

Hearing Officer Determination

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”) and 38 D.C. Code 2561.02.

Procedural History

Following the filing of the initial due process complaint on 4/10/15, this Hearing Officer was assigned to the case the same day. DYRS, a noneducational public agency which acts as LEA for Local School, noted that service on it was improper, but before a Response to the complaint was filed, Petitioner on 4/23/15 filed a Request for an Expedited Hearing and Amended Due Process Complaint Notice, which request was granted by Order Granting Request to Expedite Amended Complaint issued on 4/23/15. DYRS filed a timely response on 4/28/15. The response did not challenge jurisdiction. However, when Petitioner limited the remedy sought herein to seek only appropriate placement, Respondent filed a Motion to Dismiss on 5/1/15, asserting that educational placement could not be determined in this proceeding because it would implicate residential placement which is outside the jurisdiction of this forum. The Motion to Dismiss was denied by the undersigned on 5/5/15 in a written order.

The resolution meeting took place on 4/30/15. The 15-day resolution period ended on 5/8/15, but the parties agreed during the Prehearing Conference and on the record at the Due Process Hearing to waive the final days of the resolution period in order to more quickly proceed with the Due Process Hearing. A final decision in this matter must be reached no later than 10 school days following the Due Process Hearing, which requires a Hearing Officer Determination (“HOD”) by 5/22/15.

The Due Process Hearing, which was closed to the public, took place on 5/7/15. Petitioner was represented by Chessey Robinson, III, Esq. DYRS was represented by Lindsey O. Appiah, Esq., and Kathleen Liu, Esq. Counsel did not discuss settlement at the hearing. Petitioner participated in the first part of the hearing by telephone, without opposition from Respondent and with leave of the Hearing Officer, due to a fall and injury the night before the hearing which prevented Petitioner from being able to travel to the hearing. During Respondent’s case, transportation arrived to take Petitioner to the Emergency Room, at which point she ended her telephonic participation in the hearing without objection.

Neither party objected to the testimony of witnesses by telephone. The parties made no admissions and agreed on no stipulations.

Petitioner’s Disclosure statement, submitted on 5/4/15, consisted of a witness list of six witnesses and documents P1 through P23. Petitioner withdrew documents P1, P3, P6 and P15 as illegible and/or duplicative of Respondent’s disclosures; the remainder of Petitioner’s Disclosure statement and documents (P2, P4, P5, P7-P14 and P16-P23) were admitted into evidence without objection.

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Respondent's Disclosure statement, submitted on 5/4/15, consisted of a witness list of three witnesses and documents R1 through R9. Respondent's Disclosure statement and documents were admitted into evidence without objection.

Petitioner's counsel presented one witness in Petitioner's case-in-chief (*see* Appendix A):

1. Parent

Respondent's counsel presented three witnesses in Respondent's case (*see* Appendix A):

1. Program Manager (DYRS Supervisor for Ward 7)
2. Case Manager (Social Worker at DYRS)
3. Special Education Coordinator (at Local School)

Petitioner presented no rebuttal witnesses.

The issues to be determined in this Hearing Officer Determination are:

Issue 1: Whether DYRS denied Student a FAPE by (a) preventing meaningful parental participation in the determination of educational placement at Local School in April 2015, and/or (b) failing to provide prior written notice concerning that decision or Parent's written requests to discuss placement from 4/7/15 to 4/9/15.

Issue 2: Whether DYRS denied Student a FAPE by failing to implement Student's IEP, which requires a self-contained educational setting, when he was placed in Local School in April 2015, as it does not offer a self-contained classroom setting.

Petitioner seeks the following relief:

1. DYRS shall place Student in an appropriate placement within 10 school days, with transportation as needed.²

Oral closing arguments were made by counsel for both parties at the end of the Due Process Hearing. Upon request of Respondent and concurrence of Petitioner, the opportunity to file written closing arguments was also granted, which were filed by both parties on 5/11/15.

