STUDENT[1], by and through his Parent Petitioners, v. District of Columbia Public Schools ("DCPS") Respondent. Case	HEARING OFFICER'S DETERMINATION Date of Hearing: September 2, 2009 Date of Complaint: July 7, 2009 Representatives: Counsel for Petitioners: Zachary Nahass, Esq. 1220 L Street, NW Suite 700 Washington, DC 20005 Counsel for DCPS: Candace Sandifer, Esq. Tanya Chor, Esq. Office of General Counsel 825 North Capitol St. NE Washington, DC 20002 Hearing Officer: Coles B. Ruff, Esq.

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[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (I.D.E.A.), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004* (I.D.E.I.A.), District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapters 25 and 30 revised.

PROCEDURAL BACKGROUND:

A Due Process Hearing was convened September 2, 2009, at the Van Ness School, 1150 5th Street, SE, Washington, DC 20003. The hearing was held pursuant to a due process complaint submitted by the counsel for the parent and student filed on July 7, 2009, alleging the issues outlined below.

RELEVANT EVIDENCE CONSIDERED:

The Hearing Officer considered the representations made on the record by each counsel which may have resulted in stipulation of fact if noted, the testimony of the witness(es) and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-9 and DCPS Exhibits 1-5) which were admitted into the record.

ISSUE(S): [2]

Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate placement for the 2009-10 School Year?

FINDINGS OF FACT [3]:

1. The student is years old and resides with his parent(s) in the District of Columbia. (Parent's testimony)

2. The student has been determined to be eligible for specialized instruction as a child with a specific learning disability ("SLD"). (DCPS Exhibit 3)

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[2] The alleged violation(s) and/or issue(s) raised in the complaint may or may/not directly correspond to the issue(s) outlined here. However, the issue(s) listed here were reviewed during the hearing and clarified and agreed to by the parties as the issue(s) to be adjudicated. Any other issue(s) raised in the complaint was withdrawn. Petitioner's counsel acknowledged at the start of the hearing that the claim of failing to update the student's IEP was being withdrawn in light of the updated IEP disclosed by DCPS. The Hearing Officer also determined that because the complaint alleged the inappropriateness of the student's April 2008, IEP primarily because it had not been updated, the existence of the March 2009 IEP resulted in the claim being moot. Therefore, the only issue adjudicated was the issue on the alleged failure to provide an appropriate placement for SY 2009-10.

[3] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. When citing an Exhibit that is the same for both parties but submitted separately, the Hearing Officer will cite only one party's Exhibit.

3. The student attended School A, a DCPS elementary school, during the 2008-09 School Year ("SY"). The student was in the fifth grade during SY 2008-09. Having completed the fifth grade, the student graduated from School A and is to attend a different school for SY 2009-10. However, at the end of the SY 2008-09 the Parent was not informed as to what school the student would attend for SY 2009-10. As of the due process hearing DCPS had not convened a placement meeting and had not informed the Parent of the student's placement for SY 2009-10.[4] (Parent's testimony)

4. The student's April 28, 2008, Individualized Education Program ("IEP") prescribed the student receive 20 hours of specialized instruction in a special education setting. The IEP cited a February 21, 2008, assessment as the basis for the student's then present levels of academic performance. The present levels of performance cited were the following: Math Calculation - Grade Level: 2.9, Math Reading - Grade Level: 2.1, Reading Comprehension - Grade Level 1.7, Basic Reading Grade Level 1.0 and Written Expression Grade level 1.3. (Petitioner's Exhibit 5)

5. The April 28, 2008, IEP in the Least Restrictive Environment ("LRE") section stated the following: "[the student] requires a small structured environment to accommodate his disabilities." The Placement setting as described in the IEP was as follows: "Combination General Education and Resource Classroom." (Petitioner's Exhibit 5)

6. In February 2009 DCPS assessed the student with a Kaufman Test of Educational Achievement. The student received the following scores:

	Standard Score	Percentile Rank	Grade Equivalent
Reading Composite:			
Letter & Word Recognition	66	3	1.5
Reading Comprehension	68	2	1.7
Math Composite:		.2	
Math Concepts and Applications	54	.1	1.8
Math Computation	54	.1	1.7
Written Language Composite:			
Spelling	65	1	1.6
Oral Language Composite:			
Listening Comprehension	79	8	1.4
Sound Symbol Composite:			
Phonological Awareness	69	2	<1.0
Nonsense Word Decoding	69	2	1.3

[4] Although there was reference made to a settlement offer in which DCPS designated a placement location the settlement offer and the placement were not admitted into evidence by the Hearing Officer.

