

**DC Office of the State Superintendent of Education**

**Office of Compliance & Review**

State Enforcement & Investigation Division

STUDENT HEARING OFFICE

Van Ness Elementary School

1150 5<sup>th</sup> Street, S.E., 1<sup>st</sup> Floor, Washington, D.C. 20003

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**Virginia A. Dietrich, Esq.**

**Impartial Due Process Hearing Officer**

**CONFIDENTIAL**

**In Re the Matter of:**

**Parent on behalf of Student\***

**Petitioner,**

**vs.**

**The District of Columbia Public Schools**

**Respondent.**

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**CASE NO.**

**Complaint Date: 01/28/09**  
**Hearing Date: 02/20/09**

**Hearing Site:**  
**Van Ness Elementary School**  
**1150 5<sup>th</sup> Street, S.E., 1<sup>st</sup> Floor**  
**Washington, D.C. 20003**

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STUDENT HEARING OFFICE  
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**HEARING OFFICER DETERMINATION**

Petitioner's Counsel:

Domiento C.R. Hill, Esq.  
James E. Brown & Associates, PLLC  
1220 L Street, N.W., Suite 700  
Washington, D.C. 20005

Respondent's Counsel:

Harsharen Bhuller, Esq.  
Assistant Attorney General  
Office of the Attorney General as Counsel  
for D.C. Public Schools  
825 North Capitol Street, N.E., 9<sup>th</sup> Floor  
Washington, D.C. 20002

\*Personally identifiable information is attached as an Index to this document and must be removed prior to public distribution.

## Hearing Officer Determination & Order

### **JURISDICTION**

The Due Process Hearing was convened and this Hearing Officer Determination ("HOD") and Order written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

### **INTRODUCTION**

On 01/28/09, an *Administrative Due Process Complaint Notice* ("Complaint") was filed by the parent ("Parent") on behalf of the [REDACTED] year old student ("Student"), alleging that District of Columbia Public Schools ("DCPS") denied Student a Free Appropriate Public Education ("FAPE") in violation of IDEIA, when DCPS failed to identify Student as a child with a suspected disability and determine Student's eligibility for special education services.

Petitioner argues that Student is a child with a suspected disability under IDEIA because of Student's two year history of poor academic performance and behavioral displays in school that resulted in numerous student conduct infractions, multiple suspensions, an expulsion, failing grades, and repeating the same grade twice; all of which occurred while Student attended [REDACTED] School

Petitioner contends that these factors, individually and collectively, were obvious indications that Student might have a disability that interfered with learning. Petitioner alleges that DCPS failed in its statutory obligation to identify and determine Student eligible for special education services, thereby violating its statutory duty pursuant to Child find, 34 C.F.R. 300.111.

### **PRE-HEARING CONFERENCE**

On 02/11/09, a pre-hearing teleconference was convened by the Impartial Hearing Officer, Virginia A. Dietrich, Esq.. Attorney Domiento C.R. Hill represented Petitioner. Attorney Laura George represented DCPS.

At the time of the Pre-Hearing Conference, DCPS had not responded to the Complaint. DCPS' oral response to the Complaint which was offered during the Pre-Hearing Conference, along with the other topics discussed during the Pre-Hearing Conference, were memorialized in a Pre-Hearing Conference Order issued on 02/15/09. The Pre-Hearing Conference Order is incorporated into this record as it is pertinent to the issue discussed below in Preliminary Matters.

### **DUE PROCESS HEARING**

The due process hearing convened on 02/20/09 from 3:00 p.m. – 5:00 p.m. at the Van Ness Elementary School located at 1150 5<sup>th</sup> Street, S.E., 1<sup>st</sup> Floor, Washington, D.C. 20003.

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Petitioner was represented by Domiento C.R. Hill, Esq. ("Petitioner's Attorney.") DCPS was represented by Harsharen Bhuller, Esq. ("DCPS' Attorney.") The parties did engage in the resolution process prior to the due process hearing; however, a mutually agreeable settlement could not be reached.

### **Preliminary Matters**

As a preliminary matter, DCPS renewed its motion to dismiss the Complaint on the grounds of jurisdiction. DCPS' original request for this relief was embodied in the last sentence of *DCPS' Response to Parent's Administrative Due Process Complaint Notice* ("Response") filed on 02/12/09. Parties were advised that the motion to dismiss would be addressed in the HOD, and it is addressed here.

