

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
March 11, 2016

MOTHER, on behalf of)	
STUDENT, ¹)	Date Issued: March 11, 2016
)	
Petitioner,)	Hearing Officer: Peter B. Vaden
)	
v.)	Case No: 2015-0393
)	
DISTRICT OF COLUMBIA)	Hearing Date: March 1, 2016
PUBLIC SCHOOLS,)	
)	Office of Dispute Resolution, Room 2006
Respondent.)	Washington, D.C.
)	

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Mother on behalf of 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.). In her due process complaint, Petitioner alleges, *inter alia*, that respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not providing him an appropriate educational setting for the 2014-2015 and 2015-2016 school years.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner’s Due Process Complaint, filed on December 14, 2015, named DCPS as respondent. The

¹ Personal identification information is provided in Appendix A.

undersigned Hearing Officer was appointed on December 16, 2015. On December 21, 2016, DCPS filed a Notice of Insufficiency of the due process complaint pursuant to 34 CFR § 300.508(d). By order of December 22, 2016, I determined that the complaint was insufficient to meet the content requirements of 34 CFR § 300.508(b). Petitioner filed an amended complaint on January 5, 2016, which resulting in restarting the IDEA due process hearing timelines effective that date. The parties convened for a resolution session on January 6, 2016, which did not result in an agreement. The 45-day period for issuance of this Hearing Officer Determination began on February 6, 2016. On February 4, 2016, the Chief Hearing Officer granted Petitioner's consent motion for a 20-calendar day continuance of the final decision due date, due to the unavailability of one of Petitioner's witnesses on the originally scheduled hearing date. This extended the due date for the final decision to March 18, 2016. On December 30, 2015, I convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before this Impartial Hearing Officer on March 1, 2016 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Mother appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS' COUNSEL.

Mother testified and called EDUCATIONAL ADVOCATE as witness. DCPS called SPECIAL EDUCATION TEACHER and DCPS MANAGER as witnesses. Petitioner's Exhibits P-1 through P-10 were admitted into evidence, including Exhibit P-10 which was admitted over DCPS' objection. DCPS' Exhibits R-1 through R-18 were admitted into evidence, including Exhibits R-10, R-16 and R-17, which were admitted over

Petitioner's objections. Exhibit R-19 was withdrawn. Counsel for DCPS made an opening statement. Counsel for both parties made closing arguments. There was no request to file post-hearing written argument.

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 following issues for determination were certified in the December 30, 2015 Prehearing Order:

- Whether DCPS denied Student a FAPE by failing to ensure that Student was offered a revised IEP on or after July 8, 2015;
- Whether DCPS denied Student a FAPE by failing to offer a suitable educational placement after September 8, 2014 when Student was allegedly assaulted at CITY SCHOOL 1, because following the assault, Student was unable to return to the school;
- Whether DCPS denied Student a FAPE by, on July 22, 2015, offering him an unsuitable placement at City School 2; and
- Whether DCPS has denied Student a FAPE by failing to provide him IEP instruction or services since September 8, 2014.

For relief, Petitioner requested that the Hearing Officer order DCPS to develop an appropriate IEP for Student and order DCPS to determine, with the parent's participation, an appropriate placement/location of services for Student. Petitioner also seeks appropriate compensatory education relief for the denials of FAPE alleged in the complaint.²

² At the beginning of the due process hearing, Petitioner, by counsel, withdrew an additional prayer for relief, namely, reimbursement for the cost of instruction and services privately provided to Student during the 2014-2015 school year.

FINDINGS OF FACT

Student was the subject of a prior due process hearing and a Hearing Officer Determination, issued on April 26, 2014, by former Hearing Officer Kimm Massey. At the due process hearing in this case, the parties, by counsel, agreed that I may adopt factual findings from the April 26, 2014 Hearing Officer Determination (Apr. 26, 2014 HOD), to the extent I deem those findings relevant to this decision.

