OSSE Education Program Specialist

Petitioner, Respondent DCPS and Respondent OSSE gave oral closing arguments.

ISSUES

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS denied the student a free appropriate public education ("FAPE") by denying his parents the opportunity to participate in developing his IEP, holding the student's July 16, 2013 IEP meeting without the mother present, despite the parents' request to postpone the meeting to allow her to be there.
- (b) Whether DCPS denied the student a FAPE by failing to review previously developed portions of the IEP at the October 1, 2013 IEP meeting.
- (c) Whether DCPS denied the student a FAPE by violating the parents' right to participate in developing the student's IEP and by predetermining placement at

³ "Petitioner" or "Parent" in the singular refers to Student's mother. "Petitioners" or "Parents" in the plural refers to Student's mother and father.

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Residential Treatment Facility (“DCPS Proposed RTC”) before the October 1, 2013 and July 29, 2014 IEP meetings.

- (d) Whether DCPS⁴ violated the student’s right to remain in his “current placement” pursuant to 20 U.S.C. Sec. 1415(j) through their efforts to send him to DCPS Proposed RTC while litigation over his proposed IEP was pending, and after 1:1 instruction was determined to be his “current placement.”
- (e) Whether DCPS denied the student a FAPE by denying the parents’ right to participate in developing the student’s IEP by withholding information to be discussed, and a copy of its proposed IEP, from the parents before the July 29, 2014 IEP meeting and after it began.
- (f) Whether DCPS denied the student a FAPE by denying the parents’ the right to participate in developing the student’s IEP by limiting discussion at the July 29, 2014 IEP meeting to selected sections of a previously drafted but undisclosed IEP.
- (g) Whether DCPS and OSSE denied the student a FAPE pursuant to 34 C.F.R. § 300.622 and 34 C.F.R. § 300.623 by failing to keep his educational records confidential, making repeated disclosures of that information to DCPS Proposed RTC without the parents’ consent and over their objection to the disclosure.
****For reasons discussed below in a decision on DCPS’ partial motion to dismiss, and as further stated below in the decision on OSSE’s renewed motion to dismiss, this issue is dismissed for lack of subject matter jurisdiction.****

RELIEF REQUESTED

Petitioners requested the following relief:

- (a) an Order vacating the July 16, 2013, October 1, 2013 and July 29, 2014 IEPs, and ordering DCPS to convene an IEP meeting that will prepare an entirely new IEP for the student with the parents’ informed and full participation;
- (b) an Order that DCPS and OSSE cease contacting DCPS Proposed RTC without the parents’ consent or otherwise attempting to change the student’s placement while the November 18, 2013 preliminary injunction remains in effect;
- (c) an Order that DCPS hold IEP team meetings for the student only at mutually convenient times, including rescheduling if the parents ask to change a previously scheduled IEP meeting date in order to allow them, or other members of the IEP team, to participate;
- (d) an Order that DCPS provide the same notice to the parents of matters to be discussed or documents to be reviewed at IEP team meetings that DCPS provides to its own staff and/or OSSE.

⁴ The DPC also alleges this issues as to Respondent OSSE; however, for reasons discussed below in a decision on OSSE’s renewed motion to dismiss, this issue is dismissed as to OSSE.

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FINDINGS OF FACT

1. Student resides with his parents (“Parents”/“Petitioners”) in Washington, D.C.
2. Student is eligible for special education and related services under the classification “multiple disabilities.”⁵ At age 5, he was diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”), and his medical history and needs are complex, including hearing loss, extreme sensory sensitivity, speech and language deficits, fine motor and sensory deficits, an aggression toward others. Student struggles with anxiety, and he will at times pick at the skin on his face until it causes an open wound.⁶ Student has an extreme and simultaneous attraction to and phobia of/repulsion toward sound makers such as alarms. He will often feel compelled to trigger them; yet he will have an intensely negative reaction when either he or others triggers them.⁷
3. Other than an unsuccessful 30-day trial period at a subsequent non-public special education day school in fall 2011, Student has not attended school in nearly six years (since June 2009), when the earlier non-public day school he had been attending at that time and Parents mutually agreed that it could not meet his needs.⁸
4. Over the past six years, Student has at some points received home-based instruction, and is currently receiving some services through a non-public intensive learning provider, funded by DCPS, by way of a federal district court stay-put injunction.⁹
5. There is tremendous tension and frustration, spanning many years, between DCPS and Parents over many issues, including what constitutes an appropriate placement for Student, the extent to which an appropriate placement has been proposed and/or accepted, and the fact that Student has been out of school/not receiving his full panoply of IEP services for such a long period of time.
6. One source of tension between the parties has been the process of scheduling IEP meetings. When scheduling an IEP meeting, Student’s mother (who takes care of him during the day, including arranging for/transporting him to services) coordinates with Student’s father to ensure that he can close his small business, take off from work and care for Student during the proposed time. In advance of confirming a date for an IEP team meeting, Parent also generally seeks from DCPS information about compensation for Student’s independent service providers and a proposed draft IEP, an agenda and any other relevant documents, so that she can coordinate with the independent service providers she would like to have attend the meeting with her. When approached by DCPS with proposed dates for an IEP meeting, Parent generally poses a series of questions to DCPS in an effort to gather information prior to responding to the

⁵ P-78-001.

