

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002



PETITIONERS,
on behalf of STUDENT,¹

Date Issued: [REDACTED]

Petitioners,

Hearing Officer: Peter B. Vaden



v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

ce, Room 2006

Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioners (the “Petitioners” or “PARENTS”), 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 (“DCMR”). In their Due Process Complaint, Petitioners allege that since May 31, 2012, Respondent District of Columbia Public Schools (“DCPS”) has denied the Student a FAPE by refusing to revise and update her Individualized Education Program (“IEP”).

¹ Personal identification information is provided in Appendix A.

Student, an AGE girl, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on March 5, 2013, named DCPS as respondent. The undersigned Hearing Officer was appointed on March 7, 2013. The parties met for a resolution session on March 18, 2013 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on April 5, 2013. On April 3, 2013, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. On April 23, 2013, the Petitioners filed a motion for summary decision which the Hearing Officer denied. On April 29, 2013, Petitioners filed a motion for partial reconsideration of the summary decision order, which was also denied.

The due process hearing was held before the undersigned Impartial Hearing Officer on May 2, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person, and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented LEA REPRESENTATIVE and DCPS COUNSEL.

Petitioners called as witnesses, S/L PATHOLOGIST, HEAD OF INTERMEDIATE DIVISION, and PARENT K. DCPS called, as its only witness, LEA Representative. Petitioners' Exhibits P-1, P-3, P-15 through P-20, P-23, P-25 through P-29 and P-31 through P-33 were admitted without objection. Exhibits P-4, P-5, P-12, P-14, P-22 and P-24 were admitted over DCPS' objections. DCPS' objection to Exhibit P-30 was sustained. DCPS' Exhibits R-1 through R-3, R-5 through R-7 and R-13 were admitted without objection. Exhibit R-4 was admitted over Petitioners' objection. Petitioners' objections to Exhibits R-8 through R-12 were sustained. Counsel for the respective parties made opening and closing statements. At the close of the Petitioners' case in chief, counsel for DCPS made an oral motion for a directed finding

against Petitioners, which I denied. There was no request to file post-hearing briefs.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

- WHETHER AT A MAY 31, 2012 IEP MEETING, AND SINCE THAT DATE, DCPS HAS DENIED THE STUDENT A FAPE BY REFUSING TO REVISE AND UPDATE HER IEP; AND
- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO ISSUE A PRIOR WRITTEN NOTICE, FOLLOWING A MAY 31, 2012 IEP MEETING, WHEN DCPS REFUSED TO REVISE AND UPDATE STUDENT’S IEP.

For relief, Petitioners seek an order for DCPS to fund Student’s ongoing enrollment at NON-PUBLIC SCHOOL for the 2012-2013 school year and to reimburse Petitioners for their enrollment expenses for Student at Non-Public School since the beginning of the 2012-2013 school year.

See Prehearing Order, April 4, 2013.²

PRIOR ADJUDICATION

On May 8-9, 2012, these parties appeared before Impartial Hearing Officer Melanie Byrd Chisholm for a due process hearing in Case No. 2012-0175. In that case, the Parents claimed that DCPS failed to provide the Student a FAPE, by failing to develop an appropriate IEP for the Student on October 13, 2011; by failing to provide an appropriate placement for the Student on her October 13, 2011 IEP; and by failing to convene an IEP Team meeting, as requested by the Parents, subsequent to the October 13, 2011 IEP meeting. *See* Exhibit R-1. In her May 14, 2012 Hearing Officer Determination (the May 14, 2012 HOD), Hearing Officer Chisholm found, *inter alia*, (i) that at the October 13, 2011 IEP team meeting, the IEP team developed an appropriate

² On April 11, 2013, after the due process complaint was filed in this case, DCPS convened an IEP meeting and proposed a revised IEP for Student. *See* Exhibit P-28. The Parents have not consented to implementation of the April 11, 2013 IEP. Whether this IEP was appropriate is not an issue in this case.