After considering all of the evidence, as well as the arguments of counsel, my Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where he resides with Mother. Student is blind. Testimony of Mother. Student is eligible for special education and related services under the primary disability classification Other Health Impairment/Visual Impairment. Exhibit R-6-1. Student was born with an x-linked genetic condition of anophthalmia/microphthalmia syndrome. Exhibit P-2.³

2. In November 2006, a diagnostic assessment of Student was conducted. “Because of his blindness, [Student] was only administered verbal tasks. Therefore, a Full Scale IQ statistic could not be computed for [Student].” The November 2006 evaluator determined that Student’s verbal abilities were in the Intellectually Deficient to Borderline range and his overall adaptive functioning and self-help skills were in the Mildly Intellectual Deficient range, although his day-to-day communication skills were in the Borderline range and his social skills were in the Low Average range. April 26,

³ Anophthalmia and microphthalmia are often used interchangeably. Microphthalmia is a disorder in which one or both eyes are abnormally small, while anophthalmia is the absence of one or both eyes. These rare disorders develop during pregnancy and can be associated with other birth defects. National Eye Institute (<https://nei.nih.gov/health/anoph/anophthalmia>).

2014 HOD, Para. 5.

3. Another diagnostic assessment of Student was conducted in January 2010. The January 2010 report indicated that “due to [Student’s] blindness, he was not administered any visually-based tasks . . . Therefore, while summary statistics were obtained for [Student] in the areas of verbal comprehension and working memory, a Full Scale IQ statistic could not be computed for [Student].” Based on Student’s performance on the tests and instruments administered in the January 2010 diagnostic assessment, the evaluator determined that Student’s verbally-based cognitive abilities and adaptive functioning were in the Intellectually Deficient range. Ultimately, the evaluator concluded that Student met the diagnostic and federal educational guidelines for a diagnosis of Intellectual Disability (“ID”). The evaluator acknowledged that the cognitive testing utilized was not normed for blind students, but also pointed out that Student’s medical history of microcephaly and thinning in his corpus callosum (the nerve bundle that links the two halves of the brain and allows them to communicate with each other) are neurologic and developmental risk factors often associated with sub-average intellectual functioning. April 26, 2014 HOD, Paras. 3, 4.

4. In the April 14, 2014 HOD, Hearing Officer Massey ordered, *inter alia*, that DCPS conduct evaluations of Student, including a comprehensive psychological assessment that includes a cognitive measure designed for blind students, an occupational therapy assessment, and an adaptive Physical Education assessment. April 26, 2014 HOD, p. 10.

5. DCPS arranged for the Virginia School for the Deaf and Blind (VSDB) to conduct the comprehensive psychological assessment ordered in the April 26, 2014 HOD. In her May 12, 2014 evaluation report, the VSDB evaluator noted that, due to the

low incidence of blindness in the United States there are very few assessment instruments designed specifically for the blind population. The evaluator reported that with Student, she used an assessment battery, including only tests of abilities and skills recognized as appropriate to utilize with individuals who are blind. She reported that the assessment battery organized for Student was one that would provide a comprehensive evaluation of his learning strengths and needs, provide data on his functional status that would provide a comparison of his status in relationship to those of his non-disabled and blind peers, and provide information that would assist in program planning for him. Exhibit P-2.⁴

6. The VSDB evaluator utilized two measures to assess Student's intellectual status, the Slosson Intelligence Test - Revision 3 (SIT-R3) and the Wechsler Intelligence Scales for Children – Fourth Edition Integrated (WISC-IV). The SIT-R3 has standardized adaptations of materials for individuals who are blind. Student's total score on the SIT-R3 was below 36, four standard deviations below the mean, or at a level consistent with the Severe range of intellectual disabilities. For the WISC-IV, the evaluator modified administration to accommodate for Student's blindness. On the WISC-IV, Student was able to demonstrate a standard score of 50, which, although still within the range of intellectual disabilities, was within the Moderate range. Exhibit P-2.

7. The VSDB evaluator reported that Student's academic skills were so underdeveloped that he could barely assess and attempt any of the standard academic tasks presented to him. Student's reading skills in Braille were assessed at an early

⁴ Both Petitioner and DCPS offered the VSDB psychological evaluation report as exhibits. Neither party indicated any disagreement with the evaluator's findings and recommendations or the methodology used.

kindergarten equivalency. The math skills he demonstrated were significantly underdeveloped for his age. Student could not read any numbers presented in Nemeth code (the Braille number system). Exhibit P-2.