² At the Due Process Hearing, Petitioner's counsel stated on the record that acceptance of Student at a desired school had been withdrawn by that school, so the school is not named in the requested relief. Petitioner had withdrawn compensatory education as requested relief at the Prehearing Conference

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact³ are as follows:

1. Student is a -year-old resident of the District of Columbia. Petitioner is Student's mother ("Parent").⁴

2. Student's most recent IEP, finalized by DCPS on 10/7/14, classifies him as having Multiple Disabilities.⁵ Student's Psychological/Psycho-Educational Evaluation, dated 8/1/14, diagnoses Student as having Unspecified Disruptive, Impulse Control, and Conduct Disorder, along with Borderline Intellectual Functioning.⁶

3. Student's 10/7/14 IEP provides 25 hours per week of specialized instruction outside general education, along with three hours per month of behavioral support services outside general education and 30 minutes per month of speech-language pathology services outside general education.⁷ While not in the record, Student's previous IEP apparently was similar to his 10/7/14 IEP, except for a requirement of seven hours per month of behavioral support services, which was reduced to three hours in the 10/7/14 IEP.⁸

4. Student has repeated 9th grade more than once and, despite being ■■■ has earned no credits towards high school graduation.⁹

5. Student "has a history of noncompliance and conduct problems" and "does not appear to be interested or motivated to change his behavior or seek treatment."¹⁰ Student's Violence Risk Evaluation, dated 4/7/14, concluded that his risk assessment is High based on the 24 risk factors in the Structured Assessment of Violence Risk in Youth (SAVRY).¹¹ Student reportedly brags about being a bully and stated that "I like hurting other people. I

³ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁴ Parent.

⁵ R7-1.

⁶ P5-16.

⁷ R7-13.

⁸ P8-2.

⁹ P8-1; P5-3.

¹⁰ P5-16.

¹¹ R3d-12,14; Program Manager; Case Manager.

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like being able to scare them.”¹² Student has a significant history of broken bones in his own arms, hands and fingers from fighting.¹³

6. At the same time, a psychiatric evaluator found Student “charming and handsome [and] more intellectually able than his recorded IQ of 78 would suggest.”¹⁴ Student “has artistic talent and potential that should be developed but it will not be realized if he cannot embrace therapeutic interventions.”¹⁵ Last year Student attended summer school, where he wrote poetry.¹⁶

7. Student has had escalating involvement with the criminal justice system beginning in March 2012, with 8 charges by May 2014.¹⁷ While in detention at Youth Services Center in 2014 he had two incidents, including breaking someone’s jaw.¹⁸

8. DYRS tries to keep youth from being committed and works with probation officers and others to provide services to avoid commitment.¹⁹ But in September 2014 a Notice of Intent to Recommend Commitment of Student was submitted, based among other things on Student’s struggles in multiple schools where he had a “propensity for aggression and physical violence.”²⁰ Student was committed to DYRS in January 2015 for a period of two years and is in a secure residential facility.²¹

9. A Family Group Conference was held in October 2014 in which placement was discussed at both Out-of-State School and Local School.²² Both Out-of-State School and Local School have a high level of restrictiveness.²³ DYRS viewed Local School as most appropriate for Student.²⁴ Parent and Student preferred Out-of-State School over Local School; DYRS sought to work with the family so accommodated their preference for Out-of-State School.²⁵ DYRS made it clear to Parent and Student that putting Student at Out-of-State School was conditional, and that if Student did not succeed at Out-of-State School he would be moved to Local School.²⁶

¹² R3d-5.

¹³ P5-4.

¹⁴ P4-6.

¹⁵ *Id.*

¹⁶ P4-3.

¹⁷ P4-4; P5-5,6.

¹⁸ P4-5.

¹⁹ Program Manager.

²⁰ P16-1,2; Case Manager.

²¹ Case Manager.

²² Parent.

²³ Program Manager.

²⁴ Case Manager.

²⁵ *Id.*

²⁶ Case Manager; Program Manager.

