DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Office of Dispute Resolution
1050 First Street, NE, 3rd Floor
Washington, DC 20002

PETITIONER, an Adult Student,[1]	Date Issued: December 22, 2020
Petitioner,	Hearing Officer: Peter B. Vaden
v.	Case No: 2020–0181
D.C. DEPARTMENT OF YOUTH REHABILITATION SERVICES,	Online Video Conference Hearing
Respondent.	Hearing Date: December 15, 2020

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the adult STUDENT, Petitioner, under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq*., and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). Petitioner brought this proceeding initially against Respondents District of Columbia Public Schools (DCPS) and D.C. Department of Youth Rehabilitation Services (DYRS) alleging that the respective public agencies had denied Student a free appropriate public education (FAPE) beginning in the 2018-2019 school year. Petitioner reached a settlement with DCPS and, on November 16, 2020, I granted Petitioner's request to dismiss DCPS as a respondent. Petitioner continues to assert claims against DYRS for

[1] Personal identification information is provided in Appendix A.

alleged denials of FAPE relating to Student's placement at RESIDENTIAL SCHOOL in the spring of 2019.

Petitioner's original due process complaint was filed on October 15, 2020. The undersigned hearing officer was appointed on October 16, 2020. Petitioner filed an amended complaint on October 20, 2020. On November 2, 2020, the parties met for a resolution session and were unable to resolve the issues in dispute. On November 5, 2020, I convened a telephone prehearing conference with counsel to discuss the issues to be determined, the hearing date and other matters. My final decision in this case is due by January 3, 2021.

In my November 5, 2020 Prehearing Order, I dismissed, for want of subject matter jurisdiction, Petitioner's claims against DYRS brought under Section 504 of the Rehabilitation Act of 1973 and under the Americans with Disabilities Act.

On October 30, 2020, DYRS filed a motion to dismiss the claims against it, which motion I denied by order issued on November 5, 2020. On November 25, 2020, Petitioner filed a motion for a default decision or, in the alternative, for a directed finding against DYRS. I denied this motion by order issued December 6, 2020.

The due process hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on December 15, 2020. Due to the closing of the hearing rooms at the Office of Dispute Resolution in the wake of the COVID-19 virus outbreak, the due process hearing was held online and recorded, using the Microsoft Teams video conference platform. Student was scheduled to attend the hearing on line,

but did not appear. MOTHER appeared online and Student was represented by PETITIONER'S COUNSEL. At the request of Petitioner's Counsel, and without objection from DYRS, I proceeded with the hearing in Student's absence. Respondent DYRS was represented by DYRS' COUNSEL.

Counsel for the respective parties made opening statements. Petitioner called PSYCHOLOGIST and Mother as witnesses. DYRS did not call any witnesses. Petitioner's Exhibits P-1 through P-20 and DYRS' Exhibits R-1 through R-5 were all admitted into evidence without objection. After the taking of the evidence, DYRS' Counsel requested leave to file written closings instead of making oral argument, which Petitioner's Counsel did not oppose. I granted the parties leave until December 18, 2020 to file post-hearing briefs. Counsel for each party timely filed written closings.

JURISDICTION

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues for determination, as certified in the November 5, 2020 Prehearing Order, are as follows:

> Did DYRS deny Student a FAPE by not providing prior written notice for changing the student's placement in June of 2019 and for changing the student's Individualized Education Program (IEP) in July of 2019?
>
> Did DYRS deny Student a FAPE by failing to develop and implement an appropriate IEP for Student from about June to October 2019?

For relief Petitioner seeks an award of compensatory education for DYRS' alleged denials of FAPE.

FINDINGS OF FACT

After considering all of the evidence received at the due process hearing in this case, as well as the argument and memoranda of counsel, my findings of fact are as follows:

1. Student, an AGE young adult, is a resident of the District of Columbia. At the time of the due process hearing, Student was incarcerated in the D.C. Jail. Testimony of Mother.

2. Student has been determined eligible for special education by DCPS under the Multiple Disabilities (MD) classification based on a Specific Learning Disability and an Other Health Impairment (Attention Deficit - Hyperactivity Disorder). Exhibit P-5; Testimony of Psychologist.

3. Student has been diagnosed with Attention Deficit - Hyperactivity Disorder (ADHD), Bipolar Disorder, Oppositional Defiant Disorder (ODD), and Cannabis Use Disorder. Student has an extensive history of alleged legal infractions and criminal offences dating to 2014. Exhibits P-15, P-16.