IEP for Student and determined an appropriate placement, in the least restrictive environment, based on the IEP developed; and (ii) that DCPS committed a procedural violation of the IDEA, which significantly impeded Parents' right to participate in the decision making process for their child, by failing to convene a parentally-requested IEP team meeting after January 24, 2012 to review Student's IEP. The Hearing Officer's conclusions of law included, *inter alia*:

- There was overwhelming evidence that student benefits from interaction with non-disabled peers. (May 14, 2012 HOD, p. 10);
- While the student was not performing on grade level in all areas, she was making progress at City Elementary School. (*Id.*, p. 11);
- At the October 13, 2011 IEP meeting, the student's IEP Team developed an appropriate IEP for the student and determined an appropriate placement, in the least restrictive environment for the student, based on the IEP developed. (*Id.*, p. 11);
- There was no evidence that supports the contention that the student required additional specialized instruction, additional accommodations and modifications or placement in a more restrictive environment. (*Id.*, p. 11);
- After the parents removed the student from public school in January 2012, DCPS inappropriately classified the student as a student parentally-placed in a private school as defined by 34 CFR §300.130 rather than a student unilaterally placed in a private school when FAPE is an issue pursuant to 34 CFR §300.148. The parents retained the right to request and have an IEP Team meeting held for their daughter. (*Id.*, p. 12);
- DCPS failed to reschedule an IEP team meeting requested by Parents after the student was removed from City Elementary School. This significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to their child. (*Id.*, pp. 12-13);
- The starting point for denial of FAPE to the student was February 3, 2012, the date that DCPS informed the parents, in writing, of its refusal to convene an IEP Team meeting for the student. The end point of the denial of FAPE was March 20, 2012, the date that the parent informed DCPS that any placement other than Non-Public School was "not an option" even if DCPS held an IEP team meeting. (*Id.*, p. 15);
- DCPS' failure to reschedule a January 26, 2012 IEP Team meeting constituted a denial of FAPE in that the procedural violation significantly impeded the parents'

opportunity to participate in the decision-making process regarding the provision of FAPE to their child, and caused harm to the child in that the IEP Team was not able to determine whether the services on the student's October 13, 2011 IEP continued to be appropriate. (*Id.*, p. 15);

- Student was harmed by DCPS' inappropriate classification of her as a student parentally-placed in a private school and entitled to equitable services rather than classification as a student unilaterally placed in a private school when FAPE is at issue entitled to FAPE. (*Id.*, p. 15); and
- The October 13, 2011 IEP was reasonably calculated to confer educational benefit and the student's placement pursuant to her October 13, 2011 IEP was appropriate. (*Id.*, p. 15.)

In the HOD, Hearing Officer Chisholm ordered DCPS to hold an IEP meeting to review Student's October 13, 2011 IEP and awarded Parents partial reimbursement for Student's tuition at Non-Public School as compensatory education. Hearing Officer Chisholm denied all other relief sought by the Parents. *Id.* In July 2012, Parents appealed the May 14, 2012 HOD to the U.S. District Court for the District of Columbia and requested that Hearing Officer Chisholm's order be vacated. Exhibit R-2.³

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact⁴ are as follows:

1. Student is an AGE resident of the District of Columbia, where she resides with Parents and her siblings. Testimony of Parent K.
2. On October 13, 2011, Student was last found eligible for special education and related services, under the primary disability classification Specific Learning Disability ("SLD").

³ Petitioners' Counsel advises that, as of date of the due process hearing in this case, the appeal was pending before the Court.

⁴ The Petitioners declined to stipulate to my adopting the findings of fact from the May 14, 2012 HOD. Accordingly, I make my findings of fact, based upon the evidence introduced at the May 2, 2013 Due Process Hearing and independent of any factual findings made in the prior HOD.

Exhibit R-5.

3. Prior to February 2012, Student attended CITY ELEMENTARY SCHOOL, a DCPS public school. Her October 13, 2011 DCPS IEP provided 3 hours per week of Specialized Instruction outside general education, 4.5 hours per week of Specialized Instruction in the general education setting and 60 minutes per week of Speech-Language Pathology, of which 30 minutes was to be provided outside general education. Exhibit P-3.

4. On January 23, 2012, counsel for Parents provided written notice to the City Elementary School principal that Student would be placed by her Parents at Non-Public School because of the alleged failure of DCPS to provide her with an appropriate education. Counsel gave notice of Parents' intention to seek public funding from DCPS for Student's placement at Non-Public School. Exhibit P-4. Parents decided to place Student at Non-Public School because they felt that Student was not making progress at City Elementary School, that she had been struggling, and that she had lost confidence and was on a downward spiral. Testimony of Parent K.