⁶ Testimony of Parent; P-30-013; P-78-003; P-51.

⁷ Testimony of Parent.

⁸ Testimony of Parent; P-76-033; P-30-013.

⁹ Testimony of Parent; OSSE R-46-005.

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question from DCPS about her availability for particular proposed dates.¹⁰ DCPS generally feels it needs to establish with Parent a mutually agreeable date as a first step, and that discussions about Parent's other inquiries can be on-going leading up to the scheduled meeting. Parent feels she cannot set a date for the meeting without first having information about agenda and other matters she has inquired about. As a result of this dynamic, the very process of scheduling IEP meetings for Student tend to be fraught with tension.¹¹

7. As of May 21, 2013, Student had been considered by several OSSE approved RTCs, all of which had either declined to accept him or rescinded their offers of acceptance.¹² However, one of the RTCs that had considered Student ("DCPS Proposed RTC") indicated that it was willing to reconsider Student for possible admission.¹³ DCPS Proposed RTC ultimately accepted Student, on the condition that DCPS would fund one-on-one aide support for Student, at least initially. Parent was notified of the reconsideration on June 24, 2013.¹⁴

July 16, 2013 IEP Meeting

8. Parent participated in several IEP meetings for Student during the 2012-2013 school year, each two or more hours long, during which she was involved in developing Student's IEP 2012 IEP. Parent agreed with all listed services in Student's 2012 IEP, and agreed in 2012 that Student's placement should be a residential treatment facility ("RTC"). However, Parent subsequently believed and currently believes that the 2012 IEP (and those following it) no longer reflect Student's current needs.¹⁵

9. On May 30, 2013, Hearing Officer Peter Vaden issued an order finding Student's 2012 IEPs did not deny Student a FAPE.¹⁶

10. On June 7, 2013, DCPS Program Manager sent an email to Parent proposing an IEP meeting on June 21, 2013, and stating "at this meeting, we will discuss how best to implement an educational plan for [Student] moving forward as well as discuss if any new testing/evaluations may be required to update the IEP."¹⁷

11. After various communications back and forth, the parties agreed to set an IEP meeting for June 21, 2013. On June 19, 2013, DCPS Program Manager (Student's case manager) notified Parent that due to a personal conflict, he could not convene the meeting on June 21, 2013, and would have to reschedule it. As of July 1, 2013, the meeting was rescheduled for July 16, 2013.¹⁸

¹⁰ Testimony of Parent.

¹¹ Testimony of Parent; testimony of DCPS Program Manager.

¹² P-17-001.

¹³ P-17-002.

¹⁴ P-7; P-15.

¹⁵ Testimony of Parent.

¹⁶ R-6.

¹⁷ P-9-006.

¹⁸ R-11-1.

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12. On July 8, 2013, Parents notified DCPS in writing of their intent to unilaterally place Student at Unilateral RTC,¹⁹ and that Student would be entering Unilateral RTC “as soon as a place becomes available for him (estimated to occur within the next two to three weeks).”²⁰ The unilateral placement letter indicated that, “Although the length of [Student’s] stay at [Unilateral RTC] will not be finally determined until he enters the program . . . children typically stay there about 60 days.”²¹ The unilateral placement letter further stated, “[Parents] expect DCPS to monitor [Student’s] educational program at [Unilateral RTC] and to be prepared to effectuate a prompt transition to another educational placement upon his discharge.” Additionally, the unilateral placement letter stated, “If DCPS expects [Unilateral RTC] to implement any IEP goals for [Student], then the process of updating and revising his IEP should continue now. Most of the contents of his IEP are nearly one year old, and rely upon yet older information. In any event, a proper IEP should be ready for him at his discharge from [Unilateral RTC].”²²

13. On July 10, 2013, DCPS through counsel notified Parents in writing that DCPS would not fund Student at Unilateral RTC, as it could not legally do so, since the school did not have a certificate of approval in accordance with D.C. Code § 38-2561.03. DCPS’ letter also stated that “DCPS is not required to, nor will it propose a revised IEP while [Student] is unilaterally placed by [Parents] at [Unilateral RTC]. Nor will it monitor [Student], as it is under no such obligation.”²³