8. The VSDB evaluator reported that the results of her evaluation indicated that Student was experiencing significant delays in almost every aspect of his cognitive and academic functioning and that Student's blindness, in and of itself, was not the primary cause for these delays. Throughout the evaluation, Student demonstrated general functional status that was within the developmental range expected for a five-to-six year old. The evaluator recommended that given the level of Student's academic skills and intellectual abilities, he will require specialized instruction programming to address his learning needs in addition to his blindness. She recommended that a program designed for students with a learning disability would not be appropriate for student, because such programs support students who are attempting to navigate regular education initiatives (*i.e.* standard course content). Standard programs for students with multiple disabilities would also be difficult for Student to access because of his blindness. The VSDB evaluator recommended that Student would benefit from a program designed for students with multiple disabilities who are blind, and that such a program should be provided in a quiet, Braille and tactile-rich environment that would allow instruction to occur at a slower pace with opportunities for repetition and review of skills and information. She recommended that Student would also benefit from opportunities to be with other students who are blind and to participate in recreation activities designed for these students. Exhibit P-2.

9. At a July 8, 2014 meeting, Student's DCPS Multidisciplinary Team (MDT) reviewed the VSDB psychological evaluation and Occupational Therapy (OT) and

Adaptive Physical Education (APE) evaluations of Student. Mother, GRANDMOTHER, and Educational Advocate attended the meeting. Mother opposed classifying Student's primary disability as ID and requested that Other Health Impairment (OHI) be identified as Student's primary disability. The MDT team agreed that Student's primary disability identification would be OHI (x-linked genetic condition of anophthalmia/microphthalmia syndrome; microphthalmia of the left eye, anophthalmia of the right eye, blindness and developmental delay). Exhibit P-3.

10. At the July 8, 2014 meeting, the MDT/IEP team developed a revised IEP for Student which provided annual goals for Mathematics, Reading, Written Expression, Adaptive/Daily Living Skills, Vision, Health/Physical and Motor Skills/Physical Development. For Special Education Services, the IEP provided 24.5 hours per week of Specialized Instruction, including 10 hours per week of vision instruction, and 290 minutes per month of Adaptive Physical Education. For Related Services, the IEP provided 240 minutes per month of OT and 360 minutes per month of Orientation and Mobility. All of the IEP Special Education and Related Services were to be provided in an outside general education setting. Exhibit R-7. The IEP also provided for a full-time dedicated aide and assistive technology devices for Student. Neither Mother nor Educational Advocate had any issue with the content of the July 8, 2014 IEP. Testimony of Educational Advocate.

11. For Student's school location, DCPS initially stated at the July 8, 2014 meeting that Student should remain in the school he attended for the 2013-2014 school year, because he had not completed the prior grade. Mother preferred that Student move on to high school. The DCPS representative stated DCPS would be willing to propose City School 1, which had a self-contained program to address Student's vision

needs, as well as his academic delay, and he would be with his same age peers. Mother expressed concerns that the City School 1 program had ID students, but she agreed to Student's placement there for the 2014-2015 school year. Exhibit P-3.

12. Student enrolled in City School 1 at the start of the 2014-2015 school year, but permanently stopped attending after approximately two weeks, following an alleged assault incident. On September 8, 2014, Student told his Mother and Grandmother that another student had touched his privates that day in the school restroom. Student was upset by the alleged incident. Testimony of Mother.

13. The next day, Mother wrote LEA REPRESENTATIVE by email to report Student's account. Mother had been concerned about bathroom privacy, because Student had reported a similar "touching" incident at his previous school. In her email, Mother reminded LEA Representative that when Mother had visited City School 1 before the school year started, LEA Representative had showed her private bathrooms that Student would be able to use. In her email, Mother requested LEA Representative to make sure that Student's dedicated aide only took him to one of the private bathrooms. Exhibit P-4. Grandmother followed up with a visit to the school. She reported Student's account of the alleged touching incident to the assistant principal, who told her that they would conduct an investigation. The school did not get back to Mother, until she contacted a school dean about one week later. At that point, the school contacted the District of Columbia Metropolitan Police Department (MPD), who visited the home to conduct an investigation. The MPD instructed Mother to follow up with Child Protective Services at Children's Hospital. According to Mother, a physician at Children's Hospital, who met with Student, told Mother she believed that something had happened at the school and that Student should not return there. The physician

provided mother a list of therapists for Student. Testimony of Mother.

14. Neither Mother nor DCPS ever received a report from MPD about its investigation of the alleged touching incident. It was established from video recordings that the other student, whom Student had identified as having touched him in the bathroom, had not been in the bathroom with Student. Testimony of Mother. (Whether Student was, or was not, a victim of improper touching in the school bathroom cannot be determined from the hearing evidence.)

