

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

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

OSSE  
Student Hearing Office  
December 31, 2013

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[Parent], on behalf of [Student]<sup>1</sup>

Date Issued: December 30, 2013

Petitioner,

Hearing Officer: Jim Mortenson

v

[Local Education Agency],

Respondent.

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**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed by the Petitioner on November 15, 2013. The Petitioner and Respondent are both represented by counsel. A response to the complaint was filed by the Respondent on November 25, 2013. A prehearing conference was convened on December 2, 2013, and a prehearing order was issued on that date.

The Respondent filed a motion for the Undersigned to recuse himself on December 3, 2013. The Petitioner filed a reply to the motion on December 4, 2013. The motion was denied in an Order dated December 5, 2013.

The Petitioner filed a trial brief on December 10, 2013. Both parties exchanged disclosures for hearing and filed them with the Undersigned on December 11, 2013. The Respondent filed its trial brief on that date as well. A resolution meeting was held on December 13, 2013, and resulted in no agreements.

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<sup>1</sup> All proper names have been removed in accordance with Student Hearing Office policy and are referenced in Appendix C which is to be removed prior to public dissemination.

The hearing was convened at 9:00 a.m. on Wednesday, December 18, 2013, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The hearing ended about 12:00 p.m. The due date for this Hearing Officer's Determination (HOD) is January 29, 2014. This HOD is issued on December 30, 2013.

## **II. JURISDICTION**

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

## **III. ISSUES, RELIEF SOUGHT, and DETERMINATION**

The issues to be determined by the Independent Hearing Officer (IHO) are:

- 1) Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to provide special education and related services in conformity with his individualized education program (IEP) during the 2013-2014 school year because he has not been provided all of the required: specialized instruction outside of the general education setting; occupational therapy (OT); and counseling services?
- 2) Whether the Respondent failed to ensure the Petitioner had a meaningful opportunity to participate in the determination about the Student's educational placement for the 2013-14 school year?

The Petitioner is seeking prospective placement at High Road School and compensatory education consisting of 75 hours of tutoring, one hour of counseling per week for six months, and 20 hours of OT services.

The Petitioner has not shown that the Respondent failed to provide special education and related services in conformity with the Student's IEP. The Petitioner has not shown that that the

Respondent failed to ensure the Petitioner had a meaningful opportunity to participate in the determination about the Student's educational placement for the 2013-2014 school year.

#### **IV. EVIDENCE**

Four witnesses testified at the hearing, three for the Petitioner and one for the Respondent. The Petitioner's witnesses were: Petitioner (P); a representative of School B (M.R.); and Educational Advocate (M.L.). The Respondent's witness was the Special Education Coordinator for the Attending School (T.S.).

P's testimony was not entirely credible as it was contradicted by T.S. and documentation, and it lacked specificity or was based on unsupported hearsay.<sup>2</sup> The other witnesses testified credibly.

All of the Petitioner's 18 disclosures were entered into evidence. All of the Respondent's four disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A and the Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

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<sup>2</sup> While hearsay is generally admissible in an administrative hearing, it is not automatically given credible weight.

## V. FINDINGS OF FACT

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

1. Student is a 12 year old learner with disabilities.<sup>3</sup> The Student was determined by the IEP team in May 2013 to meet the definition of "multiple disabilities" under IDEA, likely due to meeting the definitions for both "emotional disturbance" and "other health impairment."<sup>4</sup> He has superior intelligence and suffers from: Attention Deficit Hyperactivity Disorder, Combined type; Depressive Disorder; and a Learning Disorder.<sup>5</sup>
2. The Student's disabilities impact his ability to progress academically without specialized instruction and related services including OT and behavioral support services.<sup>6</sup> Specifically: he requires directions to be explained in very simple and concrete terms; he is easily frustrated and overwhelmed when he misunderstands or does not grasp information quickly or smoothly; he does better with visual examples which aid verbal explanations; he requires a small class size and lots of emotional support; his emotional and organizational difficulties impact the rate at which he is able to progress; his inability to control his emotions and frustrations at times prevent him from learning new skills quickly and sustaining the skills; he demonstrates distractibility and processing issues; he is behind grade level in reading, math, and writing; he has difficulty with appropriate spacing of words and sentences when writing; at times he has problems accepting adult directives and demonstrated oppositionality; he can become reactive and disruptive when frustrated or upset, including shutting down; he struggles to make his own choices with peers; he has low self-esteem and

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<sup>3</sup> P 1, Testimony (T) of P.

<sup>4</sup> P 1, P 12.

<sup>5</sup> P 10, P 12.