14. At approximately 10:00 a.m. on July 15, 2013, DCPS Program Manager provided teleconference call-in information to parties who would be attending the scheduled 11:00 a.m. July 16, 2013 IEP meeting remotely.²⁴

15. At approximately 10:30 a.m. on July 15, 2013, Parents’ counsel informed DCPS that Parent had not received legally required notice of the meeting, did not know who else had been invited to the meeting, had not received Student’s “educational records” (which Petitioners’ counsel was defining as emails exchanged about Student with DCPS Proposed RTC) in response to Parents’ June 24, 2013 request for the same, and that one independent provider may not be able to participate in the meeting due to previous lack of payment by DCPS.²⁵

16. On the evening of July 15, 2013, Parent emailed DCPS Program Manager to request that the July 16, 2013 meeting be rescheduled for several reasons, including the lack of availability of one of the independent service providers, lack of childcare arrangements due to the fact that Parent interpreted DCPS’ July 10, 2013 letter stating that Student’s IEP would not be revised while he was at Unilateral RTC as a cancellation of the July 16, 2013 meeting, and because Parent did not feel she had sufficient information regarding the purpose of the meeting,

¹⁹ Testimony of Parent; P-21.

²⁰ DCPS R-12-1.

²¹ R-12-3.

²² R-12-4.

²³ R-13-1.

²⁴ P-24-002-003.

²⁵ P-24-002.

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items to be discussed and individuals who would be present at the meeting.²⁶ Parents' counsel followed up with an email to DCPS on July 16, 2013 with the request to postpone the IEP meeting.²⁷

17. Indicating that Parent's counsel had confirmed the meeting the week prior, and that public school employees' schedules are difficult to coordinate during the summer, DCPS Program Manager informed Parent that the meeting would go forward as scheduled.²⁸

18. An IEP team meeting for Student was convened on July 16, 2013, and neither Parent nor her counsel attended.²⁹

October 1, 2013

19. On July 19, 2013, OSSE issued a location assignment letter assigning Student to DCPS Proposed RTC.³⁰

20. On July 22, 2013, Parents' counsel requested a pre-placement IEP meeting. That same day, DCPS Program Manager proposed two dates that same week when he could be available for the meeting, pending availability of staff at DCPS Proposed RTC.³¹

21. On July 29, 2013, DCPS Program Manager again requested a dates when Parent and her counsel could meet. On July 29, 2013 Petitioners requested to hold off on having an IEP meeting for Student for several reasons, including that Student was having trouble and had been hospitalized at Unilateral RTC.³²

22. On or around August 13, 2013, once Student had been discharged from Unilateral RTC and while Student was hospitalized at a local hospital, DCPS Program Manager indicated to Parent that DCPS would like to convene an IEP meeting to review and consider relevant information a follow-up IEP meeting and all records from Unilateral RTC and the local hospital.³³

23. On August 14, 2013, DCPS Program Manager contacted OSSE Education Program Specialist to inquire whether DCPS Proposed RTC still had a spot for Student. In August and September 2013, OSSE Education Program Specialist and DCPS Proposed RTC exchanged several emails in which OSSE Education Program Specialist requested and DCPS Proposed RTC provided confirmation that a spot was still available for Student, and a 30 day extension of his acceptance,³⁴ and in which OSSE Education Program Specialist later informed

²⁶ Testimony of Parent; P-29-004.

²⁷ P-29-001.

²⁸ P-29-003.

²⁹ R-17-1.

³⁰ P-32-004.

³¹ P-32-001 through P-32-003.

³² P-36-001.

³³ P-40-002.

³⁴ P-48-001.

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DCPS Proposed RTC that Parents had filed suit in federal district court, and were challenging the location of assignment.³⁵

24. On or around September 25, 2013, DCPS issued to Parents a Prior Written Notice assigning Student to DCPS Proposed RTC.³⁶

25. On October 1, 2013, an IEP meeting was convened. Parent, Parents' counsel, Parents' behavioral specialist and Parents' educational consultant attended. At DCPS' invitation, a representative from DCPS Proposed RTC also attended.³⁷ An agenda had been forwarded to Parents on September 30, 2013.³⁸

26. Student's behavioral specialist contributed valuable input at the meeting, including helpful information regarding Student's present levels of performance. Student's behavioral specialist did not recommend a particular location of services. Student's behavioral specialist recommended a gradual transition to an RTC, stating that an RTC would need to be sufficiently staffed for Student's needs ("manned to the teeth"), and there would need to be a one-one-one who could help him learn to remain in anxiety provoking situations and learn to adjust to them.³⁹

27. Helping Student to desensitize toward his triggers, such as alarms and other noises, is essential to preparing him to function in the world. Student can desensitize through a gradual, planned approach, with the ultimate goal of his eventually not requiring accommodations to tolerate his current triggers.⁴⁰

28. Parent did not expressly raise objections to any portions of the July 2013 IEP during the October 1, 2013 IEP meeting. In reaching this finding, the Hearing Officer has weighed and considered Parent's testimony that she was not in agreement with the July 2013 IEP, both because she was not at the July 2013 IEP meeting and because she does not believe it reflects the son's needs. However, no objections to the particular content in the IEP were raised during the meeting.⁴¹

July 29, 2014 IEP Meeting

29. As of the July 29, 2014 IEP meeting, DCPS continued to support residential as Student's placement, and DCPS Proposed RTC as Student's location of services.

