

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* (“IDEA”), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 [Chapter E30](#). The Due Process Hearing was convened for one day on October 25, 2013, at the Office of the State Superintendent (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is a child with a disability pursuant to IDEA with a disability primary disability classification of intellectual disability (“ID”). In May 2013 the student and his parent relocated to the District of Columbia, from Prince George's County, Maryland (“Prince George’s”). While residing in Prince George’s the student was enrolled with the county school system. Prince Georges had placed and funded the student at a special education day school (“School A”) located in the District of Columbia.

According to the student's most recent individualized educational program ("IEP") he is to receive 28.45 hours per week of specialized instruction; 3 hours per month of occupational therapy services from an occupational therapist; and 2 hours a month of speech and language services; a behavior intervention program; constant monitoring, transportation services and a dedicated aide to prevent him from eloping from the premises, hitting, or kicking other students and staff.

The student’s parent engaged the services of an educational advocate to assist him in navigating the student’s enrollment in DCPS after their relocation to the District of Columbia. On August 30, 2013, based upon the information provided to him, the student’s parent went to the student’s local DCPS high school (“School B”) to provide the school the student’s IEP from School A and to request a meeting so that DCPS could determine an appropriate school placement for the student.

On September 4, 2013, the student’s parent sent an email to the special education coordinator (“SEC”) at School B requesting transportation for the student to attend school and describing the nature and extent of the student’s disabilities and needs. The student’s parent, through counsel, also filed this due process complaint asserting that DCPS had failed to implement the student’s IEP.

On September 13, 2013, a resolution meeting (“RSM”) was convened at which the School B’s SEC participated and stated that if the parent enrolled the student at School B he would arrange for transportation from his home for the student to attend school. The student began attending School B on

October 11, 2013, with DCPS bus transportation.

Petitioner initially sought an order directing DCPS to place and fund the student at a school that can implement the student's IEP and conduct a thirty day review meeting to review the student's programming and placement and to determine compensatory education.

DCPS filed a response to the complaint on September 16, 2013. DCPS denied any alleged denial of a free and appropriate public education ("FAPE") and specifically asserted there was a meeting scheduled for October 15, 2013, to discuss the student's placement and services. DCPS filed an amended response to the complaint on October 8, 2013, stating that the student had never attended School B and that DCPS was willing and ready to convene the meeting on October 15, 2013.

As stated, the resolution meeting was held September 13, 2013. The meeting was unsuccessful in resolving the issues. The parties expressed the desire to proceed directly to hearing. Thus, the 45-day period began on September 14, 2013, and ended (and the Hearing Officer Determination "HOD" was originally due) October 28, 2013.

A pre-hearing conference ("PHC") was convened on October 7, 2013. The Hearing Officer issued a pre-hearing conference order on October 17, 2013, outlining the issues to be adjudicated.

The parties appeared for hearing on October 25, 2013. At the conclusion of the hearing Petitioner's counsel requested leave to file a written closing statement and submitted a motion to extend the HOD due date for five calendar days. Respondent agreed to the extension and the motion was granted. The HOD due date was extended to November 2, 2013.

ISSUE: ²

The issues adjudicated is:

Whether DCPS denied the student a FAPE by failing to implement the student's IEP from the start of SY 2013-2014 until October 11, 2013, when he began attending School B.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1 through 15 and DCPS Exhibit 1) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

² The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order do not directly correspond to the issues outlined here. The Hearing Officer restated the issue(s) at the outset of the hearing and the parties agreed that these were the issue(s) to be adjudicated.

FINDINGS OF FACT:³

1. The student is a child with a disability pursuant to IDEA with a disability primary disability classification of ID. (Petitioner's Exhibit 10-1)
2. In May 2013 the student and his parent relocated to the District of Columbia, from Prince George's. While residing there the student was enrolled with the county school system and it had placed him in School A with county funding. The student attended School A for nine years until July 2013. (Parent's testimony)
3. According to the student's most recent IEP he is to receive 28.45 hours per week of specialized instruction; 3 hours per month of occupational therapy services, 2 hours per month of speech and language services; a behavior intervention program; constant monitoring, transportation services and a dedicated aide to prevent him from eloping from the premises, hitting, or kicking other students and staff. (Petitioner's Exhibit 10)
4. On July 16, 2013, the parent went to School B to inquire about DCPS providing the student special education services due to his relocation to the District of Columbia. Because the student had attended School A and requires extensive services the parent did not believe School B was an appropriate school for the student to attend. The parent was informed the student would need to attend School B for at least thirty days to allow sufficient time to review the student's educational needs and the school's ability to meet his needs. (Parent's testimony)
5. On July 26, 2013, the parent returned to School B with the documentation he thought was necessary to enroll the student at School B. (Parent's testimony)
6. The student's parent engaged the services of an educational advocate to assist him in navigating the student's enrollment in DCPS. On August 30, 2013, based upon the information provided to him, the student's parent went to School B to provide the school the student's IEP from School A and to request a meeting so that DCPS could determine an appropriate school placement for the student. (Parent's testimony, Petitioner's Exhibit 8-1)
7. On September 4, 2013, the student's parent sent an email to the special education coordinator ("SEC") at School B requesting transportation for the student to attend school and describing the nature and extent of the student's disabilities and needs. (Parent's testimony, Petitioner's

³ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

Exhibit 8-1)