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10. Within several weeks after beginning at Out-of-State School, Student became aggressive and violent, threatening to choke one resident, attacking another with that resident's crutches, locking a staffer who intervened into a room, breaking the nose of a resident, breaking a glass window by punching it, and attacking two staffers so severely that they had to take time off work to recover.²⁷ Student was "out of control" at Out-of-State School.²⁸

11. By 4/6/15, Out-of-State School decided to return Student to DYRS and issued an Intent to Discharge letter, asking that Student be removed from Out-of-State School within 30 days.²⁹ However, the next day Student broke a second nose and Out-of-State School asked DYRS to expedite Student's removal "due to the severity of his behavior."³⁰ DYRS returned Student from Out-of-State School in part to keep him from facing additional criminal charges as a result of violent acts against other students.³¹

12. Parent was contacted about Student's move from Out-of-State School at about the time of his move.³² Due to security and safety concerns, the policy is to give no advanced notice to parent whenever the youth being moved is in the High risk category, because problems had arisen in the past with youth receiving help to escape during transit when advanced notice was given.³³

13. Parent was aware of the entire course of Student's behavior and efforts at treatment.³⁴ DYRS did not provide prior written notice to Parent when Student was moved from Out-of-State School, nor was there discussion with Parent about another school for Student.³⁵ Parent was given no option for Student other than Local School, and was given no opportunity to look at Local School.³⁶

14. Local School and Out-of-State School do not have self-contained special education classrooms; both Out-of-State School and Local School rely on full inclusion programs in which classes have both special education and general education teachers.³⁷ In the combined classroom, special education students may be separated into a different part of the room from the general education students, so that each group can get the lessons they need.³⁸ Using the inclusion model, each student with an IEP is provided with differentiated

²⁷ Program Manager; P14-1.

²⁸ Case Manager.

²⁹ P14-1,2; Program Manager.

³⁰ R4-3; Program Manager.

³¹ Program Manager; R4-1.

³² Parent; Case Manager.

³³ Program Manager.

³⁴ *Id.*

³⁵ Parent.

³⁶ *Id.*

³⁷ Case Manager; P8-3; P9-2.

³⁸ Case Manager.

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work that will support that student.³⁹ Out-of-State School's Special Education Supervisor stated that Student's 2014 IEP could be implemented in the general education setting with only "slight modification."⁴⁰

15. At Local School, Student's unit contains six youths and he is to be in a classroom with those six.⁴¹ Classes at Local School typically have 8-10 students, along with a general education teacher, a special education teacher and two DYRS staffers for behavior management.⁴² A majority of the youth at Local School have IEPs.⁴³

16. Local School schedules meetings to review the IEPs of incoming students within 30 days, new evaluations are ordered as needed, and a new IEP is developed within 45 days if needed.⁴⁴ For unexplained reasons, Local School did not have access to Student's 2014 IEP until 5/6/15, when it became available online in SEDS, although Local School had Student's earlier IEP.⁴⁵

17. On 4/8/15 and 4/9/15, Petitioner's counsel suggested four locations that might be suitable for Student.⁴⁶ Two of the four locations were on a DCPS list of COA-approved residential treatment facilities that can implement a full-time, out of general education IEP.⁴⁷ Those two locations were psychiatric residential treatment facilities, but Student was rejected for that level of care.⁴⁸ Other locations suggested by Petitioner were not chosen because they have a low tolerance for aggression and would likely bring additional charges against Student for violent acts, while Local School would not.⁴⁹

18. Student has already had problems at Local School, with fights on 4/15/15 and 4/20/15 in which Student "beat up" two youths in the unit without provocation.⁵⁰

19. A meeting was held at Local School on 4/28/15 which included Student, Parent, Special Education Coordinator, the Unit Manager, a mental health person, Program Manager and Case Manager, at which there was discussion of Student's IEP, the fact that he won't engage in his education and refuses to leave his pod, and what his refusals mean for Student.⁵¹ Student has a defiant attitude, stating that he could not be made to engage in

³⁹ Special Education Coordinator; P19-1.

⁴⁰ P17-1.

⁴¹ Case Manager.

⁴² Special Education Coordinator.

⁴³ Case Manager.

⁴⁴ P9-2.

⁴⁵ Special Education Coordinator.

⁴⁶ P20-1; P21-1.

⁴⁷ P23-1.

⁴⁸ Program Manager.

⁴⁹ Case Manager.

⁵⁰ Case Manager; R9-1,2.

⁵¹ Program Manager; Case Manager; Special Education Coordinator.