<sup>6</sup> P 1.

tends to follow others into problem situations; he is impulsive and uninhibited if frustrated or upset; he can be positive and appropriate with adult help; and he is gratified by success.<sup>7</sup>

3. During the 2012-2013 school year the Student attended School A, a non-public special education school.<sup>8</sup>
4. The IEP team at School A met, with a representative from the Respondent, and revised the Student's IEP on May 21, 2013.<sup>9</sup> The team determined the Student required the following services: specialized instruction outside of the general education setting for 25 hours per week; behavioral support services outside of the general education setting for 90 minutes per week; and OT outside of the general education setting for 60 minutes per week.<sup>10</sup> The IEP team discussed, with the LEA representative, moving the Student to a less restrictive setting, but this change was not made.<sup>11</sup>
5. During the last part of the 2012-2013 school year at School A the Student experienced more instances of complaining, whining, and pouting in response to attending to behavior choices.<sup>12</sup> He was sometimes allowing his avoidance behaviors to overwhelm his potential.<sup>13</sup> Progress with fostering increased leadership skills and making choices independent of peer influence continued to be a challenge for him.<sup>14</sup> He had some behavior referrals, one in-school suspension, and increased need for counselor supported problem solving.<sup>15</sup> He had made academic progress in reading, writing and math.<sup>16</sup>

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<sup>7</sup> P 1.

<sup>8</sup> P 1, P 10, P 11, P 12, Testimony (T) of P.

<sup>9</sup> T of P, P 1, P 2.

<sup>10</sup> P 1.

<sup>11</sup> T of P.

<sup>12</sup> P 10.

<sup>13</sup> P 10.

<sup>14</sup> P 10.

<sup>15</sup> P 10.

<sup>16</sup> P 11.

6. In letters dated June 27, 2013, the Respondent advised the Petitioner that the Student's location of service would be changed from School A to the Attending School.<sup>17</sup> The Petitioner was provided an opportunity to discuss this change.<sup>18</sup> She did discuss the change with staff at the Attending School and decided to enroll the Student there during the summer of 2013.<sup>19</sup> There is no evidence the Petitioner requested and was denied an IEP team meeting to discuss the change from School A of the Attending School.
7. The Student missed only one day of school prior to the week disclosures for this case were due, during the 2013-2014 school year.<sup>20</sup> The Student was not provided special education and related services during the first week of school and was placed in a general education classroom because the Respondent failed to ensure his placement was correct prior to the start of the school year.<sup>21</sup> After the first week of school he was placed in a self-contained special education classroom for all academics.<sup>22</sup>
8. The Student was provided OT services, at least after the first week of school.<sup>23</sup>
9. There were 15 weeks of school prior to the week disclosures for the hearing were exchanged, and the Student was provided 270 minutes of individual behavioral support services, and the rest of the remaining 1,080 minutes of behavioral support services were provided in group sessions, except for the first week of school when the Student was not provided behavioral support services.<sup>24</sup>

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<sup>17</sup> P 3, P 4.

<sup>18</sup> P 3, P 4.

<sup>19</sup> T of P.

<sup>20</sup> R 1, R 2.

<sup>21</sup> T of T.S.

<sup>22</sup> T of T.S.

<sup>23</sup> T of P, T of T.S. (The Petitioner testified that the Student advised her he was not provided OT services during the 2013-2013 school year and this was not corroborated. Given the lack of credibility of P, she has not persuaded the Undersigned that OT services were not provided.)

<sup>24</sup> T of T.S., P 1, R 3. (The Undersigned has taken administrative notice of the Respondent's 2013-2014 school calendar.)

10. There is no evidence the Student has had any behavioral problems at school during the 2013-2014 school year.
11. The Student is earning all passing grades as of December 11, 2013.<sup>25</sup>
12. The reference to an “inclusion reading class” in R 1 is an error.<sup>26</sup>

## **VI. CONCLUSIONS OF LAW**

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

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. “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.” D.C. Mun. Regs. 5-E3030.14. The recognized standard is a preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. The IDEA “is violated when a school district deviates *materially* from a student’s IEP.” Wilson v. D.C., 770 F.Supp. 2d 270, 275 (D.D.C. 2011), *citing: Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (“[A] *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.”); *accord S.S. ex rel. Shank v. Howard Road Acad.*, 585 F.

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<sup>25</sup> R 2.

<sup>26</sup> T of T.S., R 1.

Supp. 2d 56, 68 (D.D.C. 2008); Catalan ex rel. E.C. v. District of Columbia, 478 F. Supp. 2d 73, 75 (D.D.C. 2007), *aff'd sub nom. E.C. v. District of Columbia*, No. 07-7070 (D.C. Cir. Sept. 11, 2007). “[T]he materiality standard *does not require that the child suffer demonstrable educational harm* in order to prevail” on a failure-to-implement claim. Wilson, at 275 (emphasis in original), *citing*: Van Duyn, 502 F.3d at 822 (emphasis added); *cf.* MM ex rel. DM v. Sch. Dist. of Greenville Cnty., 303 F.3d 523, 537 n.17 (4th Cir. 2002) (rejecting the argument that parents must show actual developmental regression before their child is entitled to ESY services under the IDEA). “Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld.” *Id.*, *See, e.g.*, Van Duyn, 502 F.3d at 822; S.S., 585 F. Supp. 2d at 65–68; Mary McLeod Bethune Day Acad. Pub. Charter Sch. v. Bland, 534 F. Supp. 2d 109, 115–16 (D.D.C. 2008); Catalan, 478 F. Supp. 2d at 76.