On 02/12/09, DCPS filed its Response to the Complaint. This pleading followed on the heels of the Pre-Hearing Conference that occurred on 02/11/09 where DCPS learned that Petitioner had participated in a resolution meeting to resolve the issues contained in the Complaint. Attached to the Response as exhibits were (1) an unexecuted Settlement Agreement prepared by DCPS and dated 02/09/09, offering to resolve the issue in the Complaint, (2) Resolution Meeting Notes prepared by DCPS and dated 02/09/09, that clearly indicated that matters were "Unresolved," and (3) handwritten notes dated 02/09/09 authored by advocate, Kevin Carter, that indicated that Parent was amenable to resolution of the matter once the matter of adequate attorney's fees was addressed. The Hearing Officer notes that the Settlement Agreement expressly states that "This agreement is in full satisfaction and settlement of all claims contained in the pending hearing Complaint, including all claims that the parent now asserts or could have asserted as of the date of this agreement."

The last sentence of DCPS' Response requested that the Hearing Officer dismiss the Complaint because all issues were resolved at the resolution meeting with the exception of attorney fees. The Response indicated that since the Parent was in agreement with all aspects of the settlement agreement except for attorney's fees, and since attorney's fees were not within the jurisdiction of the Hearing Officer and not the proper subject of a due process hearing, then all issues raised in the Complaint were moot and the case should be dismissed.

The Hearing Officer has jurisdiction over all matters relating to identification, evaluation and provision of a FAPE to a child with a disability. *34 C.F.R. 300.1.*

This Complaint comes before the Hearing Officer with one specific allegation regarding the provision of a FAPE, i.e., whether or not DCPS failed to identify and determine Student eligible for special education services? Although the Complaint requested attorney's fees as a form of relief, attorney's fees were not identified as an issue to be resolved through the production of evidence at a due process hearing.

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The Pre-Hearing Conference Order issued on 02/15/09, which memorializes the issues for litigation and the relief requested, makes no reference to attorney fees, either as an issue or as a form of relief. Furthermore, the Pre-Hearing Conference Order states, "The parties and their attorneys shall be held to the matters agreed upon or ordered. If either party believes that this Hearing Officer has overlooked or misstated anything in this Order, he/she is directed to advise this Hearing Officer of the same within three (3) business days of the date of this Order (with a copy to opposing counsel)." The Hearing Officer received no notification from either party that anything contained in the Pre-Hearing Conference Order was inaccurate or otherwise amiss.

DCPS' argument that the Hearing Officer was deciding attorney's fees at the due process hearing was difficult to understand. Attorney's fees are matters that are decided by courts, not by hearing officers. The SOP Section 1000 specifically states, "A court of competent jurisdiction, in its discretion, may award reasonable attorney's fees to the parent(s) of a child who is the prevailing party." 34 C.F.R. 300.517 also states that attorney's fees are within the province of a court of competent jurisdiction. DCPS argued that since all matters pertaining to the Complaint with the exception of attorney's fees were resolved at the resolution meeting, this Hearing Officer would be deciding the issue of attorney's fees, if a due process hearing were to go forward.

DCPS further argued that *Davis v. District of Columbia*, 470 F. Supp. 2d 1, 47 IDELR 263 (U.S. District Court, District of Columbia (2007)), held that an attorney could not pursue litigation unnecessarily simply to recoup attorney's fees and that *Davis* prohibits counsel from taking actions that are not in their client's best interests. DCPS' interpretation of *Davis* is not entirely accurate. *Davis* states, "attorneys may not act against the best interests of their clients in an attempt to win an award of attorneys' fees from the defendants to *which they might not otherwise be entitled.*" Thus, it would be a court that would make the decision of reasonable attorney's fees, not a hearing officer. *Davis* also stated that an independent hearing officer erred when the independent hearing officer determined that the parent was obliged to accept the settlement because it addressed all of her FAPE-related claims.

This Hearing Officer knows of no law that requires a party to accept a settlement offer. The reasons for acceptance or rejection of any settlement offer are confidential and not a matter for a hearing officer to ruminate over or decide. It is a separate and distinct issue from hearing a case on the merits of a complaint. If a case is not settled when it reaches this Hearing Officer, it proceeds to litigation on the issues contained in the Complaint.

The District of Columbia Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP") Section 1002.1 allows the Hearing Officer to dismiss a hearing when informed by the parties that the case has been settled (other than those that have been formally mediated), and may, if requested, incorporate the terms of an agreement into an Order with consent of both parties.

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In this case, the parties arrived at the due process hearing without an executed settlement agreement. Petitioner's Attorney represented on the record that the Complaint had not been resolved through settlement. DCPS' Attorney represented on the record that the case was resolved because DCPS was offering all of the relief requested in the Complaint. However, when asked by the Hearing Officer whether the case was settled, DCPS' Attorney said no. When DCPS' Attorney was asked whether or not she would like the opportunity to settle the case, DCPS' Attorney replied that she did not have settlement authority on behalf of her client.

