

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
July 22, 2015

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: July 22, 2015
Petitioner,)	
)	Hearing Officer: John Straus
v.)	
)	Case No: 2015-0167
District of Columbia Public Schools (“DCPS”))	
)	Hearing Date: June 19, 2015
Respondent.)	Room 2003
)	

HEARING OFFICER DETERMINATION

Background

The Petitioner, the Student’s mother, filed a due process complaint notice on May 8, 2015, alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”). The Petitioner alleged that DCPS failed to develop an appropriate Individualized Education Program (“IEP”) for the Student and failed to provide an appropriate location of services since the IEP team determined the Student required a full time program on May 7, 2015. The Petitioner requested DCPS to fund the Student’s placement at Nonpublic School and the Hearing Officer to order DCPS to provide compensatory services to redress the lack of special education and related services as a result of DCPS’ failure to place the Student in an appropriate placement by reimbursing the Student’s placement at Nonpublic School and transportation costs.

DCPS asserts both the October 17, 2014 and May 7, 2015 IEPs were reasonably calculated to provide educational benefit at the time of its development. DCPS denied that the Student’s IEP team agreed that Student required a full-time program and alleges the IEP team agreed to make a referral to the DCPS Least Restrictive Environment (“LRE”) team to observe the student and make educational programming recommendations. DCPS asserts that Education Campus or High School can implement the IEP.

¹ Personal identification information is provided in Appendix A.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and 38 D.C. Code 2561.02.

Procedural History

Neither Petitioner nor Respondent waived the resolution meeting. The resolution meeting took place on May 19, 2015. At the resolution meeting, the parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on June 7, 2015. The 45-day timeline to issue a final decision began on June 8, 2015 and the final decision is due by July 22, 2015.

The due process hearing took place on June 19, 2015 in Room 2003 at the Office of Dispute Resolution. The due process hearing was a closed hearing. The Petitioner was represented by Donovan Anderson, Esq. and DCPS was represented by Steven Rubenstein, Esq. Neither party objected to the testimony of witnesses by telephone. The Petitioner participated in person.

The Petitioner presented four witnesses: a DCPS Social Worker, who was compelled by the Petitioner; a Neuropsychologist, who was certified as an expert in developmental neuropsychology and autism spectrum disorders; the Nonpublic School Representative; and the Petitioner. DCPS presented two witnesses: Special Education Teacher (“SET”) and Local Education Agency Representative (“LEA Representative”), who was certified as an expert in special education programming and placement.

The Petitioner’s Disclosure Statement, filed and served on June 12, 2015, consisted of a witness list of four witnesses and documents P-01 through P-19. The Petitioner’s documents were admitted into evidence without objection. The Respondent’s Disclosure Statement, filed and served on June 12, 2015, consisted of a witness list of eight witnesses and documents R-1 through R-14. The Respondent’s documents were also admitted into evidence without objection.

The issues to be determined in this Hearing Officer Determination are as follows:

1. Whether DCPS denied the Student a FAPE by failing to develop an IEP on May 7, 2015 that is reasonably calculated to provide educational benefit; specifically, the IEP does not provide sufficient amount of specialized instruction and related services.
2. Whether DCPS denied the Student a FAPE by failing to provide an appropriate location of services since the IEP team determined the Student required a full time program on May 7, 2015.

For relief, the Petitioner requested the Hearing Officer order DCPS to fund the Student’s placement at Nonpublic School with transportation for the 2015-2016 school year and, as

compensatory services, DCPS to fund the Student's placement at Nonpublic School during the 2014-2105 school year.