4. On or about January 18, 2019, Student was recommitted to DYRS' Youth Services Center (YSC). Exhibit P-3. A condition to Student's recommitment, recommended by the court and DYRS, was for Student to be placed at a residential

education facility. Testimony of Mother.

5. In August 2016, DYRS entered into a Memorandum of Agreement with the D.C. Office of the State Superintendent of Education and DCPS regarding educational services for certain youth committed to DYRS (the MOA). The MOA has been extended through July 31, 2021. Under the MOA, DCPS agreed to be the local educational agency (LEA) in the District of Columbia for all youth committed to DYRS who are placed in Residential Treatment Facilities (RTCs), when timely notified by DYRS of placement. The MOA requires, *inter alia*, that DYRS notify DCPS within 1 business day of any new placement or lateral placement change of a committed youth in an RTC outside of the District of Columbia. For students with IEPs placed in an RTC, the MOA places responsibility on DCPS for ensuring that the students receive a FAPE in the least restrictive environment and the MOA provides that DCPS shall be responsible for convening all IEP meetings, eligibility meetings, and any other meeting necessary to ensure timely and appropriate delivery of services to these students during the period of commitment to DYRS. Exhibit R-1.

6. On February 28, 2019, DCPS convened an IEP annual review meeting for Student at YSC. In the IEP, the IEP team reported that Student is an adult student who had been detained at YSC since January 24, 2019; that Student had multiple admissions at the detention center for various infractions and that Student was then in the GRADE. The February 28, 2019 IEP identified Mathematics, Reading, Written Expression and Social-Emotional-Behavioral Development as areas of concern. The February 28, 2019

IEP provided for Student to receive 39 hours per week of Special Education Services, including 5 hours per week of Reading, 5 hours per week of Written Expression and 29 hours per week of Specialized Instruction, as well as 240 minutes per month of Behavioral Support Services and 4 hours per year of parent counseling and training. All of these services were to be provided outside the general education setting. As justification for this level or restriction, the IEP team wrote that Student "requires accommodations that are [unavailable] in the general education setting such as one-to-one instruction, a small group classroom setting, and frequent prompting and redirection due to impulsive behaviors and lack of self control in larger settings." Exhibit P-3. (The hearing officer observes that the hours of special education and related services set forth in this IEP were likely incorrect. The 39 hours per week of special education services stated in the IEP, in addition to 6 hours per week of Behavioral Support Services, exceed the normal DCPS school week. *See, e.g.*, *R.B. v. District of Columbia*, No. CV 18-662 (RMC), 2019 WL 4750410, at *7 (D.D.C. Sept. 30, 2019) (District considered program totaling approximate average of 27.25 hours per week to be a full-time IEP.)

7. On April 4, 2019, DYRS placed Student at Residential School, an out-of-state RTC. Exhibit R-2. On April 10, 2019, DYRS notified DCPS by email that Student had been placed at Residential School. Exhibit R-3. On April 23, 2019, DYRS provided DCPS completed enrollment forms for Student's placement at Residential School.

Exhibit R-4. On July 2, 2019, DCPS sent acknowledgment by email to DYRS that Student had been enrolled in Residential School since April 4, 2019. Exhibit R-5.

8. On June 3, 2019, Residential School convened an IEP team meeting for Student. Student attended the meeting. No representative from DCPS or DYRS participated in the meeting. For types of support, the Residential School IEP team decided that Student would receive special education emotional and learning supports and services, provided by special education personnel, for more than 20% but less than 80% of the school day. Exhibit P-4.

9. In July 0f 2019, on a weekend-pass home visit to the District, Student left a note for Mother that Student would not return to Residential School. Afterwards, Student did not return to Residential School or to Mother's home. Testimony of Mother. Student was considered by DYRS to be in "abscondence" status beginning July 23, 2019. Exhibit R-2. Student was involved in another incident of unlawful behavior and has been incarcerated in the D.C. Jail since December 2019. Testimony of Mother.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this hearing officer's own legal research, my conclusions of law are as follows:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the adult student in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute

about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the public agency, the agency shall hold the burden of persuasion on the appropriateness of the proposed placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Discussion

– Did DYRS deny Student a FAPE by not providing prior written notice for changing the student's placement in June of 2019 and for changing the student's Individualized Education Program (IEP) in July of 2019?