Since attorney's fees was not an issue before the Hearing Officer, the case proceeded to a hearing on the merits of the allegations contained in the Complaint, i.e., the allegation of DCPS' dereliction of duty under Child find to identify and determine whether or not Student was eligible for special education services.

DCPS' motion to dismiss the Complaint because the Hearing Officer lacks jurisdiction is formally denied.

### **Disclosures**

Petitioner's Five-Day Disclosure letter dated 02/12/09, containing Exhibits #1-19, was admitted into evidence without objection. It was timely filed by the due date of 02/12/09.

DCPS did not file a disclosure statement. DCPS' Response, filed on 02/12/09, contained two (2) exhibits that DCPS sought to introduce as disclosures with the argument that they were timely disclosed to the other party and therefore the Petitioner was not prejudiced. The exhibits contained in DCPS' Response were identical to Petitioner's Exhibit #4, which was already admitted into evidence. Petitioner did not object to the admission of DCPS' exhibits, and the exhibits were admitted as evidence. DCPS' Exhibit #R-1 is an unexecuted Settlement Agreement and Resolution Meeting Notes, both prepared by DCPS. DCPS' Exhibit #R-2 consists of handwritten notes prepared by Kevin Carter, Advocate, and dated 02/09/09.

### **Issue Presented for Litigation**

Issue #1 – Whether DCPS failed to determine and identify Student as eligible for special education services, thereby denying Student a FAPE?

Petitioner alleges that the school had ample knowledge that Student was a student with a suspected disability based on grade retentions, academic performance, and behavioral concerns that impeded Student's learning in the classroom. Student experienced numerous suspensions, early dismissals from school and finally an expulsion in January 2009. Given Student's history of poor academic performance and behavioral displays in school, Petitioner alleges that DCPS should have conducted a clinical psychological evaluation to determine if Student suffered from an emotional disturbance because Student had been exhibiting (1) unusual behaviors during normal circumstances,

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- (2) problems building and maintaining satisfactory relationships with staff and peers, and  
 (3) the inability to thrive educationally which cannot be explained by sensory, health and/or intellectual factors.

**Relief Requested by Petitioner**

- (1) A finding of a denial of a FAPE on Issue #1;
- (2) DCPS to complete independent evaluations of Student, including psycho-educational, clinical psychological, speech and language, social history, psychiatric, and if necessary, neuropsychological, vocational, vision and hearing screenings, and occupational therapy; and
- (3) Within five (5) business days of the receipt of all of the independent evaluations, DCPS shall reconvene a MDT/IEP meeting to determine if Student is eligible for special education services, and if Student is determined eligible, DCPS shall create an appropriate IEP and discuss compensatory education.

**Witnesses Presented**

For Petitioner:  
 (1) Petitioner.

For DCPS:  
 None.

**FINDINGS OF FACT**

#1. Student has been attending \_\_\_\_\_ since September 2006, and is currently in the 9<sup>th</sup> grade. Student has been retained twice while attending  
*(Testimony of Petitioner.)*

#2. During the 2006-2007 school year, Petitioner received many calls from the school regarding Student's behaviors of not responding to redirects, not staying in designated areas, fighting with other students, and one incident of assaulting staff. During the 2006-2007 school year, Student was suspended multiple times for fighting and being disrespectful. *(Testimony of Petitioner.)*

#3. Student's final grades for the 2006-2007 school year consisted of "F's" in Student's core courses of English, math, history and science. *(Petitioner's Exhibit #12, transcript.)* Student was retained in the same grade at the end of June 2006-2007 school year. *(Testimony of Petitioner.)*

#4. During the 2006-2007 school year, Petitioner asked school staff for assistance, wanting to know what could be done differently to help Student be successful in school. Petitioner spoke with Student's teachers almost every day, but was never told

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that Student might be eligible for or might need special education services. (*Testimony of Petitioner.*)

#5. For the 2007-2008 school year, Student received final grades of "F" in Student's core courses of English, math, history, and science. (*Petitioner's Exhibit #12, transcript.*) Student's report card indicated that Student had been retained in the 8<sup>th</sup> grade; however, Student attended summer school, earned grades of "A" in reading and math, and was promoted to the 9<sup>th</sup> grade. (*Testimony of Petitioner.*)

#6. During the 2007-2008 school year, Student was the subject of multiple suspensions, including a 25 days suspension near the end of the 2007-2008 school year. During that same school year, Petitioner received calls from the school on the average of 3-5 times per week regarding Student's behavior which generally consisted of being disrespectful to teachers or peers, fighting with other students, not staying in designated areas, and not responding to redirection. (*Testimony of Petitioner.*)

