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ODR
Office Of Dispute Resolution
April 20, 2015

Confidential

<p>Parent on Behalf of Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools ("DCPS") ["LEA"]</p> <p>Respondent.</p> <p>Date Issued: April 19, 2015</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Hearing Date: April 1, 2015</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened on April 1, 2014, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Office of Dispute Resolution 810 First Street, NE, Washington, D.C. 20003,

BACKGROUND AND PROCEDURAL HISTORY:

The student is attending a DCPS high school (“School A”) where he began attending at the start of (“SY”) 2014-2015. He is a child with disability pursuant to IDEA with a disability classification of emotional disturbance (“ED”). The student’s parent (“Petitioner”) alleges that the student failed nearly all his classes at School A in the first quarter of SY 2014-2015. Petitioner alleges that on December 5, 2014, through counsel, she requested that DCPS provide her the student’s education records. On December 8, 2014, School A forwarded to Petitioner’s counsel some educational documents. On that date Petitioner’s counsel responded to School A that the records provided were incomplete.

On February 3, 2015, Petitioner filed this due process complaint asserting DCPS had failed to provide the student’s educational records. Petitioner is seeking, inter alia, that DCPS within five (5) days of an order provide Petitioner a complete copy of, or access to, all of the student’s educational records including, SEDS records, SST documents, SEDS contact logs, standardized tests, disciplinary records, teacher reports, attendance reports, report cards and any other records maintained by DCPS in the student’s file.

DCPS filed a timely response to the complaint on February 12, 2015. DCPS denied any alleged violation(s). DCPS asserted that the student has an IEP that provides for 15 hours of specialized instruction outside general education, that IEP progress reports and other documents are routinely provided to the parent and there was no issue raised by Petitioner about documents at a recent manifestation review determination (“MDR”) meeting. On February 6, 2015, DCPS sent a letter of invitation to Petitioner to attend an IEP meeting and proposed March 5, 2015, as a meeting date. The student was detained on February 9, 2015, at Youth Services Center (“YSC”) and DCPS agreed to arrange for provision of his educational records. The student later returned from YSC² to School A.

The Hearing Officer convened a pre-hearing conference on February 23, 2015, and issued a pre-hearing order, on February 26, 2015, outlining, inter alia, the issue to be adjudicated.

The 45-day period by which a decision is due began on March 5, 2015, and ends (and the Hearing Officer’s Determination (“HOD”) is due) on April 19, 2015. The hearing was originally scheduled for March 16, 2015. Prior to the hearing being convened DCPS filed a motion to continue the hearing to allow time for additional disclosures and asserting that a resolution

² The Hearing Officer takes administrative notice that DCPS is the local educational agency (“LEA”) for YSC.

meeting had not yet been convened. The Hearing Officer convened the hearing on March 16, 2015, and heard arguments on DCPS' motion. The Hearing Officer granted the motion to continue over Petitioner's objection. A new hearing date was set. However, the HOD due date was not extended. A resolution meeting was held on March 27, 2015. The parties did not reach a settlement at the resolution meeting.

ISSUE: ³

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to provide Petitioner or Petitioner's representative access to, or a copy of, the student's complete educational records within 45 days of Petitioner's December 5, 2014, request.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 15⁴ and Respondent's Exhibits 1 through 20) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: ⁵

1. The student is attending School A where he began attending at the start of SY 2014-2015. He is a child with disability pursuant to IDEA with an ED disability classification. (Parent's testimony, Petitioner's Exhibit 1-1)
2. The student's most recent individualized educational program ("IEP") prescribes the following services: 15 hours per week of specialized instruction and 120 minutes per month of behavior support services, both outside general education. (Petitioner's Exhibit 1-9)

³ The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order may not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that this was the issue(s) to be adjudicated.

⁴ Petitioner's Exhibits 16 through 32 were not admitted into the record because they were filed less than five business days prior to the hearing and DCPS counsel objected to their admission. Respondent's Exhibits 21 through 28 were also untimely disclosed and were objected to by Petitioner and not admitted.

⁵ The evidence that is the source of the Finding of Fact ("FOF") is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by more than one party separately the Hearing Officer may only cite one party's exhibit.