5. At the time counsel for Parents served the January 23, 2012 notice on the City Elementary School principal, an IEP meeting for student had been scheduled for January 26, 2012. Exhibit P-4. On January 24, 2012, the City Elementary School special education coordinator sent Parents an email postponing the IEP meeting due to a death in her family. In her email, the special education coordinator wrote that she would reschedule the IEP meeting. Exhibit P-5. She neither rescheduled the meeting nor provided any reason for not doing so. Testimony of Parent K.

6. On March 26-27, 2012, DCPS COMPLIANCE CASE MANAGER and Petitioners' Counsel corresponded by email regarding convening an IEP meeting for Student.

Compliance Case Manager initially agreed to hold the IEP meeting. Later the same day, he wrote Petitioners' Counsel that after speaking with DCPS counsel, he was informed that because Student was a DCPS Private and Religious Office ("PRO") student, she would need to be re-enrolled into DCPS in order for DCPS to convene a multidisciplinary team ("MDT") meeting. Exhibit P-14.

7. In March 2012, Student was evaluated at Non-Public School by S/L Pathologist to assess her linguistic strengths and weaknesses and to develop speech and language goals. S/L Pathologist reported that Student's linguistic profile is consistent with the diagnoses of Mixed Receptive-Expressive Language Disorder, a Reading Disorder, Unspecified and a Disorder of Written Expression. She reported that a Phonological Disorder was also warranted for the presence of verbal dyspraxia. Exhibit P-12, Testimony of S/L Pathologist.

8. On May 25, 2012, Non-Public School staff and Parent K developed an IEP at Non-Public School for Student. This private school IEP provided for full-time (33.5 hours per week) Specialized Instruction in the special education setting and 90 minutes per week of Speech/Language Services. Exhibit P-17.

9. On May 31, 2012, after the May 14, 2012 HOD was issued, DCPS convened an IEP meeting for Student at City Elementary School. Compliance Case Manager "ran" the meeting. Both Parents and their counsel attended in person. Non-Public School staff attended by telephone. Testimony of Parent K, Exhibit R-3. Compliance Case Manger stated at the meeting that it would not be possible to make modifications to Student's IEP at the meeting because DCPS did not have access to Student's records on the Special Education Data System ("SEDS") due to Student's not being currently enrolled in DCPS. He stated that DCPS would convene an MDT meeting to review/revise Student's IEP – should Student be re-enrolled – but

at that time was not able to do so. Parents stated at the meeting that they felt that the number of hours of Specialized Instruction in the October 13, 2011 IEP was not sufficient. Non-Public School staff shared their observations of Student's time at Non-Public School and stated that they felt that Student needed a full-time IEP and more Speech/Language services that was offered in the October 13, 2011 IEP. Parents' counsel stated that he did not feel that the IEP meeting fulfilled the requirements of the May 14, 2012 HOD because the IEP was not being updated. Exhibit R-3.

10. DCPS made it clear at the May 31, 2012 IEP meeting that Student would continue to be offered the October 13, 2011 IEP. Parent K understood that if Student returned to City Elementary School for the 2012-2013 school year, she could receive the special education and related services specified in the October 13, 2011 IEP. Testimony of Parent K.

11. At the May 31, 2012 IEP meeting, Parent K was concerned by the number of hours of services in the October 13, 2011 IEP and the way the hours were delivered. She did not see any way that these hours were sufficient. Testimony of Parent K.

12. Parents did not hear anything further from DCPS for the rest of the 2011-2012 school year. Testimony of Parent K.

13. Before the end of the 2011-2012 school year, Parents extended Student's enrollment at Non-Public School for the 2012-2013 school year and signed an enrollment contract. Testimony of Parent K.

14. On August 31, 2012, counsel for Parents provided written notification to Compliance Case Manager that the Parents served notice that they intended to maintain Student's placement at Non-Public School for the 2012-2013 school year "for reasons presented

at our recent IEP meetings” and that they would be seeking public funding for this placement. Exhibit P-20.