30. Parent did not receive an agenda or any documents from DCPS in advance of the July 29, 2014 meeting.⁴²

³⁵ P-50.

³⁶ P-62-002; P-62-005.

³⁷ P-63-001-002.

³⁸ P-64-001.

³⁹ Testimony of DCPS Program Manager; P-65-007-008.

⁴⁰ P-65-027;

⁴¹ Testimony of Parent; P-65.

⁴² Testimony of Parent.

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31. During the July 29, 2014 IEP meeting, the DCPS team projected a draft of Student's proposed IEP on the wall one page at a time. Parent and her representative did not receive a paper copy of the draft proposed IEP until they requested it, and after the meeting had started.⁴³

32. Parent, Parents' counsel and Parents' independent service providers participated during the meeting. Toward the conclusion of the meeting, DCPS Case Manager gave the parties an opportunity to raise any additional issues of concern.⁴⁴

CONCLUSIONS OF LAW

"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*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

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 student'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).

A. Whether DCPS denied the student a free appropriate public education ("FAPE") by denying his parents the opportunity to participate in developing his IEP, holding the student's July 16, 2013 IEP meeting without the mother present, despite the parents' request to postpone the meeting to allow her to be there.

When convening an IEP team meeting, IDEA imposes upon an LEA certain obligations to ensure that parents have an opportunity to participate. The LEA must notify parents of the meeting early enough that they will have an opportunity to attend, and the LEA must schedule the meeting at a mutually agreed time.⁴⁵ With respect to the July 16, 2013 meeting, the record is clear that DCPS took these steps. An IEP meeting may be conducted without a parent in attendance only if the LEA is unable to convince the parent to attend, in which case the LEA must keep a record of its attempts to arrange a mutually agreed on time and place.⁴⁶ Here, the DPH record includes correspondence confirming the mutually agreed to date and location of the IEP team meeting. If a parent cannot attend an IEP meeting, the LEA must use other methods to

⁴³ Testimony of Parent.

⁴⁴ P-76-042-043.

⁴⁵ 34 CFR § 300.322(a).

⁴⁶ 34 CFR § 300.322(d).

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ensure the parent's participation.⁴⁷ In this instance, the LEA provided a teleconference number Parents and other team members could use if they could not attend the meeting in person, as contemplated in 34 CFR § 300.328. The LEA methodically complied with its statutory obligations in convening the meeting in Parents' absence.

In reaching this conclusion, careful consideration was given to Parents' argument that the July 10, 2013 letter from DCPS' counsel after Parents' July 8, 2013 notice of unilateral placement gave Parent the impression that the July 16, 2013 meeting was cancelled. Ultimately, the Hearing Officer does not credit this argument. First, the letter states that DCPS would not revise Student's IEP while he was at Unilateral RTC. However, Parents' notice of unilateral intent had indicated that it may several weeks before a bed would be available for Student at Unilateral RTC, and the July 16, 2013 IEP meeting was approximately six days after the July 10, 2013 letter. With this context in mind, it would be reasonable to conclude that if the July 16, 2013 meeting were cancelled, counsel for DCPS would have explicitly said so in his letter and/or someone from DCPS would have followed up to ensure Student had in fact been transferred to Unilateral RTC, thus relieving DCPS (from its perspective as articulated in the July 10, 2013 letter) of the obligation to convene an IEP team meeting. Since the meeting had already been confirmed, to the extent that there was any ambiguity following the July 10, 2013 letter about whether the meeting was going forward, it would be reasonable to expect that Parent would have contacted DCPS to verify/confirm her understanding that the meeting was cancelled, prior to changing or putting on hold the arrangements she had been making in order to be able to attend the meeting. In light of the fact that Student was soon to be transferred to Unilateral RTC and that Parent had just asked in the unilateral placement letter that Student's IEP goals be updated so that Unilateral RTC could implement them, going forward with the scheduled meeting and offering an additional meeting immediately afterward to again give Parent an opportunity to participate was a reasonable course of action.