3. The student is chronically absent from school and classes and has been truant during his time at School A. The student has also had disciplinary suspensions. (Petitioner's Exhibit 10)
4. The student parent believes the student is operating on fourth grade level and has been on that level for some time and believes the student is failing all of his classes. However, the student's parent does not know whether the student's absences from School A have resulted in automatic failing grades for the student. (Parent's testimony)
5. On December 5, 2014, Petitioner through counsel requested in writing that School A forward to Petitioner's counsel a copy of the student's educational records. (Petitioner's Exhibit 11)
6. On December 8, 2014, in response to the written request for educational records School A provided Petitioner's counsel the following documents: (1) the student's most recent IEP dated March 24, 2014, (2) an evaluation summary report dated May 27, 2014, (3) A prior written notice ("PWN") regarding evaluation(s) dated May 6, 2014, (4) the student's School A report card for the first quarter of SY 2014-2015, (5) the student's transcript, (6) the student's School A attendance records, (7) a prior achievement history report,⁶ (8) letters of invitation to meetings during SY 2013-2014. (Petitioner's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 13-1, 14-3, Respondent's Exhibit 14-1, 14-6)
7. On December 8, 2014, Petitioner's counsel sent an email to School A acknowledging receipt of the documents that School A sent and stating that documents provided were not complete. Petitioner's counsel stated in the email the following: "...There should be evaluations, encounter tracker forms for related services, SEDS parent contact list, SEDS document list, numerous prior IEPs, disciplinary records, report cards from [the student's middle school] and probably many other records. Please forward a copy of ALL of the records in [the student's] file or provide a date and time when the parent and I can access a complete copy of his records..." (Petitioner's Exhibit 14-2)
8. On December 12, 2014, Petitioner's counsel sent an email to School A stating the following: "On December 5, 2014, I forwarded to your attention a request for a copy of [the student's] records. I neglected to mention that if instead of providing a complete copy of his records you would prefer to provide access to a complete copy of his records, please provide three dates/times that I can come to [School A] and review his records." (Petitioner's Exhibit 12)
9. On December 18, 2014, Petitioner's counsel sent another email to School A asking when the additional records she requested would be available or for School A to provide at least two dates/times that she could come to School A and be provided access to the student's records. (Respondent's Exhibit 14-4)

⁶This report included, inter alia, the DCPS schools the student has attended since 2003 and the student's standardized assessments data from SY 2008-2009 through SY 2013-2014.

10. On December 19, 2014, Petitioner's counsel emailed School A and included copies of her previous email correspondence with School A regarding the student's records and stated the following in the December 19, 2014, email: "Thank you for the meeting notices. However, I am still in need of a complete copy of or access to [the student's] records. Please see my detailed emails below." (Respondent's Exhibit 14-4)
11. On January 7, 2015, and January 16, 2015, Petitioner's counsel sent emails to School A reiterating her request for copies of or access to the student's records. (Petitioner's Exhibit 14-1)
12. On Wednesday, January 21, 2015, Petitioner's counsel sent another email to School A stating that she had filed the request for access to the student's records on December 5, 2014, that 47 days had passed since that request and pointing out that DCPS was required to provide the records within 45 days of the request. In the email Petitioner's counsel again requested a copy of the student's complete records or access to a completed copy of his records. She stated that if she did not receive the additional records requested or access to the records by noon of Friday, she would assume that School A did not intend to provide copies or access. (Respondent's Exhibit 14-3)
13. On January 22, 2015, School A special education coordinator ("SEC") sent Petitioner's counsel a return email stating that the requested documents had been provided and requesting three meeting dates and times from Petitioner. (Respondent's Exhibit 14-2)
14. In response Petitioner's counsel sent an email to the School A SEC identifying the records that School A sent and the additional documents for which she was requesting copies or access. The email stated that Petitioner's counsel was unsure what was being asked of her in terms of proposing meeting dates and times, but presuming she was being asked for proposed dates for the parent to meet at School A, she agreed to speak with the student's parent and get back to the SEC with dates and times. (Respondent's Exhibit 14-2)
15. On December 10, 2014, the D.C. Superior Court Child Guidance Clinic conducted a psycho-educational evaluation of the student (evaluation report dated December 30, 2014). The evaluator assessed, inter alia, the student's cognitive and academic functions and reviewed records includes some of the student's DCPS records. This evaluation has been provided to DCPS and has not yet been reviewed by an IEP team and DCPS intends to and has attempted to schedule an IEP meeting for the student to review this evaluation. (Witness 1's testimony, Petitioner's Exhibit 9-1, 9-2)
16. On February 3, 2015, School A sent a letter to the student's parent and her counsel requesting a meeting to update the student's IEP and later requested a meeting to conduct an evaluation of the student. An IEP meeting was scheduled in February 2015 but School A had to reschedule the meeting for March 20, 2015. School A again sent the student's parent a certified letter with the new date and also a letter by regular mail and contacted the parent and her counsel by telephone. Before the meeting was scheduled and held

Petitioner filed the due process and thereafter School A attempted to schedule a resolution with the student's parent and her counsel. (Witness 1's testimony)