– Did DYRS deny Student a FAPE by failing to develop and implement an appropriate IEP for Student from about June to October 2019?

A. May DYRS be held responsible for the failure to provide Student with a free appropriate public education?

My starting point for this analysis is to consider whether DYRS may be liable for the failures to provide Student a FAPE alleged in the complaint, specifically for changing Student's placement to Residential School in spring 2019 without providing written notice to Student and for developing an allegedly inappropriate IEP for Student in June 2019.

For youth committed to its custody, DYRS is responsible for providing food, shelter, education and ordinary medical care. *See* D.C. Code § 2-1515.01 (5)(A)(iii). DYRS is a "Public agency" as defined by the IDEA, *see* 34 C.F.R. § 300.33, and serves as

the LEA for some, but not all, students with disabilities committed to its custody. For example, under the 2016 MOA among OSSE, DYRS and DCPS, for youth committed to DYRS awaiting placement at another facility, DYRS is responsible for ensuring that they receive education services as required by the IDEA. *See*, MOA, § VI.B.2. However, for youths with IEPs who are committed to DYRS, such as Student, and are placed by DYRS in out-of-state Residential Treatment Facilities (RTCs), DCPS is responsible for ensuring that those students receive a FAPE, *provided that DYRS timely notifies DCPS of the RTC placement*. *See* MOA, §§ V.B.3, V.B.6(b). Along with the notification, DYRS must provide DCPS with:

> a) a copy of each student's most recent IEP and report card or transcript (and, if applicable, GED test scores);
>
> b) a completed DCPS enrollment form; and
>
> c) a DYRS ward letter.

Id.

In the present case, Student was committed to DYRS on or about January 24, 2019. On April 4, 2019, DYRS placed Student at Residential School, an out-of-state RTC. It appears from the evidence at the due process hearing that DYRS first notified DCPS of Student's placement at Residential School on April 10, 2019. DYRS provided DCPS with the completed DCPS enrollment form on April 23, 2019. The MOA specifies that the DYRS' notification to DCPS of an RTC placement is to be made within one business day of the committed student's placement in an RTC. MOA, § V.B.3. I find

that DYRS' notification to DCPS of Student's placement in Residential School was not timely under the MOA and that DCPS did not become responsible for ensuring that Student received a FAPE at Residential School until April 23, 2019, when DYRS provided the required DCPS enrollment form. I conclude that DYRS may be found liable if Student was denied a FAPE during the interim period, from April 4, 2019, when DYRS placed Student in Residential School, until April 23, 2019, when DYRS presented the enrollment form for Student to DCPS.

Before the due process hearing, Petitioner reached a bilateral settlement with DCPS and withdrew its claims against that agency. Petitioner's remaining claims are made against DYRS only and are limited to whether DYRS denied Student a FAPE by not giving required prior written notices and by making inappropriate changes to Student's IEP in June 2019.

B. Prior Written Notice of change in placement

The IDEA requires that written notice must be given a reasonable time before the public agency proposes to change the educational placement of the student or the provision of FAPE to the student. *See* 34 C.F.R. § 300.503(a). For students who have reached the age of majority, the prior written notice (PWN) must be given to the adult student and the parents. *Id.*, § 300.520(a)(1)(i). Petitioner contends that Student was denied a FAPE by DYRS' failure to give a PWN when it placed Student at Residential School. Petitioner has the burden of persuasion on this claim.

On January 18, 2019, Student was committed to DYRS' Youth Services Center

(YSC). Student's February 28, 2019 YSC IEP, developed by DCPS, provided, *inter alia*, for Student to receive full-time special education, as well as 240 minutes per month of Behavioral Support Services, outside of general education. Beginning April 4, 2019, DYRS placed Student at Residential School. Mother testified that DYRS did not give her prior written notice of Student's placement at Residential School. (Whether or not DYRS provided prior written notice to the adult student was not established by the evidence.)

DYRS argues, on brief, that no PWN was required because placing Student at Residential School was not a change in educational placement – only a change in location of services from Youth Services Center to the out-of-state residential facility. There is persuasive case law in our jurisdiction that a change in the location of a student's services does not constitute a change in educational placement if there is no difference in the fundamental elements of the student's programming. *See, e.g.*, *Middleton v. District of Columbia*, 312 F. Supp. 3d 113, 131 (D.D.C. 2018) (*citing Z.B. by & through Sanchez v. District of Columbia*, 382 F. Supp. 3d 32, 42 (D.D.C. 2019), *aff'd sub nom. Sanchez v. District of Columbia*, 815 F. App'x 559 (D.C. Cir. 2020), *cert. denied sub nom. Z. B. By & Through Sanchez v. District of Columbia*, No. 20-205, 2020 WL 5883397 (Oct. 5, 2020).