9. On March 18, 2009, DCPS convened a multidisciplinary team ("MDT") meeting to review and update the student's IEP. The parent attended the MDT meeting. The student's IEP was amended to provide for the 20 hours of specialized instruction in a general education setting. The IEP cited the following present levels of performance from the February 2009 Kaufman Assessment. The March 2009 IEP does not have a statement as to the student's Least Restrictive Environment ("LRE"). (DCPS Exhibit 2)

10. The student's third advisory report card for SY 2008-09 indicates that the student remained at the "Beginning" level of all items measured by the report card for each of three advisories up to that point. (Petitioner's Exhibit 6)

11. The student has been admitted to the [redacted] is a full time special education school with no general education students. [redacted] staff reviewed the student's most recent educational assessment and determined the student would benefit from the school's reading resource teachers and believes the student would benefit from its full time special education placement based on how significantly below grade level the student is operating academically. The classroom that [redacted] has been identified for the student has seven students, one special education teacher and a classroom aide. (Ms. [redacted] Testimony, Petitioner's Exhibit 7)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5 DCMR 3030.3 the burden of proof is the responsibility of the party seeking relief. [5] In this case the student/parent is seeking relief and has the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

Did DCPS deny the student a free and appropriate public education by failing to provide the student with an appropriate placement? Conclusion: Petitioner's counsel sustained the burden of proof by a preponderance of the evidence.

DCPS is required to "ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services." 34 C.F.R. §

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[5] Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and /or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

300.115(a). In general, an LEA is required to provide for each qualified child with a disability sufficient support and services to enable him to obtain educational benefits. Hendrick Hudson Dist. Bd. of Ed. V. Rowley, 458 U.S. 176, 203-4. And, each LEA must ensure that the parents of a child with a disability are members of any group that makes decisions on the educational placement of their child. 20 U.S.C. §1414(e).

34 CFR § 300.116 Placements provides:

> In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that-- (a) The placement decision-- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and (2) Is made in conformity with the LRE provisions of this subpart, including Sec. Sec. 300.114 through 300.118; (b) The child's placement-- (1) Is determined at least annually; (2) Is based on the child's IEP; and (3) Is as close as possible to the child's home; (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled; (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (Authority: 20 U.S.C. 1412(a)(5))

The evidence clearing demonstrates the student graduated from School A and DCPS has not convened a meeting with the parent to determine the student's placement for SY 2008-09. The failure to convene such a meeting and determine the student's placement with the parent's participation significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE. The fact that the student has been without a placement for the first two weeks since the start of SY 2009-10 has caused the student a deprivation of educational benefits. Although DCPS may identify a placement for the student a placement meeting was not held and DCPS presented no evidence of the appropriateness of any placement at the due process hearing.

Although the students' prior IEP had prescribed a combination setting the student's most recent IEP does not even have a statement as to the student LRE. Although the student's most recent IEP prescribes only 20 hours of specialized instruction and the student, based on his February 2009 educational assessment is operating five grade levels behind his current grade level. Ms. [redacted] testimony sufficiently demonstrates that the placement proposed by the parent can provide educational services that will benefit the student at least on an interim basis until DCPS has convened a meeting and provided the parent an opportunity to participate in making the placement determination for SY 2008-09. Consequently, this Hearing Officer has determined the student should be placed at the placement proposed by the parent on an interim basis until DCPS convenes a placement meeting.

ORDER:

1. DCPS shall immediately, as of the date of this Order, place and fund the student at the of Prince Georges County, Maryland, on an interim basis and provide transportation services.

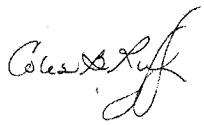
2. DCPS shall within fifteen (15) business days of the issuance of this Order, convene a multidisciplinary team (MDT)/placement meeting to review the student's existing evaluations and determine an appropriate placement for SY 2009-10.

3. The MDT meeting shall be scheduled through counsel for the student and parent.

4. DCPS will be given a day for a day extension of any of the prescribed time frames in this Order for any delay caused by the student, the parent(s) and/or their representative(s).

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer
Date: September 7, 2009