#7. Student had 21 documented behavior infractions during the 2008-2009 school year that included the following: verbal altercations with other students, verbal disrespect towards staff, failure to follow staff directives, involvement in a power struggle with teacher, being put out of class, numerous incidents of unspecified non-compliance, talking and getting out of Student's seat in class, refusing to do class work, verbal altercations with staff, being restrained by a police officer for verbally and physically trying to attack another student, disorderly conduct in class, provoking a fight in the hallway, throwing a basketball at another student during gym class, excessive use of profanity, verbal threats, and physical contact with a staff, student or volunteer. (*Petitioner's Exhibit #9, 2008-2009 Log Entries dated 01/14/09.*)

#8. During the current 2008-2009 school year, Petitioner has been notified many times regarding Student's behavior problems and violations of student conduct codes. Student was suspended twice; once for 10 days for violent behavior, and once for a period of 2-3 days. In between suspensions, Student has been sent home from school early due to behavior. (*Testimony of Petitioner.*) On 01/13/09, held an Expulsion Conference where Student's multiple infractions of violent behavior that obstructed the school's educational process were discussed. On 01/21/09, expelled Student. (*Petitioner's Exhibit #15, correspondence from dated 01/21/09.*)

#9. Student's 1st Quarter Progress Report from for the 2008-2009 school year reflects an "F" in Algebra I, an "F" in Foundations in Public Policy, and an "F" in English I, and a "C+" in Environmental Science. Teachers' comments include, "refusing to do work in class, constant socializing in class that leads to poor academic performance, problems with attitude and behavior, talking back and talking over the teacher, distracting other students, completing very little homework, and behavior issues causing Student to be put out of class." Student was absent for 10 days during the 1st Quarter. (*Petitioner's Exhibit #11, Quarter 1 Progress Report from*

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#10. Student's 2<sup>nd</sup> Quarter Progress Report from \_\_\_\_\_ for the 2008-2009 school year reflects an "F" in Algebra I, an "F" in Foundations in Public Policy, an "F" in English I, and a "C+" in Environmental Science. Teachers' comments include, "Student needs to stop being disruptive in class, Student being not present in class, extremely off-task in class and disruptive, not completing warm-ups or class work, rarely turning in homework." Student was absent for 4 days during the 2<sup>nd</sup> Quarter. (*Petitioner's Exhibit #10, Quarter 2 Progress Report from*

#11. On 01/28/09, Petitioner, through Petitioner's Attorney, provided a written request and consent for \_\_\_\_\_ to evaluate Student for special education and related services. Petitioner specifically requested that DCPS complete a comprehensive psychological, a speech and language evaluation, a social history, a psycho-educational evaluation, a clinical psychological evaluation, a psychiatric evaluation, a neuropsychological evaluation and an occupational therapy evaluation. (*Petitioner's Exhibit #19, correspondence from James E. Brown & Associates, PLLC to dated 01/28/09.*)

#12. No school staff member spoke with Petitioner regarding evaluation or special education services during the 2007-2008 and the 2008-2009 school years. In January 2009, the school offered counseling services for Student, and it wasn't until 02/12/09 that the school offered to assess Student to determine eligibility for special education services. (*Testimony of Petitioner.*)

#13. Student's behavior problems in school do not manifest themselves at home. (*Testimony of Petitioner.*)

#14. A due process complaint alleging that DCPS had failed to identify and determine that Student was eligible for special education services was sent by facsimile to the District of Columbia Special Education Student Hearing Office on 01/27/09. (*Petitioner's Exhibit #2, Administrative Due Process Complaint Notice dated 01/27/09.*)

### **DISCUSSION AND CONCLUSIONS OF LAW**

"The burden of proof shall be the responsibility of the party seeking relief. Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. 3030.3.

#### **Issue #1 – Whether DCPS failed to determine and identify Student as eligible for special education services, thereby denying Student a FAPE?**

The purpose of IDEIA is "to assure that all children with disabilities have available to them a free appropriate public education ("FAPE") which emphasizes special education and related services designed to meet their unique needs. 34 C.F.R. 300.17, 34 C.F.R. 300.39(a).

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Inherent in the responsibility of providing a FAPE is the duty of States to find children who might be in need of special education services. Pursuant to 34 C.F.R. 300.111(a)(i), DCPS must ensure that all children with disabilities residing within the District of Columbia, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated. This also includes children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 C.F.R. 300.111(c)(1).