15. Parents were not invited by DCPS to another IEP review meeting until April 2013, when DCPS convened an IEP review meeting for Student at City Elementary School. This meeting was convened on April 11, 2013. Parents and Petitioners’ Counsel attended. Staff from Non-Public School participated by telephone. The DCPS IEP developed by the April 11, 2013 IEP Team provided for 3 hours per week of Specialized Instruction outside the general education setting, 4.5 hours per week of Specialized Instruction in the general education setting, 45 minutes per week of Speech-Language Pathology outside of general education and 45 minutes per week of Speech-Language Pathology in general education. Exhibit P-28. Parent K did not agree with the hours of services in the April 11, 2013 IEP. Testimony of Parent K. Parents rejected the option of the April 11, 2013 IEP and chose to keep Student at Non-Public School. Exhibit P-29. As of the hearing date in this case, Parents have not decided that they will re-enroll Student at City Elementary School. Testimony of Parent K.

16. Non-Public School is a special education day school for children with learning disabilities and attention-deficit disorders. Children at Non-Public School have no interaction with non-disabled peers. The school provides individualized instruction and small class size, with a focus on arts integration. At Non-Public School, all of Student’s teachers hold District of Columbia special education certifications. Non-Public School has a current Certificate of Approval issued by the D.C. Office of the State Superintendent of Education (“OSSE”). The school’s OSSE-approved tuition rate is approximately \$43,700 per year. Testimony of Intermediate Division Head.

17. Non-Public School is meeting Student's special education needs and learning needs. In the opinion of Intermediate Division Head, Student has absolutely made progress at Non-Public School. Student is more confident, more willing to take risks, and is able to work more independently. Student's reading fluency has improved dramatically. Her writing is showing improvement and she has grown a lot in math. Testimony of Intermediate Division Head. I found Intermediate Division Head to be a credible witness.

18. Student is making progress in the Speech-Language areas at Non-Public School in reading skills, in competence with vowel patterns, and in writing. Testimony of S/L Pathologist. I found S/L Pathologist to be a credible witness.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda 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 normally the responsibility of the party seeking relief – the Petitioners in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

ANALYSIS

1. HAS DCPS HAS DENIED STUDENT A FAPE BY REFUSING TO REVISE AND UPDATE HER IEP AT A MAY 31, 2012 IEP MEETING AND SINCE THAT DATE?

May 31, 2012 IEP Meeting

Petitioners assert that DCPS denied Student a FAPE because at the May 31, 2012 IEP meeting, and after that date until April 2013, DCPS refused to revise and update Student's October 13, 2011 IEP. In its response to the due process complaint ("DCPS Response), DCPS maintained that it had made FAPE available to Student before Parents placed her at Non-Public School, but that it is not obligated to develop an IEP or placement for Student until such time as she re-enrolls in and attends a DCPS School. DCPS Response, p. 3. At the due process hearing, DCPS "refined" its argument and now contends that the May 14, 2012 HOD, in which Hearing Officer Chisholm found that the October 13, 2011 IEP was an appropriate IEP for Student, must be treated as an agreement between the Local Education Agency ("LEA") and the parents. DCPS argues that the October 13, 2011 IEP was always available to Student and it did not deny Student a FAPE by not revising the IEP before April 2013.

In the May 14, 2012 HOD, while finding that the October 13, 2011 IEP was appropriate, Hearing Officer Chisholm found that DCPS denied Student a FAPE by not convening an IEP team meeting after the student was removed from City Elementary School, as had been requested by Parents. She ordered DCPS to hold an IEP team meeting to review Student's IEP. DCPS convened the IEP meeting on May 31, 2012. However, at that meeting, the DCPS representative stated it was not possible to make modifications to the IEP because DCPS did not have access to Student's records in SEDS. He told the Parents that Student would have to be re-enrolled in a DCPS school for DCPS to be able to review and revise the IEP. Petitioners argue that the DCPS' inability or unwillingness to review Student's IEP, as was ordered by Hearing Officer Chisholm, was a new denial of FAPE.

I conclude that both the Parents and DCPS misapprehend the effect of Hearing Officer

Chisholm's decision. The Parents err in arguing that at the May 31, 2012 IEP meeting, DCPS violated the IDEA, by not complying with Hearing Officer Chisholm's order to review Student's IEP. Under the IDEA, decisions made in a due process hearing, that are on appeal by the parents, are not final.⁵ *See* 20 U.S.C. § 1415(i)(1)(A) (Decision made in a due process hearing shall be final, except that any party involved in such hearing may appeal such decision.) On July 9, 2012, Parents appealed the May 14, 2012 HOD to the U.S. District Court for the District of Columbia, pursuant to 20 U.S.C. § 1415(i), requesting that Hearing Officer Chisholm's order be vacated. *See Exhibit R-3*. The Parents' appeal is still pending before the federal court. Consequently Hearing Officer Chisholm's May 14, 2012 decision is not final and is not enforceable. *Cf. Sammons v. Polk County School Bd.*, 2008 WL 2557564, 3 (M.D.Fla.2008) (Since Defendant appealed the ALJ's order, the ALJ's order is not final, and therefore, it is not an enforceable judgment on the merits.) Assuming, without deciding, that DCPS did not comply with Hearing Officer Chisholm's May 14, 2012 order to review Student's IEP, its failure to comply with a non-final decision would not constitute a denial of FAPE.