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school or with mental health workers, and that he has an attorney who is going to get him moved.⁵²

20. Student is refusing his medication, refusing to meet with a psychiatrist, refusing speech-language services, and repeatedly refusing school.⁵³ DYRS is encouraging Student to participate in school and is attempting to get him stabilized and then work on his IEP.⁵⁴ Special education staff at Local School has taken packets to Student in his unit to work with him one-on-one.⁵⁵ Student consistently responds that the school work is not too difficult.⁵⁶

21. The 30-day meeting has not yet been held at Local School, so it is not yet known whether Student's IEP needs to change.⁵⁷ Given the student population at Local School, which includes many with behavioral problems, and the access to special education supports within the inclusion classroom, it is not clear whether Student's IEP needs to require specialized instruction outside general education.⁵⁸ Often peer tutoring is used at Local School where a more advanced student will work with one who is less advanced.⁵⁹ A proper IEP depends on what needs Student displays at Local School, which is difficult to determine when Student refuses to cooperate.⁶⁰

Conclusions of Law

Based on the Findings of Fact above, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law are as follows:

The overall purpose of the IDEA is to ensure that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The IDEA applies even if the young person is committed to DYRS. *See* U.S. Department of Education, Office of Special Education and Rehabilitative Services, guidance dated 12/5/14 (R2-1).

"The IEP is the 'centerpiece' of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (3d Cir. 2010), *quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and is the primary vehicle for providing a FAPE. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

⁵² Program Manager; Special Education Coordinator.

⁵³ Special Education Coordinator; Program Manager.

⁵⁴ Program Manager; Special Education Coordinator.

⁵⁵ Special Education Coordinator.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

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To provide a FAPE, once a child who may need special education services is identified, the LEA or public agency is obligated to conduct an initial evaluation and make an eligibility determination within 120 days. D.C. Code § 38-2561.02(a). If the child is found eligible, the LEA or public agency must then devise an IEP, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. See 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S. Ct. 1996, 2002, 85 L. Ed. 2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir. 1991); *Dist. of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir. 2010).

The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

In addition, the LEA or public agency must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114.

A Hearing Officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5-E D.C.M.R. § 3030.3. The burden of proof is on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S. Ct. 528, 537, 163 L. Ed. 2d 387 (2005).

Issue 1: *Whether DYRS denied Student a FAPE by (a) preventing meaningful parental participation in the determination of educational placement at Local School in*

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April 2015, and/or (b) failing to provide prior written notice concerning that decision or Parent's written requests to discuss placement from 4/7/15 to 4/9/15.

Petitioner did not meet her burden of proof on this issue because the move from Out-of-State School to Local School was not a change in educational placement, but a change in location of service, and the lack of prior written notices was at most a procedural violation.

Petitioner is quite right that the IDEA does require parental involvement regarding any decisions “on the educational placement of their child.” *See Aikens v. Dist. of Columbia*, 950 F. Supp. 2d 186, 190 (D.D.C. 2013), *citing* 20 U.S.C. § 1414(e); 34 C.F.R. 300.116(a)(1), 300.327. However, on the facts of this case a change in location does not require involvement of the parent. As the court explained in *Aikens*, 950 F. Supp. 2d at 192:

In the absence of a “fundamental change in” or “elimination of” a basic element of [student] T.A.’s educational program at [prior school] Shadd when it moved to [new school] BAT, there has been no change in educational placement. Without such a change, DCPS was not required to . . . involve [parent] in the decision to move T.A. from Shadd to BAT. T.A. was not denied a FAPE.

See also James v. Dist. of Columbia, 949 F. Supp. 2d 134, 137 (D.D.C. 2013) (“[w]hile the IDEA requires a student’s parents to be part of the team that creates the IEP and determines the educational placement of the child, it does not ‘explicitly require parental participation in site selection.’ *White*, 343 F.3d at 379.”); *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003) (“‘[e]ducational placement,’ as used in the IDEA, means educational program – not the particular institution where that program is implemented”).

Several factors are relevant in determining whether a change in location amounts to a change in Student’s educational placement, including whether the youth will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new location is the same option on the continuum of alternative placements.⁶⁶ *Savoy v. Dist. of Columbia*, 844 F. Supp. 2d 23, 31 (D.D.C. 2012). *See, also*, U.S. Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46644 (August 14, 2006) (a change of placement under the IDEA occurs where a child’s

⁶⁶ Continuum of alternative placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under §300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions)

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new educational program is likely to be substantially and materially different than his current program or would result in a change in the level of interaction with nondisabled peers).