15. Following Student's report of the alleged touching incident, Mother never sent Student back to City School 1. After the reported incident, Mother contacted LEA Representative to request a "30-day review" meeting to review Student's placement at City School 1. The meeting convened on October 14, 2014. Mother and Educational Advocate, LEA Representative and Student's case manager attended. At the meeting, LEA Representative offered to put protocols in place to be sure there were no more bathroom incidents. Mother was unwilling to send Student back to City School 1 because she believed that Student had been traumatized by the incident. Mother and Educational Advocate also told LEA Representative that the City School 1 program was inappropriate and they were very unhappy about how Student was learning and how he was being taught. LEA Representative stated that City School 1 would submit Student's paperwork to DCPS' central office for consideration of a transfer. Testimony of Mother, Testimony of Educational Advocate, Exhibit R-10.

16. In December 2014, a follow-up MDT meeting was held at City School 1 which was attended by DCPS RESOLUTION SPECIALIST, LEA Representative, Student's case manager, Mother and Educational Advocate. Mother asked about DCPS' providing a program tailored to Student's needs at City School 2, Student's

neighborhood school. Resolution Specialist responded that she would have to take the request to her superiors. Testimony of Mother, Testimony of Educational Advocate, Exhibit P-5.

17. In January 2015, a meeting was convened at DCPS' central office. Mother, Grandmother, Educational Advocate, Resolution Specialist and DCPS Manager attended. At that meeting, DCPS offered to place Student at Maryland School for the Blind, a non-public school approved by the D.C. Office of the State Superintendent of Education (OSSE) for visually impaired students. At the same time, DCPS encouraged Mother to send Student back to City School 1. Testimony of Educational Advocate. Mother did not want Student to attend the Maryland school because it was so far from home. Testimony of DCPS Manager. Mother told the meeting participants that Student suffered from separation anxiety. Testimony of Mother.

18. On February 11, 2015, DCPS issued a Prior Written Notice (PWN) to inform Mother that in response to her request for a change of location of services, no change to Student's services or placement was being made. The PWN stated that Student's claim of assault was unsubstantiated, that the MDT team determined that City School 1 could meet Student's needs and provide FAPE, that safety concerns would be addressed with a comprehensive safety plan to include the support of the Student's dedicated aide and other school based staff. The PWN stated that the team reviewed Mother's request that services be provided at City School 2, but that City School 2 was unable to provide the hours of vision services required by Student's IEP. The PWN stated that Student had missed a significant amount of school, that DCPS had offered remedial support through a short term increase in services and placement at Maryland School for the Blind, and that Mother had rejected this proposal. Exhibit R-12.

19. At the January 2015 meeting, DCPS asked mother to provide documentation from Student's physician that he could not return to City School 1. Testimony of Mother. In mid-April 2015, Educational Advocate delivered to DCPS a March 19, 2015 letter from Student's psychologist, PRIVATE PSYCHOLOGIST. Private Psychologist wrote that as a result of the alleged touching incident at City School 1 on September 8, 2014, Student was traumatized and was experiencing Acute Stress Disorder. She wrote that Student's sense of safety was further compromised by his blindness and his inability to accurately identify the perpetrator. She wrote that Student "experiences limited cognitive functioning which further compromises his ability to identify individuals who have positive intentions compared to this [*sic*] who have negative intentions." Private Psychologist recommended that Student be transferred to a different school where he could "thrive and feel safe." Exhibit R-13, Testimony of Educational Advocate.

20. On May 18, 2015, COMPLIANCE CASE MANAGER wrote Mother and Educational Advocate by email to schedule a meeting to discuss how DCPS planned to move forward in light of recent concerns regarding Student's location of services. A meeting was scheduled for May 28, 2015 at DCPS central offices. Exhibit P-8. This meeting was attended by Compliance Case Manager, Mother, Grandmother, Educational Advocate, and several DCPS personnel. It was not a full IEP team meeting. Testimony of Educational Advocate. At the May 28, 2015 meeting, DCPS proposed to move Student to the ILS program at City School 2. Mother objected that the ILS program was an intellectual disability program. Mother stated that she would agree to sending Student to City School 2, if DCPS placed him in a Multiple Disabilities program tailored to Student's needs. Compliance Case Manager informed Mother that she would

have to speak to her superiors. Mother received no immediate response to this placement request from DCPS. At the May 28, 2015 meeting, Mother agreed for Student to remain at home, receiving home services, for the rest of the 2014-2015 school year.

Testimony of Mother, Exhibit P-8.