DCPS is mistaken in its assertion that the May 14, 2012 HOD should be deemed an implied agreement between the LEA and the Parents as to placement. Under the IDEA, if the decision of a hearing officer in a due process hearing agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of the IDEA's stay-put provision. *See* 34 CFR § 300.518(d); *District of Columbia v. Vinyard* 2012 WL 5378122, 6 (D.D.C.2012). However, Hearing Officer Chisholm's decision did not agree with Parents that a change of Student's

⁵ Neither does the IDEA empower due process hearing officers to enforce Hearing Officer Determinations. *See Robinson v. Pinderhughes*, 810 F.2d 1270, 1273-1274 (4th Cir.1987) (The federal statute does not contain any provision for enforcing final administrative orders.)

placement was appropriate. This IDEA regulation does not apply. *Cf. L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 903–04 (9th Cir.2009) (finding that there was no implied agreement as to “current educational placement” for stay-put purposes because the district court, in reviewing the administrative decision, ruled in favor of the parents on procedural grounds and never adjudicated the appropriateness of the private school placement).

Failure to Conduct Annual IEP Review

Section 614(d)(4)(A)(i) of the IDEA requires the IEP Team to review a child’s IEP annually to determine whether the annual goals for the child are being achieved. *See* 34 CFR § 300.324(b). Student’s IEP Team did not review her October 13, 2011 IEP in October 2012. DCPS argues that it was not required to conduct an annual review of Student’s IEP, because students who have been placed by their parents in a private school, and whose parents have indicated their desire for the student to remain in the private school, have no right to a revised IEP. DCPS is correct that when FAPE is not at issue, children placed by their parents in a private school are entitled to a “services plan” from the LEA – not an IEP. *See* 34 CFR § 300.148(a). However, a school district is required to continue developing IEPs for a disabled child no longer attending its schools, when a prior year’s IEP for the child is under administrative or judicial review. *MM ex rel. DM v. School Dist. of Greenville County*, 303 F.3d 523,537 (4th Cir.2002) citing *Amann v. Stow Sch. Sys.*, 982 F.2d 644, 651 n. 4 (1st Cir.1992); *Town of Burlington v. Department of Education*, 736 F.2d 773, 794 (1st Cir.1984), *aff’d sub nom.Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985); *Bowers v. McKenzie*, 1988 WL 63067, 2 (D.D.C.) (D.D.C.1988) (following *Burlington, supra*). The Parents’ appeal of the May 14, 2012 HOD put the October 13, 2011 IEP under judicial review by the U.S. District Court and no final judgment has been rendered. Therefore, pending

the federal court's decision, FAPE remains at issue. DCPS' failure to conduct an annual review of Student's IEP in October 2012 was a procedural violation of the IDEA.

A procedural violation does not, standing alone, establish a failure to provide a FAPE. *See Lesesne v. Dist. of Columbia*, 447 F.3d 828, 834 (D.C.Cir.2006). "An IDEA claim is only viable if those procedural violations affected the student's substantive rights." *Id.* (emphasis omitted). In the absence of a showing that the child's education was substantively affected, no relief may be awarded. *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 47 (D.D.C.2008). In *O.O.*, U.S. District Judge Bates found that the hearing officer's delay in issuing a hearing officer determination violated the procedures mandated by the IDEA. But, because the child had already been withdrawn from DCPS and enrolled at a private school before the parents requested the due process hearing, Judge Bates concluded that the procedural violation did not affect the child's substantive rights. "O.O. was not harmed by the delay because he was receiving a beneficial education throughout the process. Hence, DCPS's procedural violations must be disregarded as harmless." *Id.* at 49 (citations and internal quotations omitted.)