Here, both Out-of-State School and Local School use an “inclusion model” in which there are not separate general education and special education classrooms, but small classes taught by both general education and special education teachers according to what the students need. Both schools are in secure residential facilities for students with a “High” risk level. The youth in both facilities tend to have behavioral issues and receive a high level of focus on their behavior as each class of 8-10 students has two behavioral staffers in addition to a general education teacher and a special education teacher. Further, the two facilities clearly appear to be the same option on the continuum of placements.

With these similarities, and no suggestion of any change between Out-of-State School and Local School in the extent of education with nondisabled children or the opportunities for nonacademic or extracurricular services, this Hearing Officer is convinced that the change of school was simply a change in location and not a change in educational placement. Parent did not have a right to participate in the decision to change Student’s location. Even so, DYRS did communicate with Parent and her counsel to keep her informed of the movement of her son, albeit without advanced notice due to security and safety policies.

Further, Parent, directly and through counsel, repeatedly made clear to DYRS her position and perspective on the schooling of Student. Parent first stated her position in October 2014 that Out-of-State School was preferred to Local School; DYRS accepted that preference despite its view that Local School was the best choice. However, DYRS made clear that to Parent that if Out-of-State School did not work out for Student he would be returned to Local School. Parent was still able to communicate her preference in April 2015 that Student be permitted to try other schools rather than Local School. Although DYRS did not yield to Parent’s position at that point and did transfer Student to Local School, Parent had an opportunity to make her views known and participate in a meaningful way. *Cf. Hawkins v. Dist. of Columbia*, 692 F. Supp. 2d 81, 84 (D.D.C. 2010) (right conferred by the IDEA on parents to participate does not constitute a veto power). This Hearing Officer concludes that Petitioner did have input beyond what is strictly required by the IDEA in these circumstances and that it was not unreasonable for DYRS to carry through on the plan that had been made in October 2014 to move Student to Local School if Student had significant problems at Out-of-State School.

Petitioner also claims that DYRS failed to issue prior written notices for the change it made⁶¹ and in response to each suggestion from Parent about other schools that DYRS did

⁶¹ While the advocacy in this case focused on 34 C.F.R. 300.503(a), which requires a prior written notice for a change or refusal to change placement, but not location, legislation which took effect on 3/10/15 in the District of Columbia requires prior written notice even for changes in location. *See* D.C. Code § 38-2571.03 (“[b]efore any change in service

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not accept. As an initial matter, DYRS could hardly be expected to issue prior written notices for each informal suggestion not accepted from Parent's counsel in the final days immediately before this litigation commenced. However, there was no prior written notice for the change in location from Out-of-State School to Local School, as required by new District of Columbia legislation⁶² that took effect only weeks before. While DYRS has safety and security concerns that may cast its obligations in a different light, at most this is a procedural violation of the IDEA. *See Honig v. Doe*, 484 U.S. 305, 312, 108 S. Ct. 592, 598 (1988). Of course, only those procedural violations of the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable. *See, e.g., Lesesne ex rel. B.F. v. Dist. of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006). The purpose of the prior written notice requirement "is to ensure that parents are aware of the decision so that they may pursue procedural remedies." *M.B. ex rel. Berns v. Hamilton Southeastern Schools*, 668 F.3d 851, 861-862 (7th Cir. 2011).

In this case, Parent has been represented by able counsel who participated in events at issue, communicated on her behalf with DYRS, and quickly filed the present due process complaint. Any failure by DYRS to provide prior written notice concerning the change in location and rejection of other options for Student did not impair Parent's ability to participate in the process or result in harm to Student. *See Roark ex rel. Roark v. Dist. of Columbia*, 460 F. Supp. 2d 32, 42 (D.D.C. 2006) (failure to provide prior written notice is a procedural violation and is not a viable claim unless petitioner offers evidence of substantive harm to student's education). Here, there was no evidence that receiving prior written notices from DYRS explaining the change of location and explaining why Parent's preferred locations were not chosen would have had any impact on Student. The prior written notice would have simply put Parent on notice in case she wanted to file a due process complaint, which she has already done. On these facts, it is the conclusion of this Hearing Officer that DYRS's omission of any required prior written notice is not actionable.