8. On September 4, 2013, Petitioner also filed this due process complaint asserting that DCPS had failed to implement the student's IEP. (Petitioner's Exhibit 2)
9. On September 13, 2013, a RSM was convened at which the School B's SEC participated and stated that if the parent enrolled the student at School B [and not before] he would arrange for transportation from his home for the student to attend school. (Petitioner's Exhibit 5)⁴
10. After the RSM the parent did not go to School B and provide the school any other documentation in order to register or enroll the student in School B. (Parent's testimony)
11. On September 23, 2013, School B's SEC sent an email to the parent's attorney stating that DCPS transportation had been to the student's home to pick up the student but the student had not been put on the bus. (Petitioner's Exhibit 8-2)
12. At the start of SY 2013-2014 the student and parent resided at an initial location in the District of Columbia. At on near October 1, 2013, the parent and the student relocated to a second address within the District of Columbia. The parent notified DCPS on September 27, 2013, that he and the student would be relocating on October 1, 2013. The School B SEC responded to the notification on October 4, 2013, and transportation services for the student from the new address began on October 11, 2013. The SEC told the parent that it would take 3 to 5 days for transportation services to start from the new address. The student's first day attending School B was October 11, 2013. (Parent's testimony, Petitioner's Exhibit 8-11)
13. During the time the student was not attending school from the start of SY 2013-2014 until October 11, 2013, the student's abilities regressed due to a lack special education services. (Parent's testimony)
14. School B is ready and willing to convene an IEP meeting to review the student's program and

⁴The parent testified that prior to October 11, 2013, he never got a bus schedule or ever saw a bus come to take the student to School B and the parent denied ever refusing to put the student on a school bus. Between September 23, 2013, and October 11, 2013, however, due to the parent and student's relocation to a new address it is unclear from the evidence that there was any refusal by DCPS to provide the student transportation and/or other services.

progress since attending School B and to review the student's assignment to School B. (Witness 2's testimony)

15. DCPS has sent the parent's educational advocate a letter of invitation to attend an IEP meeting for the student on November 11, 2013. (Witness 1's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §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 IDEA §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. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's *substantive* rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. ⁵ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). The normal standard is preponderance of the evidence. See, e.g. *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) se also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE: Whether DCPS denied the student a FAPE by failing to implement the student's IEP from the start of SY 2013-2014 until October 11, 2013, when he began attending School B.

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that the student was not provided special education services from August 30, 2013, through September 23, 2013, and was thus denied a FAPE.

⁵ The burden of proof shall be the responsibility of the party seeking relief. 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.

34 C.F.R. §300.323(c) provides: Each public agency must ensure that--

(1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and

(2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP.

“To prevail on a claim under IDEA, a party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the ...authorities failed to implement substantial or significant portions of the IEP.” *Houston Indep. School District v. Bobby R.* 200 F3d 341 (5th Circ. 2000).

The evidence demonstrates that the parent came to School B before the start of SY 2012-2013 and shortly after the start and provided the school the student’s IEP from School A and requested that the student be provided special education services. The parent was told that he needed to enroll the student at School B before services would be provided. However, after the complaint was filed and the resolution meeting was held the parent took no additional action to register the student but DCPS at that point arranged for transportation services.⁶ Despite what was asserted at the RSM DCPS required no additional action by the parent for DCPS to begin providing the student services.⁷ Finally, on October 11, 2013, the student began attending School B.

Although the DCPS witness testified that the student was not enrolled until mid to late September 2013 the Hearing Officer did not find that testimony credible as the witness could not state the date that the student was registered and evidence is that the parent had brought School B required documentation for DCPS to provide the student services.⁸ Without any further action by the parent thereafter other than filing a due process complaint DCPS initiated transportation services for the student to attend School B sometime after the September 13, 2013, RSM and the September 23, 2013, email sent by the SEC.

The Hearing Officer concludes based on this evidence⁹ that the student began to regress and was significantly harmed educationally because of the missed services from DCPS’ refusal to provide transportation and other services from August 30, 2013, when the parent came to School B and brought the IEP to formally request services and September 23, 2013, when there was evidence

⁶ Finding of Fact (“FOF”) #s 9, 10

⁷ FOF #9

⁸ FOF #s 4, 5, 6.

⁹ FOF #s 3, 12

that DCPS had attempted to send transportation for the student to attend school.¹⁰ The Hearing Officer thus concludes the student was denied a FAPE.

IDEA authorized District Courts and Hearing Officers to fashion “appropriate” relief, e.g., 20 U.S.C. § 1415(i)(2)(C)(iii), and such authority entails “broad discretion” and implicates “equitable considerations.” *Florence County Sch. Dist. For v. Carter*, 5

Petitioner initially sought a educational placement for the student but was able to provide a proposed placement at the time of hearing and requested as relief and a meeting be convened to review and determine the student’s educational placement and the location where the student’s IEP will be implemented.

ORDER:¹¹

DCPS shall within ten (10) business days of the issuance of this Order, (if it has not already done so by the time this Order is issued) convene a multi-disciplinary team (“MDT”) meeting to review and update the student’s IEP, review the student’s current placement and the appropriateness of his current school location to implement his IEP and make a formal determination of the student’s placement and location of services for SY 2013-2014.

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. §1415(i)(2).

/S/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: November 2, 2013

¹⁰ FOF #9 Although the DCPS witness stated that the parent had refused to put the student on the bus, the Hearing Officer did not find this testimony convincing because it was not based on the witness’ personal knowledge, rather, on second hand information.

¹¹ Any delay in Respondent in meeting the timelines of this Order that are the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.