A fundamental component of Student's February 28, 2019 DCPS IEP was the provision for full-time special education services outside of the general education setting. Mother testified that in the June 2019 Residential School IEP meeting, she was

told by school staff that Residential School did not offer full-time IEP services. The June 3, 2019 Residential School IEP stated that Student would receive supports and services provided by special education personnel for less than 80% of the school day. I find that Mother has shown that this changed a fundamental component of the DCPS February 28, 2019 IEP, namely the full-time special education program for Student. The IDEA, therefore, required that Student and Mother be given prior written notice of Student's placement at Residential School. At the time DYRS placed Student at Residential School, it did not timely notify DCPS. Therefore, under the MOA, it was DYRS' responsibility to give the PWN. DYRS failed to give the PWN to Mother.

The failure to provide a required PWN is a procedural violation of the IDEA. *See, e.g., Shaw v. District of Columbia*, No. CV1700738, 2019 WL 498731, at 14 (D.D.C. Feb. 8, 2019), *report and recommendation adopted*, No. 17-CV-0738, 2019 WL 935418 (D.D.C. Feb. 26, 2019). Procedural violations of the IDEA may only be deemed a denial of FAPE if the procedural inadequacies—

> (i) Impeded the student's right to a FAPE;
>
> (ii) Significantly impeded the parent's (or adult student's) opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or
>
> (iii) Caused a deprivation of educational benefit.

See 34 CFR § 300.513(a)(2).

In the present case, Mother testified that after Student was committed to YSC in January 2019, there were a couple of meetings with DYRS about placing Student in a

residential setting and Mother received an email notice of the first placement meeting. Mother was told that initially, two schools accepted Student and she related that Student preferred the school which had a football team. When one of those placements became unavailable, DYRS told Mother that Student would be going to the second school, that is, Residential School. I find, therefore, that in spite of not receiving a formal PWN, Mother did in fact participate in the meetings where the placement was discussed. DYRS' not providing Mother PWN of the change in Student's educational placement to Residential School did not impede Mother's opportunity to participate in the placement decision. Nor was there evidence that the PWN omission impeded Student's right to a FAPE or caused a deprivation of educational benefit. I conclude, that under 34 CFR § 300.513(a)(2), this procedural violation may not be deemed a denial of FAPE.

C. Revision of Student's IEP by Residential School

On June 3, 2019, Residential School convened an IEP team meeting and developed its own IEP for Student. Petitioner alleges that DYRS denied Student a FAPE because the Residential School IEP was inappropriate and because DYRS did not provide prior written notice for changing Student's Individualized Education Program (IEP).

The hearing evidence did not show why Residential School undertook to develop a new IEP for Student in June 2019. (No one from Residential School testified at the hearing.) At the time, Student had a current, February 28, 2019 DCPS IEP. Student attended the June 3, 2019 IEP meeting, but no representative from DCPS or DYRS

participated. As discussed above in this decision, by April 23, 2019, DYRS had notified DCPS of Student's placement at Residential School. Therefore, under the MOA, at the time of the June 3, 2019 Residential School IEP meeting, DCPS – *not DYRS* – was responsible for ensuring that Student received a FAPE, including ensuring that Student was provided an appropriate IEP, and for giving Mother and Student PWNs of proposed IEP revisions. Moreover, under the IDEA, DCPS also remained responsible for ensuring that its representative was involved in any decisions about revising Student's IEP and that it agreed to any proposed changes in the IEP before those changes were implemented. *See* 34 C.F.R. § 300.325(b), (c). I conclude, therefore, that Petitioner's claims against DYRS concerning the allegedly inappropriate Residential School IEP and the alleged failure to give a PWN at the time of the June 3, 2019 IEP meeting were brought against the wrong District of Columbia agency and must be dismissed.

ORDER

– Based upon the above Findings of Fact and Conclusions of Law, it is hereby ORDERED that all relief requested by the Petitioner herein is denied and that this case is dismissed.

Date: December 22, 2020

s/ Peter B. Vaden
Peter B. Vaden, 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).

cc: Counsel of Record
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