Parent further points out that DCPS cancelled the June 21, 2013 meeting within days of the scheduled meeting; therefore, it would have only been equitable to extend Parent the same courtesy of rescheduling the July 16, 2013 meeting when Parent made the request. Even taking Parents' point, however, the fact remains that with respect to the July 16, 2013 meeting, Parent was provided the opportunity to participate, which is what the law requires; therefore, there was not a denial of FAPE on this issue.

B. Whether DCPS denied the student a FAPE by failing to review previously developed portions of the IEP at the October 1, 2013 IEP meeting.

An IEP team must consider existing evaluation data about a student, including evaluations and information provided by the parents.⁴⁸ During the October 1, 2013 IEP team meeting, Parents provided input through Parents' behavioral specialist and Parents' educational specialist. Parent, her counsel and each of Parents' independent evaluators were given the opportunity (even though it was a contentious meeting with lots of interruptions) to offer their assessments of Student's needs, and their recommendations. Parents' independent providers did

⁴⁷ 34 CFR § 300.322(c).

⁴⁸ 20 U.S.C. § 1414(c)(1)(A)(i).

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not offer definitive recommendations regarding where Student should be placed; however, the DCPS members of the IEP team and the representative from DCPS Proposed RTC believed that the recommendations from Parents' independent providers could be implemented at DCPS Proposed RTC. Some of the feedback from Parents' independent providers was incorporated into the IEP. Therefore, while other members of the team drew different conclusions from the information provided by Parent, her counsel and Parents' independent providers, their feedback was considered. Additionally, the relevant portions of the IEP were reviewed at the meeting. The Hearing Officer does not find a denial of FAPE on this issue.

C. Whether DCPS denied the student a FAPE by violating the parents' right to participate in developing the student's IEP and by predetermining placement at DCPS Proposed RTC before the October 1, 2013 and July 29, 2014 IEP meetings.

Parents of a student with a disability must be members of any group making a decision regarding the student's placement. *Wilkins v. District of Columbia*, 571 F.Supp.2d 163, 167 (D.D.C.2008), citing 20 U.S.C. § 1414(e); 34 C.F.R. § 300.327. An LEA must ensure that the placement "[i]s based on the child's IEP." 34 C.F.R. § 300.116(b)(2). While parents must be involved decisions regarding placement, LEAs generally have discretion in selecting the locations where the services will be provided. *See, e.g., James v. District of Columbia* 2013 WL 2650091, 3 (D.D.C. Jun. 9, 2013) (While the IDEA requires a student's parents to be part of the team that creates the IEP and determines the educational placement of the child, it does not explicitly require parental participation in site selection.). To the extent that a student's IEP is appropriate, his educational placement is also appropriate if it is able to implement the terms and conditions of the IEP. *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 55 (D.D.C.2008) (Where a student's IEP was adequate, a school capable of implementing the IEP was an appropriate location.)

Here, Student's placement on the continuum of services is residential. Student clearly has highly specialized needs, and Parents are perhaps understandably cautious about sending him far away from home in light of the nature and severity of his needs, his lack of recent exposure to school settings, and the challenges he has experienced in every learning environment. However, the IEP and notes reflect that the team very much has Student's highly particularized needs in mind in recommending not only residential treatment (the highest level of restrictiveness on the continuum of alternative placements), but also in selecting DCPS Proposed RTC as his location of services. The October 1, 2013 IEP team meeting was one in a series of IEP meetings in relatively short succession during which placement was discussed. In making the site selection for Student, DCPS sought input from Parent well in advance of the October 2013 meeting as to whether there would be other locations where Student could legally be sent that Parents would prefer they explore. Student's IEP team has carefully documented Student's need to be desensitized to his triggers using a gradual, careful, planned approach. Parent has doubts that the DCPS Proposed RTC can do what it indicates it can do, and all parties seem to agree that it is not likely that any environment will be absolutely perfect and without challenges for Student. However, the record does not support a finding at this juncture that DCPS Proposed RTC would be inappropriate for Student, when it is aware of Student's specific needs, is adequately staffed to meet his needs, and would be monitored in the meeting of Student's needs. No denial of FAPE is found on this issue.

D. Whether DCPS⁴⁹ violated the student's right to remain in his "current placement" pursuant to 20 U.S.C. Sec. 1415(j) through their efforts to send him to the DCPS Proposed RTC while litigation over his proposed IEP was pending, and after 1:1 instruction was determined to be his "current placement."