21. On May 28, 2015, a draft IEP for Student was developed by DCPS. Exhibit R-14. There was no evidence that this IEP draft was ever considered or agreed to by Student's IEP team. The May 28, 2015 IEP draft was not provided to Mother prior to her filing her original due process complaint in this case on December 14, 2015.

Testimony of Mother.

22. On June 16, 2015, DCPS issued a Location of Services letter notifying Mother that the location of services to implement Student's IEP for the 2015-2016 school year would be City School 2. Exhibit R-15. Mother moved residences around the time the letter was sent and she never received it. Testimony of Mother.

23. On July 22, 2016, Mother sent an email to Compliance Case Manager to inquire about Student's placement for the 2015-2016 school Year. Resolution Specialist responded the same day that Student was slated for City School 2 for the upcoming school year. She requested Mother to provide dates for a meeting to schedule Student's re-enrollment and to discuss Student's transition back to School. Exhibit P-8. Mother went to back-to-school night at City School 2 before the start of the school year. At the meeting, she spoke to City School 2 SPECIAL EDUCATION COORDINATOR about scheduling a meeting and Mother's observing the program proposed for Student at City School 2. Testimony of Mother.

24. On the second day of the 2015-2016 school year, Mother visited the proposed classroom at City School 2 and spoke to the classroom teacher. On September

1, 2015, DCPS convened an MDT meeting for Student. Mother and Educational Advocate attended. Mother explained her concerns about the proposed classroom at City School 2, including that it was an ID program. DCPS Manager explained the program at City School 2. Mother did not agree for Student to attend the program. Exhibit R-16, Testimony of Mother. Student has not attended any school during the current school year. 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, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 LED.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

A.

Did DCPS deny Student a FAPE by failing to offer a suitable educational placement after September 8, 2014, when Student was allegedly assaulted at City School 1, because following the assault, Student was unable to return to City School 1?

The crux of the dispute between the parent and DCPS in this case is DCPS' failure to provide an educational setting for Student, satisfactory to the parent, since at least October 2014. Student suffers from multiple disabilities, including total blindness and

moderate-to-severe intellectual delays resulting from anophthalmia/microphthalmia syndrome and congenital brain malformations. He has not attended school since September 8, 2014. Student's July 8, 2014 IEP provided for full time special education services, including vision support services and a full-time dedicated aide. For the 2014-2015 school year, DCPS assigned Student to the self-contained Independence and Learning Support (ILS) program classroom at City School 1.

On September 8, 2014, Student recounted to his mother that he had been touched on his genitals by another student in the City School 1 bathroom. Whether the touching evidence actually occurred has never been established. Immediately following the alleged incident, Mother informed City School 1 staff and, soon after, requested a review of Student's placement at City School 1. At a meeting with LEA Representative and Student's case manager on October 14, 2014, Mother and Educational Advocate requested a change in Student's placement from City School 1, both because of concerns engendered by the alleged touching incident and because Mother and Educational Advocate did not consider the ILS program at City School 1 to be suitable for Student. LEA Representative convened another meeting with Mother at City School 1 in December 2014, which was attended by DCPS' Resolution Specialist. Mother and Educational Advocate reiterated their request for a change in Student's placement. In January 2015, DCPS convened a meeting at its central offices to discuss Student's placement. This meeting was attended by Mother, Grandmother, Educational Advocate, Resolution Specialist and DCPS Manager. At the January 2015 meeting, Mother requested that Student be provided a program at City School 2 "tailored" to Student's needs. However, at the time, DCPS was unable to provide Student's vision support services at City School 2. DCPS offered to send Student to Maryland School for the

Blind. Mother rejected this school because she considered the Maryland school to be too far from home. (Mother considers Student to have “separation anxiety.”)

On February 11, 2015, DCPS issued a Prior Written Notice refusing Mother’s request to change Student’s location of services to City School 2 and confirming Student’s placement in the ILS program at City School 1. Mother contends that DCPS denied Student a FAPE by not transferring him to a suitable location of services following the alleged September 8, 2014 touching incident. DCPS maintains that it offered Student a FAPE, both at the ILS program at City School 1 and at Maryland School for the Blind, proposed at the January 2015 meeting.