Findings of Fact²

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

1. On May 23, 2014, the IEP team determined the Student requires 15 hours of specialized instruction per week in the general education setting, one hour of speech-language pathology per week outside the general education setting and one hour of behavior support services per week outside the general education setting. (Exhibit R-1)
2. On September 19, 2014, the Student's teachers were interviewed for a Functional Behavioral Assessment ("FBA"). The teachers noted the Student is constantly pulling out his cell phone, is impulsive, does not listen, and is constantly distracted. He completes little to no work. The teachers further noted the Student can be redirected with one-to-one attention; however, given the class size, it is impossible to provide what he needs in order to maintain what is expected in each class. (Exhibit R-2)
3. The Student was attending a Charter School during the 2013-2104 school year and was expelled. He enrolled in Education Campus at the end of the 2013-2104 school year. (LEA Representative's testimony)
4. On October 14, 2014, the IEP team convened. The Petitioner stated she wanted the Student to attend a nonpublic school. The LEA Representative stated that the process for a student going into a more restrictive setting is that there needs to be a referral made to the LRE team in order to have them come out and conduct an observation and report. The IEP team determined the Student required 13 hours of specialized instruction outside the general education setting, 5 hours of specialized instruction in the general education setting, 4 hours per month of behavioral support services per month in the general education setting and 2 hours per month of speech and language services per month in the general education setting. (Exhibits P-1, R-3, and R-4 and SET's testimony)
5. On November 10 and December 15, 2014, the Student received a neuropsychological assessment from the Neuropsychologist. The assessment yielded below average cognitive scores and globally limited functional living skills. The Neuropsychologist recommended the Student be placed in a full time school with specialized programming geared for students with social learning and limited cognitive and academic skills. The Neuropsychologist further recommended the Student receive small group learning and academics that are tied to real life skills, homework geared to a second to fourth grade level, and a hands-on curriculum and real world life and job skill training. (Exhibit P-3 and Neuropsychologist's testimony)

² Parentheticals in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. The Hearing Officer has declined to base a finding of fact on a witness's testimony based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

6. On January 15, 2015, a DCPS social worker completed another FBA which included four formal observations. The assessment states the Student walks the halls, leaves the classroom, talks in class, refuses to do work, displays excessive movement, and fails to follow adult directions on a daily basis and the Student has been suspended for cutting class, walking the hallways and fighting. The evaluator hypothesized the Student is more likely to engage in the academic environment and maintain on task behavior when he is feeling calm, emotionally safe and academically stimulated and understands the academic tasks. The FBA states the function of the Student's behaviors serve as a manifestation of ADHD, a need to avoid intense and unpleasant feelings, a desire for attention, sensory seeking, and to gain access to a preferred activity. (Exhibit P-17)
7. On January 29, 2015, the IEP team convened to conduct a manifestation determination review as a result of an incident at school. The team noted the Student's disability keeps him from accessing the general education curriculum and the Student can benefit from a full time program for students with specific learning disabilities. The LEA Representative stated she can make a referral to the LRE team. (Exhibit R-5 and Neuropsychologist's testimony)
8. On February 2, 2015, the DCPS Social Worker stated the Student needs constant adult supervision to secure his safety and recommended the Student be transferred to a school that can meet his needs, be safe, and access an education program that can be tailored to his intellectual needs. The DCPS Social Worker requested the DCPS Central Office approve a safety transfer for the Student to a safe school. (Exhibit P-9)
9. On February 6, 2015, the LRE team received a referral to conduct an observation of the Student. (Exhibit P-11)
10. On February 17, 2015, the Neuropsychologist recommended the Student be placed in a therapeutic special education, self-contained school for students with learning and developmental disorders. (Exhibit P-8 and Neuropsychologist's testimony)
11. The Student was placed by the DC Superior Court at the Youth Services Center ("YSC") on February 6, 2015 and he was released on February 19, 2015. (Exhibit P-7)
12. On March 9, 2015, the Neuropsychologist told the LEA Representative that she recommend that the Student be placed at Nonpublic School and asked DCPS to place the Student at Nonpublic School. (Exhibit P-7 and Neuropsychologist's testimony)
13. On March 10, 2015, the Student was accepted at Nonpublic School for the 2014-2015 school year. The Student enrolled the same day. (Exhibit P-13 and Nonpublic School Representative's Testimony) Nonpublic School provides full time special education services to students with learning disabilities, autism, emotional disturbances, and traumatic brain injuries under the IDEA in grades Pre-Kindergarten to 12th grade. The school is located in Washington, D.C. and is approved by the Office of the State Superintendent. There is an average of 8 to 10 students per class. Related services such