17. A resolution meeting on the due process complaint was held on March 27, 2015. Petitioner's counsel came to School A for the meeting. The student's parent participated by telephone. During that meeting School A provided Petitioner's counsel additional education records for the student that had not been previously provided including, inter alia, previous IEPs and IEP progress report(s). During the meeting the School A staff reviewed the SEDS database and printed and provided to Petitioner's counsel all educational records that were available to School A. School A personnel believe they have been cooperative to best their ability to provide the requested records to the student's parent and have provided all the records School A can access. (Witness 1's testimony, Respondent's Exhibit 1, 4)
18. The student's parent participated in the resolution meeting by telephone. At that meeting School A did not have the student's records from his DCPS elementary school and DCPS middle school. The student's parent wants these records to help determine at what level the student is operating. (Parent's testimony)
19. SEDS is a database system that contains a student's special education records and SEDS includes a document index for all records in SEDS for the student and that list probably would indicate all the documents in the student's file. SEDS also includes a parent's contact log. DCPS did not provide that list or the log to the student's parent. However, many of the data items contained in SEDS including contact logs are not used as a part of updating any student's IEP or are related to identification, evaluation, and educational placement of a student. Disciplinary records from the student's prior schools would not be in SEDS. (Witness 1's testimony)
20. In order to find educational records from the student's previous DCPS schools School A staff would have to conduct research by calling the previous school(s) and/or the DCPS Office of Specialized Instruction ("OSI") to request and get a copy of the records that exist but are not available to School A. School A did not make a request from any other DCPS school or OSI for any of the student's educational records. (Witness 1's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §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 IDEA §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. An IDEA claim is viable only if [DCPS'] procedural violations affected

the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.⁷ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). 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.

Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. See DCMR 5-3030.34. The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether DCPS denied the student a FAPE by failing to provide Petitioner or Petitioner's representative access to, or a copy of, the student's complete educational records within 45 days of Petitioner's December 5, 2014, request.

Conclusion: Based on the testimony and documentary evidence presented at hearing, the Hearing Officer concludes that Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS failed to provide Petitioner or Petitioner's representative access to, or a copy of, the student's complete educational records within 45 days of Petitioner's December 5, 2014, request and significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE to the student.

5E DCMR §3021 in provides in pertinent part:

In accordance with the confidentiality procedures of 34 C.F.R. §§ 300.560-300.576 and 34 CFR § 99, the parent of a child with a disability shall be given the opportunity to inspect and review and to copy at no cost to the parent all of the child's records relating to the identification, evaluation, and educational placement, and the provision of Free Appropriate Public Education (FAPE).

⁷ The burden of proof shall be the responsibility of the party seeking relief. 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.

34 C.F.R. § 300.613 provides:

(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part.⁸ The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to Sec. 300.507 or Sec. 300.530 through 300.532, or resolution session pursuant to Sec. 300.510, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes--

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

A review of the evidence in this case reveals that Petitioner, through counsel, repeatedly requested the student's records for his current and previous DCPS schools or that School A inform her of when she could come to School A and access those records. Although School A promptly provided many of the records in response to the initial request, after Petitioner's counsel made a subsequent request for additional documents pointing out that the records

⁸ As used in §§ 300.611 through 300.625 (b) Education records means the type of records covered under the definition of "education records" in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA)). Education records. (a) The term means those records that are:

(1) Directly related to a student; and

(2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

(2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of § 99.8.

(3)(i) Records relating to an individual who is employed by an educational agency or institution, that:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee; and

(C) Are not available for use for any other purpose.

(ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

(4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.

(6) Grades on peer-graded papers before they are collected and recorded by a teacher.

provided were incomplete there was delayed response. It was not until after Petitioner's counsel pointed out to School A that 45 days had passed since the initial request and no additional documents had been provided did School A request dates from Petitioner for a meeting at School A.

The School A SEC wrote in an email that the requested documents had been provided and requested a meeting. Petitioner's counsel stated she would check with the parent about possible dates and times for a meeting and get back to the School A SEC. School A then sent letters of invitation for a meeting on the same day that the due process complaint was filed. Although it appears that School A acted promptly initially, there was apparently delayed response in searching for the additional records that were ultimately provided to Petitioner after the February 3, 2015, due process complaint was filed.

Witness 1 testified that she and other School A staff made good faith efforts to provide the requested documents and was unsure what additional documents Petitioner was seeking beyond what was initially provided. However, the emails from Petitioner's counsel clearly indicated the type of additional documents she was looking for including prior IEPs. Ultimately, these additional documents were provided but after the due process complaint was filed and a resolution meeting was held.

IDEA's mandate is to provide access to the education records and this is typically accomplished by a parent visiting a student's school and not by simply requesting that a school send copies of education records.⁹ In this instance neither Petitioner nor her counsel went to School A to obtain the student's records prior to a complaint being filed. However, in repeated correspondence Petitioner's counsel requested dates and times when she could do so, and not until the 45 days had passed after the initial request, and in response to the stated deadline for DCPS to provide the additional records, did School A request proposed meeting dates.