Issue 2: Whether DYRS denied Student a FAPE by failing to implement Student's IEP, which requires a self-contained educational setting, when he was placed in Local School in April 2015, as it does not offer a self-contained classroom setting.

Petitioner also failed to meet her burden of proof on this issue. Student's 10/7/14 IEP, which was developed by DCPS prior to Student's commitment, does require 25 hours per week of specialized instruction out of general education. However, Petitioner is not challenging the implementation of Student's IEP in a normal school environment, for Student is committed and in a secure residential facility. For such circumstances, the U.S. Department of Education, Office of Special Education and Rehabilitative Services, issued detailed guidance on 12/5/14 explaining that if an individual with an IEP transfers to a correctional facility, the new public agency must provide services "comparable" to those in the student's IEP "until the new public agency either adopts the previous agency's IEP, or

location for a child with a disability is made, the LEA shall provide the parent with written notice of the proposed change").

⁶² *Id.*

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develops and implements a new IEP for the student.” (R2-4.) This tracks 34 C.F.R. 300.323(e)⁶³ and recognizes that the needs of students may differ with different public agencies, so it may be appropriate to develop and implement a new IEP for Student. DYRS’s obligation in the meantime is to provide comparable services to Student.

Petitioner argues that Student’s IEP requires him to be educated outside general education, while Local School (like Out-of-State School) does not have separate special education classrooms but relies on an inclusion model, as DYRS forthrightly acknowledges. It is apparent, however, that Local School does not have typical general education classrooms, for Local School has classes of only 8-10 students which contain both a general education and a special education teacher, along with two staffers focused on behavior, as many of the youth – certainly including Student – have behavioral issues. In the combined classroom the special education students may be separated into a different part of the room from the general education students, so that each group can get the lessons they need. Each student with an IEP is provided with differentiated work that will support that student. Often peer tutoring is used at Local School where a more advanced student will work with one who is less advanced.

It is not clear how Student will perform in this inclusion setting and the extent of services he will need. A proper IEP for Student depends on the needs he displays at Local School, which are difficult to determine when Student refuses to cooperate. Student has had a defiant attitude at Local School, stating in late April 2015 that he could not be made to engage in school, and that he has an attorney who is going to get him moved. *Cf. Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1130 (10th Cir. 2008) (“the limited resources devoted to providing education benefits for disabled children are not effectively allocated where schools expend resources on students who not only fail to use the educational opportunities provided them but also affirmatively avoid attending school altogether”). Student is also refusing his medication, refusing to meet with a psychiatrist, and refusing speech-language services, as well as repeatedly refusing to participate in his educational programming, despite the efforts of Local School. While Petitioner asserts that this is simply a part of Student’s disability, no evidence was presented that Local School is not making all reasonable efforts to engage Student. Local School is attempting to work with Student to provide educational benefit to him, initially bringing packets to his pod to work one-on-one with him, and is seeking to engage him and encourage him to participate in the classroom. DYRS is focused on trying to stabilize Student so he can begin to engage in the educational process.

⁶³ Like the U.S. Department of Education guidance, 34 C.F.R. 300.323(e) applies when transfer is between public agencies “in the same state.” While Out-of-State School is in a different state than Local School, the LEA for Out-of-State School is DCPS (*see* R1), so 300.323(e) is applicable in the view of this Hearing Officer. If the location of the schools were determinative, then 34 C.F.R. 300.323(f) would apply, which also requires comparable services initially, but does not suggest the prior IEP can be adopted and adds conducting an evaluation prior to developing an IEP, which would take additional time.

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Considering the totality of the circumstances, this Hearing Officer concludes that DYRS is providing services sufficiently “comparable” to Student’s current IEP to provide a FAPE to Student during this period while DYRS develops and begins to implement a new IEP. Moreover, even if the services were not quite comparable to Student’s current IEP, it would not justify granting the sole remedy requested in this case of a new educational placement prior to giving DYRS sufficient time to revise Student’s IEP so it is appropriate for Student.

ORDER

Petitioner has failed to meet her burden of proof on the issues in this case. Accordingly, **it is hereby ordered** that any and all claims and requests for relief are **dismissed with prejudice**.

IT IS SO ORDERED.

Dated in Caption

/s/ *Keith Seat*
Keith L. Seat, Esq.
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).

Copies to:

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