Placement decisions must be made by the student’s IEP team, including the parent. Once an IEP is developed to a student with a disability, the District must ensure that the student is provided an appropriate placement “based on the child’s IEP.” 34 C.F.R. § 300.116. *Hinson ex rel. N.H. v. Merritt Educational Center*, 579 F.Supp.2d 89, 103 -104 (D.D.C. 2008). The IDEA requires that placement decisions be made by the IEP team based upon the student’s individual needs and as required to provide FAPE. *See* 34 CFR § 300.116(a)(1); Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46641, 46596. (August 14, 2006); *Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 524 (D.C. Cir. 2005) (IEPs focus on disabled students’ individual needs.) The District must also ensure that the IEP team is convened to review and consider revising a student’s IEP to address new information about the student provided by the parent. *See* 34 CFR § 300.324(b).

In this case, following the alleged September 8, 2014 touching incident, Mother requested a change of Student’s placement from City School 1. Placement is based on the IEP. Therefore, when Mother requested a change in Student’s placement, and

provided the new information about the alleged touching incident at City School 1, DCPS was required to convene Student's IEP team to review Student's needs and where those needs could be met. Independent of Mother's request, DCPS also had a duty to reconvene Student's IEP team when it became known that Student was no longer attending school. *Cf., Rockbridge County (VA) School Division*, 57 IDELR 144 (OCR 2011) (Once the Division was aware that the Student was refusing services included in his IEP, IEP team required to meet to determine if and how it could otherwise continue to meet his educational needs.) Although DCPS convened several meetings with Mother and Educational Advocate to discuss Mother's request, both at City School 1 and at the DCPS central office, none of these were IEP team meetings.

DCPS failure to convene Student's IEP team to consider Mother's request for a change in Student's placement was a procedural violation of the IDEA. *See, e.g., Metropolitan Bd. of Public Educ. of the Metropolitan Government of Nashville and Davidson County v. Bellamy*, 116 Fed.Appx. 570, 578, 2004 WL 2452567, 7 (6th Cir. 2004) (Affirming failure to timely convene IEP meeting constituted a procedural violation.) Procedural violations of the IDEA do not, in themselves, mean a child was denied a FAPE. *See Schoenbach v. District of Columbia*, 309 F.Supp.2d 71, 78 (D.D.C.2004). A procedural violation will constitute a denial of a free appropriate public education "only if it 'result[s] in loss of educational opportunity' for the student." *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006) (internal quotation marks omitted). That is, a school district's failure to comply with the procedural requirements of IDEA will be 'actionable' only 'if those procedural violations affected the student's substantive rights.' *Id.* at 832, 834 (emphasis omitted)." *Leggett v. District of Columbia*, 793 F.3d 59, 67 (D.C. Cir. 2015).

In this case, it is evident that Student's substantive rights were affected by DCPS' failure to convene his IEP team to review his placement at City School 1. Following the alleged September 8, 2014 touching incident, Student did not attend school for the remainder of the 2014-2015 school year. The decision for Student not to return to City School 1 was made by the parent, not by DCPS, and the hearing evidence does not establish either whether the alleged touching incident actually occurred or that Student's IEP team would have changed his placement because of the incident. Notwithstanding, under the IDEA, Mother was entitled to have an IEP team review her new information concerning Student and determine his ongoing educational placement – whether at City School 1, Maryland School for the Blind (as offered by DCPS) or another location. I conclude that DCPS' failure to convene Student's IEP team, upon Mother's request for a change in Student's placement following the alleged September 8, 2014 touching incident, was a denial of FAPE. *See Leggett, supra* (Procedural violation actionable, if the student's education would have been different but for the violation.)

B.

Did DCPS deny Student a FAPE by failing to ensure that Student was offered a revised IEP on or after July 8, 2015?

Student's IEP for the 2014-2015 school year was completed on July 8, 2014. An updated IEP was purportedly developed on May 28, 2015. However, there was no IEP team meeting at that time and the purported IEP was not provided to Mother. I find that the purported May 28, 2015 IEP was not a valid IEP. *See 34 CFR 300.321(a), et seq.* (IEP means a written statement that is developed, reviewed, and revised in a meeting of the IEP team, including the parent.) DCPS' failure to ensure that Student's IEP team timely reviewed and revised his July 8, 2014 IEP was a procedural violation of

the IDEA.