Pursuant to 20 U.S.C. § 1415(j) of the Individuals with Disabilities Education Act ("IDEA"), except in circumstances inapplicable to this case, "during the pendency of any proceeding conducted pursuant to [the section titled, "Assistance for Education of All Children with Disabilities"], unless the State or local education agency and the parents otherwise agree, the child⁵⁰ shall remain in the then-current educational placement of the child." Likewise, IDEA's implementing regulations require that, except in circumstances inapplicable to this case, "during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing . . . unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement." 34 C.F.R. §300.518(a). No evidence was offered that DCPS is violating the federal district court's stay-put order. The LEA is paying for and not attempting to move Student from what the federal judge determined to be his "then current placement" while litigation is pending, which is what a procedural stay-put is designed to accomplish. Moreover, if there had been problems with enforcement of the federal district court's order, it would be the federal court itself that would be empowered to enforce it. No denial of FAPE is found on this issue.

E. Whether DCPS denied the student a FAPE by denying the parents' right to participate in developing the student's IEP by withholding information to be discussed, and a copy of its proposed IEP, from the parents before the July 29, 2014 IEP meeting and after it began.

Parent did not receive an advanced copy of the draft IEP ahead of the meeting. Instead, the draft IEP was projected onto the wall, and Parent received a paper copy of the draft IEP after the meeting began, at her request. Parent argues that this sequence of events constituted a denial of FAPE. However, while it is understandable that Parent would prefer a copy of the IEP in advance, no provision of the IDEA or D.C. Municipal Regulation in effect at that time mandated an advanced copy of the IEP. *See, e.g.*, 34 C.F.R. 300.322(b). The Department of Education was asked to make this very change to the regulations, and while recognizing the value in the LEA providing draft IEP proposals to the parent in advance, it nevertheless declined to alter the Regulation to require it. *See Analysis and Comments*, Federal Register Vol. 71, No. 156 (August 14, 2006) ("*Analysis and Comments*") at page 46678. A hearing officer cannot hold an LEA to a higher standard than the law requires. Therefore, no denial of FAPE is found on this issue.

⁴⁹ The DPC also alleges this issues as to Respondent OSSE; however, for reasons discussed below in a decision on OSSE's renewed motion to dismiss, this issue is dismissed as to OSSE.

⁵⁰ District of Columbia Municipal Regulations define "child" as "an individual between the ages of three and twenty-two," which includes Student, though he is an adult. 5-E D.C.M.R. 3001.1.

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F. Whether DCPS denied the student a FAPE by denying the parents' the right to participate in developing the student's IEP by limiting discussion at the July 29, 2014 IEP meeting to selected sections of a previously drafted but undisclosed IEP.

The evidence does not support a finding that Parent was not able to participate in the July 29, 2014 IEP team meeting. Parent, her counsel and her independent providers gave feedback throughout the meeting. Parent was given an opportunity to raise additional concerns at the end of the meeting. This Hearing Officer does not find that the discussion was limited to only certain portions of the IEP. An LEA can bring a draft/proposed IEP to a meeting, but a parent can also bring detailed information, and even his or her own draft IEP if desired. The purpose of the meeting is to have a discussion about the student's needs that can ultimately result in a final version of an IEP. No denial of FAPE is found on this issue.

MOTIONS

A. Respondent DCPS' Partial Motion to Dismiss

On March 11, 2015, Respondent DCPS filed a partial motion to dismiss the DPC ("District of Columbia Public Schools' Partial Motion to Dismiss"), to which Respondent OSSE consented on March 11, 2015, and to which Petitioners filed an opposition on March 16, 2015 ("Petitioners' Opposition to DCPS' Partial Motion to Dismiss"). The Hearing Officer has had the partial motion to dismiss under advisement.

Respondent DCPS' partial motion to dismiss argues that Petitioner's issue "(g)" – "whether DCPS and OSSE denied the student a FAPE pursuant to 34 C.F.R. § 300.622 and 34 C.F.R. § 300.623 by failing to keep his educational records confidential, making repeated disclosures of that information to DCPS Proposed RTC without the parents' consent and over their objection to the disclosure," should be dismissed on the basis that the IDEA does not give hearing officers jurisdiction over such a claim. DCPS argues that a petitioner may only bring claims related to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child pursuant to the IDEA. DCPS cites to guidance from U.S. Department of Education⁵¹ in arguing 34 C.F.R. §§ 300.622-623 cannot be properly litigated in a due process hearing brought pursuant to 34 C.F.R. § 300.511, but rather that such privacy rights claims would rather be properly brought before the Department of Education's Family Policy Compliance Office ("FPCO") or a state educational agency. Respondent argues that, pursuant to 34 CFR 300.621, hearings related to the privacy of a student's records "must be conducted according to 34 CFR 99.22," a provision of the implementing regulations under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g).

Petitioners argue that (1) the right to maintain the confidentiality of a student's educational records secured by the Individuals with Disabilities Education Act, 20 U.S.C. §1400 et seq. ("IDEA") is independent of the parallel right to similar confidentiality under FERPA, (2) the violations of IDEA confidentiality that the Petitioners cite implicate Student's right to a FAPE, and (3) there is no effective administrative remedy for the cited violations other than a

⁵¹Respondent cites to Letter to Anderson, 50 IDELR 167 (March 7, 2008).