3. The Petitioner has not shown that the Respondent failed to materially implement the Student’s IEP during the 2013-2014 school year. The IEP was not implemented only the first week of school. This error resulted in a minor discrepancy with the required provision of services in the IEP and was not a material error. It did not result in a negative impact on the Student. The Student has had neither significant behavioral problems nor academic failure. The Petitioner’s position regarding the alleged failure of the Respondent to provide special education and related services required by the IEP is based primarily on admissible hearsay evidence. She testified that the Student told her that he was not being provided OT and had to move “upstairs” for one of his classes. She also testified that a neighbor, whose child does not purportedly have an IEP, advised her that the Student was in one of her child’s classes.

She did not know when this conversation took place, a remarkable lapse given it was the impetus for her complaint as opposed to any claim of poor functional performance or poor academic achievement experienced by the Student. Petitioner's testimony was also contradicted by T.S. who credibly testified that but for the first week of school the Student received all of his academics in a self-contained classroom setting. T.S. also credibly testified that a single reference to an inclusion class in a report by a Respondent staff person was in error. That staff person was not called to rebuff T.S.'s testimony. The Petitioner failed to persuade the Undersigned that the Respondent is not implementing the IEP.

4. A placement decision is made, in the District of Columbia, by the IEP team. See D.C. Mun. Regs. 5-E3001.1. According to the Office of Special Education Programs (OSEP):

[P]lacement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience.

71 Fed. Reg. 46588 (August 14, 2006). OSEP analyzed the question of "whether a public school board has the unilateral discretion under the [IDEA] to choose the educational placement of a child with a disability as an administrative matter to the exclusion of any input from that child's parents." Letter to Veazey, 37 IDELR 10 (OSEP Nov. 26, 2001). The answer is no, but the matter is more complicated because of the vagaries of what is a "placement." "Placement" has historically been the "points along the continuum of placement options available for a child with a disability, and 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services." 71 Fed. Reg. 46588-89 (August 14, 2006). The selection of a particular location for services (the physical surrounding, such as the classroom) may not be a change in placement if a public agency has "two or more equally appropriate locations

that meet the child’s special education and related services needs. . . .” Id. 71 Fed. Reg. 46588-89 (August 14, 2006). “[T]here is not a change in ‘educational placement’ under the IDEA where a student is placed in a new program where all the basic elements are fundamentally the same as the prior placement[.]” and “a change of location alone does not constitute a change in ‘educational placement’ under the IDEA.” *D.K. v. District of Columbia*, Civ. 13-110, p. 10 (D.D.C. 2013). In cases where the failure “to identify the school at which special education services are expected to be provided will prevent parents from effectively evaluating a proposed placement” the IEP must identify the particular school in which a student will be placed. *A.K. ex rel. J.K. v. Alexandria City School Bd.*, 484 F.3d 672, 680-81 (7<sup>th</sup> Cir. 2007).

5. In the present case the IEP team discussed a change in placement at the May 2013 IEP team meeting and the team determined a less restrictive setting was not yet appropriate for the Student. Nevertheless, the Student’s location was changed from School A, a non-public special education school, to the Attending School, a public school with a segregated special education program in which the Student was placed. The Petitioner was informed about this change and was given the opportunity to discuss it. She was advised by the Respondent that the Student’s IEP could be implemented at the Attending School and subsequently enrolled the Student there. Given the Student’s improved functional performance and academic achievement at the Attending School, even if there had been a procedural error by the Respondent, there is no showing of educational harm. The Petitioner was not denied the opportunity to discuss the change of schools and did so. She did not see the need to request another IEP team meeting and enrolled the Student at the Attending School. There was not a

change in the Student's educational placement and, had there been, she was not denied a meaningful opportunity to participate in that determination.

#### **VII. DECISION**

The Respondent did not fail to provide the Student with special education and related services in conformity with his IEP during the 2013-2014 school year and, therefore, did not deny the Student a FAPE.

The Respondent did not fail to ensure the Petitioner had the opportunity to participate in the determination about the Student's educational placement for the 2013-2014 school year.

#### **VIII. ORDER**

The complaint is hereby dismissed with prejudice.

**IT IS SO ORDERED.**

Date: December 30, 2013



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Independent 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 USC §1415(i).