DCPS argues that the invalid May 28, 2015 IEP continued Student's goals and services from his July 8, 2014 IEP and therefore Student did not lose educational opportunity. *See Lesesne, supra*, 447 F.3d at 834 (Whether procedural violation resulted in loss of educational opportunity.) However, parents are not required to demonstrate that their child's education was affected by a procedural violation where the violation was "obviously substantive." *See Leggett, supra* at 67-68. Following development of the July 8, 2014 IEP, Student did not attend school for nearly an entire school year. Clearly the July 8, 2014 IEP could not be assumed, a year later, to still be reasonably calculated to enable Student to receive educational benefits. *See A.M. v. District of Columbia*, 933 F. Supp. 2d 193, 203-04 (D.D.C. 2013). I find that DCPS' failure to ensure that Student's IEP was revised before the beginning of the 2015-2016 school year was an obviously substantive violation of the IDEA and resulted in a denial of FAPE.

C.

Did DCPS deny Student a FAPE by, on July 22, 2015, offering him an unsuitable placement at City School 2?

Petitioner next contends that DCPS denied Student a FAPE by assigning him to the ILS program at City School 2 for the 2015-2016 school year. (Petitioner alleges in her complaint that the placement was made on July 22, 2015. However, the location of services letter was dated June 16, 2015. *See Exhibit R-15.*) At an MDT meeting at City School 2 on September 1, 2016, Mother rejected the City School 2 placement because she understood that the other students in the ILS program had ID and Autism Spectrum Disorder disabilities and there were no other students with vision impairments. Student

never attended school at City School 2. DCPS maintains that its placement of Student in the ILS program at City School 2 was appropriate and that City School 2 is capable of implementing Student's IEP.

At a minimum, a special education placement must be "based on the child's IEP," 34 C.F.R. § 300.116(b)(2), and be "capable of fulfilling the student's IEP," *Lofton v. District of Columbia*, 7 F.Supp.3d 117, 123 (D.D.C. 2013). *Joaquin v. Friendship Pub. Charter Sch.*, No. CV 14-01119 (RC), 2015 WL 5175885, at 4 (D.D.C. Sept. 3, 2015). Student does not have a current IEP. His assignment to City School 2 was based, presumably, upon DCPS' purported May 28, 2015 IEP. As explained above in this decision, that IEP is not valid. Until Student's IEP team meets to review and revise Student's IEP based upon his current individual needs, it cannot be determined whether the ILS program at City School 2 is, or is not, a suitable placement for Student. Therefore, I dismiss this claim without prejudice.

D.

Has DCPS denied Student a FAPE by failing to provide him IEP instruction or services since September 8, 2014?

Mother stopped sending Student to school following the alleged touching incident at City School 1 on September 8, 2014. As of the due process hearing date, Student was still not attending school. As explained above, when it became clear in fall 2014 that Mother refused to send Student back to City School 1, DCPS was required to convene Student's IEP team to determine if and how it could otherwise continue to meet his educational needs. *See Rockbridge County, supra*. Notwithstanding, the decision for Student not to go to school was made, unilaterally, by Mother. The evidence establishes that at all times, DCPS has been willing to implement Student's July 8, 2014

IEP either at City School 1, Maryland School for the Blind (since January 2015) or at City School 2 (current school year). Although Mother objected to Student's assignment to a self-contained classroom with children who had ID or ASD disabilities, she has not shown that the ILS programs at City School 1 or City School 2 were not capable of fulfilling Student's IEP. *See O.O. ex rel. Pabo v. D.C.*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008); *Lofton v. District of Columbia*, 7 F. Supp. 3d 117, 123 (D.D.C. 2013). I conclude that the parent has not met her burden of proving that DCPS has denied Student a FAPE by failing to provide him IEP instruction and services since September 8, 2014.

Remedy

In this decision, I have found that Student has been denied a FAPE by DCPS' procedural violations of the IDEA, namely not convening Student's IEP team to review his educational placement following Mother's request for a change in placement in October 2014 and not ensuring that Student's IEP was reviewed and revised before the current school year. For relief, Petitioner requests an order for DCPS to develop an appropriate IEP for Student and to determine, with the parent's participation, an appropriate ongoing placement/location of educational services.

Student requires an updated IEP and his IEP team must determine his ongoing educational placement, based upon his current individual needs, in order to provide a FAPE. I will order DCPS to convene Student's MDT team to determine what additional evaluations are needed at this time to determine Student's special education and related services needs. Student's last psychological evaluation was conducted in May 2014 by the Virginia School for the Deaf and Blind. That evaluation needs to be updated because Student has not attended school since September 2014. Because of VSDB's expertise in evaluating Students who have vision impairments, I recommend, but do not order, that

DCPS engage VSDB to update its 2014 evaluation of Student. Upon receipt of the reevaluation and any other evaluations and data needed by the IEP team, Student's IEP team, including the parent, must be convened to review the updated information, develop a revised IEP and determine Student's ongoing educational placement.