Petitioner cites 5 D.C.M.R. 3004.1(a), 3004.1(b)(4) in support of its argument that DCPS should have referred Student to the IEP Team for evaluation. "A child with a suspected disability who may need special education may be referred in writing to an IEP team by a staff member of a public agency who has direct knowledge of the child."

There were many indicators over an extended period of time that should have alerted school staff to suspect that Student might have a disability that interfered with learning. For the past two academic years, Student consistently failed Student's core academic courses, and Student was retained twice. (*Finding of Fact #1, #3, #5, #9, #10.*) That, in and of itself, should have been enough. Student's behavior in school was far from being exemplary (*Finding of Fact #2, #6, #7, #8*), and Student's continuous behavior infractions should have served as an additional alert to the school system that perhaps this child has a disability that requires special education services. Moreover, since Student's undesirable conduct only occurred at school (*Finding of Fact #13*), Petitioner was helpless to help the school understand the basis for Student's aggressive and maladjusted school behaviors.

Despite Student's consistently poor academic performance that spanned the 2006-2007 school year, the 2007-2008 school year, and the 2008-2009 school year, and despite Student's numerous and serious infractions of the student conduct code, not one single staff member from \_\_\_\_\_ advised Petitioner that Student might have a disability that affects academic performance or that the school system was responsible for determining whether Student's problems in school were related to a disability. (*Finding of Fact #4, #12.*) It wasn't until January 2009 that \_\_\_\_\_ offered counseling to Student (*Finding of Fact #12*), and this happened almost contemporaneously with Petitioner providing a written request and consent for DCPS to evaluate Student, and with the filing of a due process complaint. (*Finding of Fact #11, #14.*)

Petitioner alleges that at the very least, DCPS should have conducted a clinical psychological evaluation to determine if Student suffered from an emotional disturbance because of Student's acting out behaviors in school. Petitioner is right. It is the duty of the local education agency to identify and evaluate students with a suspected disability that affects academic performance. Student's chronic poor grades and grade retentions were very suggestive of a possible learning disability.

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In this case, the evidence was overwhelming that Student should have been evaluated to determine eligibility for special education services. DCPS failed to comply with the Child find provisions of IDEIA as far back as the 2006-2007 school year, when it failed to identify and evaluate Student to determine if Student had a disability that affected learning. At that time, Student's grade average was "F," and Student had incurred multiple suspensions for aggressive behaviors. It was abundantly clear that school intervention was warranted. No evidence of truancy was presented. Student attended school, but was just unable to adjust successfully, both academically and socially. It was the school's responsibility to find out why, using the tools of evaluation available at its disposal.

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)*.

It is obvious that on substantive grounds, Student was denied a FAPE. Student was entitled to be evaluated to determine eligibility for special education services. DCPS failed to live up to its responsibility to identify and evaluate Student.

Petitioner has met its burden of proof on Issue #1.

### CONCLUSION

Student's poor school performance, failing grades, and chronic student conduct code violations during the 2006-2007 school year, the 2007-2008 school, and the 2008-2009 school year were all strong indicators, individually and collectively, that Student might be a student with a disability that affects educational performance. Despite the depth and breadth of Student's academic and behavior problems over an extended period of time, Student was never referred to the IEP Team by any of the many school staff involved with Student. The academic failures and inappropriate social behaviors that Student exhibited were clear indicators that an initial evaluation to determine Student's eligibility for special education services was warranted. Student's substantive right under IDEIA to be evaluated for special education services was clearly violated. Petitioner prevailed on the merits of this Complaint.

### ORDER

#### **IT IS ORDERED, that**

(1) Within 10 business days of the date of this Order, DCPS shall authorize funding for the following independent evaluations: a comprehensive psychological assessment that includes cognitive, clinical and social history components; a speech and language assessment; a psychiatric assessment; a vocational assessment; vision and

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hearing screenings; and if warranted, based on the results of any of the independent assessments, DCPS shall conduct a neuropsychological assessment and an occupational therapy assessment; and

(2) Within 15 business days of the receipt of all of the independent evaluations, DCPS shall reconvene a MDT/IEP meeting to determine if Student is eligible for special education services, and if Student is determined eligible, DCPS shall develop an appropriate IEP, discuss and determine placement and if warranted, issue a Notice of Placement within 5 school days if to a public placement or 30 days if to a non-public placement, and discuss compensatory education.

**This is the FINAL ADMINISTRATIVE DECISION in this matter. Any party aggrieved by the findings and decision may APPEAL to a state court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. Section 1415(i)(2).**

03/02/09

Date

Issued: March 2, 2009

*Virginia A. Dietrich /s/*

Virginia A. Dietrich, Esq.  
Impartial Due Process Hearing Officer