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due process hearing. According to Petitioner, if an IDEA due process hearing is not the proper forum to adjudicate the type of privacy issue raised as Petitioners' issue "G," then there is essentially no means by which a petitioner could exhaust administrative remedies on this issue. Moreover, Petitioners argue that the privacy violations they allege against DCPS and against OSSE directly interfered with Student's receipt of a FAPE by presenting a skewed picture of Student to the receiving schools, causing them to misunderstand the student being referred to them by OSSE and/or DCPS.

As a condition of receiving federal funding, state education agencies and local education agencies must comply with FERPA. The United States Supreme Court has applied a specific type of analysis to the question of whether and under what circumstances federal funding statutes such as FERPA provide privately enforceable rights, and has held that FERPA's "nondisclosure provisions . . . have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions." *Gonzaga University v. Doe*, 536 U.S. 273, 290 (2002). The Supreme Court has held that Congress intended as the enforcement mechanism for FERPA that parents and student who suspect a violation of the act could file a complaint before the FPCO that would lead to an investigation which, if it uncovered violations, would prompt the FPCO to distribute a notice of factual findings and a statement of the specific steps the educational institution must take to comply with FERPA. *Id.* at 289.

Likewise, 20 U.S.C. § 1412(a)(8) and 20 U.S.C. § 1417(c) require states to ensure that they have adequate confidentiality policies and procedures in place, and that they take adequate measures to ensure confidentiality of educational records and data, as a condition of receiving funding under the IDEA, and as specified in 34 C.F.R. §§ 300.622 and 300.623. As Petitioners point out in their opposition, 34 C.F.R. § 300.618-620 set out an alternative hearing procedure for instances in which a parent or student challenges the accuracy of the educational records, but not for instances there has been an alleged breach of confidentiality. Allegations of confidentiality breaches may be properly brought before the FPCO and/or the SEA. *See Letter to Anderson*, 108 LRP 33560 (2008). Such restrictiveness in the number and types of venues in which claims of privacy breaches may be brought appears to reflect Congress' intent to maintain an aggregate/systemic approach to monitoring compliance for purposes of determining on-going funding.

Petitioners argue that, as a condition of funding under IDEA, states must have many different types of policies and procedures in place, including to ensure FAPE is available to all children with disabilities ages 3-21, that methods are developed to find children who require special education, that students with disabilities are educated, to the maximum extent possible, in their LRE, that students are properly evaluated, and that children in private schools receive certain services, as well as the policies and procedures regarding confidentiality. Allegations of violations of the other types of policies and procedures are clearly within a hearing officer's jurisdiction in a DPH; therefore, Petitioners argue that there is no reason to carve out the confidentiality requirement for different treatment. However, each of those other types of policies and procedures are unambiguously reflected as individually enforceable rights within the IDEA, which distinguishes them from the confidentiality requirements. Petitioners argue that they essentially have no effective administrative remedy against OSSE in this case, as OSSE is

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the very SEA Petitioners are alleging violations against, and that would decide the claim if Petitioners were to file a state complaint. Petitioners also, however, have the option to file a claim with the FPCO, and/or to file the claim before a court of competent jurisdiction.⁵² Even to the extent that these alternatives are not adequate, broadening the type of forums available would far exceed a hearing officer's authority.

Petitioners further argue that, even if claims of confidentiality breaches generally do not fall within a hearing officer's jurisdiction, the specific confidentiality breach Petitioners have alleged would fall within a hearing officer's jurisdiction, in that Petitioners are alleging that Respondents disclosed Student's confidential educational records to nonpublic schools without Parents' consent, and that these disclosure presented a skewed picture of Student, causing the nonpublic schools to misunderstand the student being referred to them, resulting in his being rejected once the schools got to know him better, resulting in behavioral deterioration and a delay in finding the appropriate school for Student. Petitioners argue, therefore, that the disclosures interfered with Student's right to receive a FAPE, and therefore falls within a hearing officer's jurisdiction pursuant to 20 U.S.C. § 1415(b)(6)(A). For all the reasons stated above, however, the Hearing Officer does conclude that the issue of disclosure of confidential records is an individually enforceable right falling within a hearing officer's jurisdiction, even in light of this argument.

For these reasons, "District of Columbia Public Schools' Partial Motion to Dismiss" is **GRANTED**, and Petitioner's DPC allegations "whether DCPS and OSSE denied the student a FAPE pursuant to 34 C.F.R. § 300.622 and 34 C.F.R. § 300.623 by failing to keep his educational records confidential, making repeated disclosures of that information to the DCPS Proposed RTC without the parents' consent and over their objection to the disclosure" is ***Dismissed with Prejudice***.