Petitioner also seeks a compensatory education award. Petitioner's expert, Educational Advocate, proposed a compensatory education award of 75-105 hours of tutoring for each month of educational services missed by Student since he stopped attending school in September 2014, in addition to many hours of make-up adaptive physical education, occupational therapy and orientation/mobility services. Where a parent has established a denial of the education guaranteed by the IDEA, the hearing officer must undertake "a fact-specific exercise of discretion" designed to identify those compensatory services that will compensate the student for that denial. The proper amount of compensatory education, if any, depends upon how much more progress a student might have shown if he had received the required special education services and the type and amount of services that would place the student in the same position he would have occupied but for the school district's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005)).

DCPS' denials of FAPE in this case resulted from procedural violations of the IDEA – the District's failure to convene Student's IEP team to consider Mother's request for a change in Student's placement after September 8, 2014 and its failure to ensure that Student's IEP was updated before the start of the 2015-2016 school year. Student has multiple disabilities, including moderate-to-severe intellectual delays in addition to his blindness. The hearing evidence in this case does not establish what position

Student would now occupy if he had attended school after September 8, 2014 or the type and amount of services he would need to regain that position. Further, the parent's role in Student's not attending school for the last 18 months must be considered in the compensatory education analysis. *Cf. Reid, supra*, 401 F.3d at 523 (Compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting appropriate relief.) On the current record, deciding what position Student would now occupy, but for DCPS' procedural violations of the IDEA, would be purely speculative. Accordingly, I find that the evidence is insufficient to craft an appropriate, specific fact based, compensatory education remedy and I will deny without prejudice Petitioner's request for a compensatory education award. *See Phillips v. District of Columbia*, 736 F. Supp. 2d 240, 249 (D.D.C. 2010) (Upon finding that the student may have suffered a setback in his educational development as a result a denial of FAPE, Hearing Officer should provide the parent with an additional opportunity to supplement the record with evidence necessary to support a compensatory award consistent with *Reid*.)⁵

⁵ In closing argument Petitioner's Counsel requested that I order Student's IEP team to craft a compensatory education award. This request would appear to be barred by the *Reid* decision. ("Under the statute, the hearing officer may not delegate his [compensatory education remedy] authority to a group that includes an individual specifically barred from performing the hearing officer's functions" *Id.* 401 F.3d at 526.) Petitioner's Counsel cited the D.C. Circuit's more recent decision in *Boose v. District of Columbia*, 786 F.3d 1054, 1058-59 (D.C. Cir. 2015) for its apparently contrary holding, in *dicta*, that if the parent were to prevail on the merits, the district court could either order the school system to determine the appropriate amount of compensatory education or make that determination itself. *Boose* at 1058-59. However the *Boose* decision did not explicitly overrule the Court's pronouncement in *Reid* that a hearing officer may not delegate his compensatory education authority to the IEP team. Moreover, the *Reid* decision is the D.C. Circuit's leading decision on the compensatory education remedy, whereas its *Boose* decision addressed primarily the mootness doctrine. I conclude that the bar in *Reid* against a hearing officer's delegating his compensatory education authority to the IEP team remains good law in this jurisdiction.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED:

1. DCPS, subject to obtaining consent from the parent, shall without delay obtain a psychological reevaluation of Student, to include, *inter alia*, an educational assessment, conducted at public expense, by a qualified evaluator experienced with evaluating individuals who are blind;
2. Within 10 school days of the entry date of this order, DCPS shall convene Student's MDT team, including the parent, to determine what additional evaluations and data are needed at this time to enable Student's IEP to review and revise his IEP and to determine a suitable placement for him. DCPS shall obtain these evaluations and data without delay and, upon receipt of the psychological reevaluation and other data, DCPS shall promptly convene Student's IEP team to review and revise his IEP in accordance with 34 CFR § 300.324, *et seq.*, and to decide Student's ongoing educational placement.
3. The Petitioner's request for an award of compensatory education is denied without prejudice;
4. Petitioner's claim that DCPS denied Student a FAPE by offering him an unsuitable placement at City School 2 for the 2015-2016 school year is dismissed without prejudice and
5. All other relief requested by the Petitioner herein is denied.

Date: March 11, 2016

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
Office of Dispute Resolution
Chief Hearing Officer
OSSE - SPED
DCPS Resolution Team