Similarly in this case, months before the IEP annual review was due, Student had been withdrawn from DCPS and enrolled at Non-Public School. Parent K testified that Parents decided in spring 2012 to maintain Student at Non-Public School for the 2012-2013 school year. On August 21, 2012, their attorney confirmed this decision by written notice to DCPS.⁶

⁶ In the May 14, 2012 HOD, Hearing Officer Chisholm found, with respect to DCPS' failure to convene an IEP meeting, the starting point for denial of FAPE was February 3, 2012, the date that DCPS informed the parents, in writing, of its refusal to convene an IEP Team meeting for the student. The end point of the denial of FAPE was March 20, 2012, the date that the parent informed DCPS that any placement other than Non-Public School was "not an option" even if DCPS held an IEP team meeting. (May 14, 2012 HOD, p. 15). Because the Parents appealed the May 14, 2012 HOD, the decision has no preclusive effect. *See, e.g., Hoey v. District of Columbia*, 540 F.Supp.2d 218, 231 n. 8 (D.D.C.2008) (Where D.C. Office of Employee Appeals decision did not become final owing to agency's appeal, no basis to attach a

Therefore, DCPS' failure to conduct an annual review of Student's IEP in October 2012 did not affect Student's substantive rights. Like the child in *O.O.*, Student was not harmed by the omission because she was receiving a beneficial education at Non-Public School, before and after the October 11, 2011 IEP should have been reviewed. I find that Student was not denied a FAPE by DCPS' failure to conduct an annual review of her City Elementary School IEP in this instance, because the omission did not deprive Student of an educational benefit under the IDEA. *See O.O.* at 50.

2. DID DCPS DENY STUDENT A FAPE BY FAILING TO ISSUE A PRIOR WRITTEN NOTICE FOLLOWING THE MAY 31, 2012 IEP MEETING?

At the May 31, 2012 IEP meeting for Student, DCPS' representative, Compliance Case Manager, informed Parents that DCPS did not have access to Student's records in SEDS, the computerized student records system, because Student was not enrolled in DCPS, and that DCPS was not able to make modifications to Student's October 11, 2011 IEP, as requested by Parents. After the meeting, Parents did not hear anything more from DCPS. I conclude, therefore, that DCPS did not provide Parents a Prior Written Notice after the May 31, 2012 IEP meeting. The Petitioners contend this failure to provide the prior written notice violated the IDEA.

The IDEA requires that the LEA must give prior written notice before the LEA refuses to, *inter alia*, initiate or change the identification, evaluation, or educational placement of child with a disability or the provision of FAPE to the child. *See* 34 CFR § 300.503(a). At the May 31, 2012 IEP meeting, DCPS refused to change the educational placement and provision of FAPE to Student but, neither before nor after the meeting, gave Parents written notice of its refusal. I find that DCPS' failure to give the required prior written notice was a procedural violation of the IDEA. *See Honig v. Doe*, 484 U.S. 305, 312, 108 S.Ct. 592, 598 (1988)

res judicata preclusive effect to a non-final agency decision in an on-going adjudication.)

(Safeguards include prior written notice whenever the responsible educational agency refuses to change the child's placement or program.) However, 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, supra*, 447 F.3d at 834. 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, Parents have been represented at all times by able counsel, who accompanied them to the May 31, 2012 IEP meeting, communicated on their behalf with DCPS and, seasonably, filed the present due process complaint. DCPS' failure to provide prior written notice after the May 31, 2012 IEP meeting did not impair Parents' ability to participate in the process or result in harm to the Student. I find that, on these facts, DCPS' omission of prior written notice is not actionable.

CONCLUSION

In this case, Petitioners seek reimbursement of their enrollment expenses for Student at Non-Public School to remediate DCPS' failure to revise Student's IEP after the May 14, 2012 HOD was issued and DCPS' omission of prior written notice when it refused Parents' request to revise the IEP. I have found that DCPS violated the IDEA by failing to give prior written notice, after declining to make modifications to Student's IEP at the May 31, 2012 IEP meeting, and by failing to conduct an annual review of Student's IEP in October 2012. However these omissions by DCPS were procedural violations of the IDEA which did not effect Student's ability to receive a FAPE. Without a demonstration of substantive harm, procedural violations alone are insufficient to order tuition reimbursement. *O.O., supra* at 50. The Parents' request for relief must be denied.

ORDER

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

All relief requested by the Parents herein is denied.

Date: May 8, 2013

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).