B. Respondent OSSE's Renewed Motion to Dismiss

On March 17, 2015, Respondent OSSE filed a renewed motion to dismiss the DPC, to ("Office of the State Superintendent of Education's Renewed Motion to Dismiss for Good Cause"). Respondent DCPS did not file a written response or make an oral response on the record; however, DCPS stated that it did not object to OSSE's motion, and made the following stipulation,

"DCPS stipulates that OSSE was not involved in the July 2014 IEP meeting or the proposal of [DCPS Proposed RTC] as a location of service at the July 2014 meeting. Furthermore, DCPS – not OSSE – contacted [DCPS Proposed RTC] after the November 19, 2013 preliminary injunction order was issued."

Petitioners did not join in the stipulation made between Respondent DCPS and Respondent OSSE; however, Petitioners indicated during the DPH that they had no reason to dispute the

⁵² Petitioners have requested a finding that the administrative process is futile, so that Petitioners can proceed directly to court; however, such a finding is not necessary in order rule on the motion, or in order for Petitioners to make the argument regarding exhaustion/futility of administrative remedies before an appropriate court.

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stipulation. Petitioners opposed Respondent OSSE's renewed motion to dismiss the DPC orally on the record during the DPH, as the response period had not yet lapsed as of the time the DPH convened. Petitioners incorporated by reference into their oral opposition Petitioner's reply to Respondent DCPS' and Respondent OSSE's oppositions to Petitioner's motion for summary disposition, as further support for Petitioners' opposition to Respondent OSSE's renewed motion to dismiss. The Hearing Officer has had the renewed motion to dismiss under advisement.

Two of the issues in the PHO are alleged to OSSE as well as to DCPS. Issue "(d)" is "whether DCPS and/or OSSE violated the student's right to remain in his 'current placement' pursuant to 20 U.S.C. Sec. 1415(j) through their efforts to send him to [DCPS Proposed RTC] while litigation over his proposed IEP was pending, and after 1:1 instruction was determined to be his 'current placement.'" Additionally, there was an issue "(g)" — "whether DCPS and OSSE denied the student a FAPE pursuant to 34 C.F.R. § 300.622 and 34 C.F.R. § 300.623 by failing to keep his educational records confidential, making repeated disclosures of that information to [DCPS Proposed RTC] without the parents' consent and over their objection to the disclosure." Respondent OSSE argues that both of these issues must be dismissed as to OSSE. As to issue "(d)," OSSE states that it was not/is not a party to the referenced litigation, and that OSSE did not make any disclosures to the DCPS Proposed RTC after the November 19, 2013 when a federal district court granted Petitioners motion for preliminary injunction, maintaining Student's stay-put/"current educational placement" as 1:1 instruction.

Petitioners argue that Hearing Officer Vaden had found on May 10, 2013 that 1:1 instruction was Student's stay-put/"current educational placement," and that nothing from his analysis had changed as of August 29, 2013, when Petitioners appealed in federal district court the previous hearing officer's May 30, 2013 HOD denying Petitioners all requested relief. Petitioners state that, while they accept OSSE's representation that post-injunction contacts were by DCPS only, the issue should not be dismissed as to OSSE because of attempts OSSE made to change Student's placement and/or provide confidential information to the DCPS Proposed RTC after the May 10, 2013 stay-put order from Hearing Officer Vaden.

Petitioners have not disputed that OSSE was not a party to the litigation culminating the May 30, 2013 HOD, and have not alleged that there was any litigation pending between the May 30, 2013 HOD and Petitioners' August 8, 2013 appeal in federal district court. The preliminary injunction in the federal appeal was issued on November 19, 2013. Respondents have stipulated and Petitioners have not disputed that OSSE made no contact with the DCPS Proposed RTC after the November 19, 2013 preliminary injunction. Therefore, issue "(d)" is not applicable to OSSE.

As reflected in the ruling on DCPS' partial motion to dismiss above, this Hearing Officer has already concluded that there is a lack of jurisdiction to consider issue "(g)". Accordingly, "Office of the State Superintendent of Education's Renewed Motion to Dismiss for Good Cause" is **GRANTED**. Issue "(g)," having already been dismissed with prejudice as to DCPS is also **Dismissed with Prejudice** as to OSSE for the same reasons as it was dismissed as to DCPS. Additionally, issue "(d)" is **Dismissed with Prejudice** as to OSSE for the reasons stated in this section.

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ORDER

No denial of FAPE has been found on the issues alleged. Accordingly, all relief Petitioner requested in the complaint must be **DENIED**.

This complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

Date: April 17, 2015

/s/ NaKeisha Sylvester Blount
Impartial Hearing Officer

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).