Perhaps if the IEP meeting School A sought to convene had been held the additional documents could have been provided then. However, by the time School A made the request for possible meeting dates the required timeline by which the records were to be provided had passed. This delayed action by DCPS does not in the Hearing Officer's opinion constitute, as the regulation requires, complying "with a request without unnecessary delay and before any meeting regarding an IEP."

The student's parent testified that she wanted the documents including those from the student's prior schools in order to discern the student's academic functioning. Although it appears that the parent may not have been aware of the documents that had already been provided to her counsel, she was correctly aware that the documents from the student's prior schools had not been provided. Based upon her testimony, the Hearing Officer concludes that the lack of complete

⁹ See generally *Jalloh v. District of Columbia*, 535 F. Supp. 2d 13, 21-22 (D.D.C. 2008) (rejecting claim that LEA failed to provide certain types of school records in response to parent's request): "Counsel misses the point: although Ms. Jalloh and her counsel requested access to records regarding R.H., neither Ms. Jalloh nor her counsel followed up by going to [the school] where the records were located to achieve that access. Thus, the hearing officer correctly concluded that he could not find that DCPS denied R.H. a FAPE based solely on the absence of records."

educational records significantly impeded Petitioner's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student.

Under these circumstances, the hearing officer concludes that Petitioner has met her burden of proving a denial of FAPE in connection with this claim. See, e.g., 34 C.F.R. § 300.513(a)(2) (hearing officer may find denial of FAPE where procedural inadequacies impeded child's right to FAPE, impeded Parent's opportunity to participate in decision-making, or caused deprivation of educational benefit); *Lesesne v. D.C.*, 447 F. 828 (D.C. Cir. 2006) (procedural violations that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable). The hearing order will, therefore, order DCPS to promptly provide Petitioner access to the student's complete educational records.

Although DCPS counsel asserted during the hearing that the SEDS database and the information about the student therein were not all considered educational records, based upon the testimony of the DCPS witness, the SEDS database is perhaps the most effective source of determining what special education records for this student are available to be provided. Accordingly the Hearing Officer directs that DCPS also allow Petitioner access to the list of records available for this student in SEDs including the parent contact log.¹⁰

ORDER:

1. DCPS shall, within five (5) school days of issuance of this order review and compile all available educational records that it has and maintains pertaining to the student including any records that are maintained by any of the DCPS school(s) the student attends or has attended in the past.
2. The parent shall within five (5) school days of the issuance of this order provide DCPS at least three dates and times (that are a DCPS school day and during business hours of 9:00 am to 3:00 pm) that the parent is available within the next thirty (30) calendar days following the issuance of this order to come to School A to review and have access to the student's educational records.

¹⁰ The Hearing Officer notes as an additional basis for granting Petitioner's request for access to the SEDS data base information about the student *Letter to Erquiaga* 114 LRP 50728 (July 28, 2014) which states in pertinent part:

“ The FERPA statute (20 U.S.C. § 1232g(a)(1)(B)) and its implementing regulations in 34 CFR § 99.10(a)(2)(i) make clear that, for purposes of FERPA's inspect and review provisions, an SEA and its components constitute an educational agency or institution. They specifically state that whether or not a SEA is an educational agency or institution under FERPA, parents have the right to review education records maintained by an SEA on their children who are or have been in attendance at any educational agency or institution that is subject to FERPA. Accordingly, records that are directly related to students and maintained by the NDE (or SLDS) are "education records" for purposes of FERPA's inspect and review provisions. In response to your specific question about ways in which the NDE can fulfill the parental access requirements in FERPA, the SEA can fulfill these requirements by: (1) allowing a parent to view requested data included in the SLDS data fields on his or her child; (2) providing the parent with a copy of the Nevada Department of Education Data Dictionary; and (3) if requested to do so, by providing a reasonable explanation of the children's data included in the SLDS to the parent.”

3. DCPS shall within five (5) school days of being provided the parent's dates/times of availability shall agree to a date and time proposed by the student's parent and thereafter, within thirty (30) calendar days of the issuance of this order, provide the student parent's and her representative access to see and review (and be provided any requested copies of said records within three (3) school days following that meeting at no cost to the parent) of any educational records¹¹ that have not already been provided to the parent by School A either electronically or in hard copy either from School A directly or disclosed to the parent has a part of the disclosures (timely or untimely submitted) in preparation for the hearing in this matter.

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. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: April 19, 2015

¹¹ The student's educational records that DCPS shall grant the parent access to include SST documents, standardized tests, disciplinary records, teacher reports, attendance reports, report cards, evaluations, encounter tracker forms for related services, SEDS parent contact log, SEDS document list, prior IEPs, disciplinary records from the student's middle school and any other records maintained by DCPS in the student's file.