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as speech and language services and behavior support services are provided in the classrooms. The Student attends Nonpublic School on a regular basis and is enrolled in classes to obtain a DC High School diploma. He is making academic and behavioral progress since he enrolled. (Nonpublic School Representative's Testimony)

14. On April 22, 23 and 29, 2015, a member of the LRE team conducted observations of the Student at Nonpublic School. The observer stated the Student was unilaterally placed by the Petitioner at Nonpublic School and noted that the IEP team feels the Student could benefit from a full time self-contained SLD program and made several recommendations regarding his education program in a report, dated May 11, 2015. (Exhibit P-12 and LEA Representative's testimony) The observer observed the Student texting in school but that behavior had greatly improved since the observation. (Nonpublic School Representative and LEA Representative's testimony) DCPS attempted to convene an IEP team meeting prior to the Due Process Hearing. (Exhibits R-12 and LEA Representative's testimony)
15. On May 7, 2015, the IEP team convened at High School. The team did not change the Student's IEP because the LRE report was not completed. The Petitioner disagreed with the hours of specialized instruction and requested that the Student be placed at Nonpublic School. (Exhibits P-2, R-8, and R-9 and SET's and LEA Representative's testimony)

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:

"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. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005).

DCPS denied the Student a FAPE by failing to develop an IEP on May 7, 2015 that is reasonably calculated to provide educational benefit; specifically, the IEP does not provide sufficient amount of specialized instruction and related services.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003). In *Board of Education v. Rowley* the United States Supreme Court set forth a two-part inquiry for determining whether a school district has satisfied the FAPE requirement. First, the state must have "complied with the procedures set forth in the Act." *Rowley*, 458 U.S. at 206. Second, the IEP that is developed must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. Pursuant to *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009), the Hearing Officer must "focus on the adequacy of the IEP at the time it was created, and ask if it was reasonably calculated at that time

to enable the student to receive educational benefits.” *Schaefer v. Weast*, 554 F.3d 470 (U.S. App. 2009).

The evidence in this case clearly indicates that the student requires more hours of specialized instruction and related services than what his IEP calls for. The October 14, 2014 IEP team did increase the Student’s hours of service because, given the general education class size, it was impossible to provide what the Student needed in order to maintain what is expected in each class. Despite the increase in hours, the Student left the classroom without permission, talked in class, refuses to do work, and failed to follow adult directions on a daily basis. The Student was suspended for cutting class, walking the hallways and fighting. The May 7, 2015 IEP team had that information but refused to change the Student’s hours of services because they wanted to wait for the LRE report. The LRE report provided no additional information regarding the Student’s current IEP program because the Student has been unilaterally placed in special class for the entire school day. The Student demonstrates success when provided a full time special education program. Based upon the evidence the Hearing Officer concludes that at the May 7, 2015, the IEP team failed to develop an appropriate IEP. Consequently, the Hearing Officer will direct in the order below that the Student’s IEP is amended to provide a full time special education program.

DCPS denied the Student a FAPE by failing to provide an appropriate location of services since the IEP team determined the Student required a full time program on May 7, 2015.

A change in location is not always a change in placement. A placement is a point along the child's continuum of placement options,³ while a location is the physical location where the child receives related services, such as a classroom. However, a change in location may rise to a change in placement if the change in location substantially alters the student's educational program. 71 Fed. Reg. 46,588 (2006). *See Letter to Fisher*, 21 IDELR 992 (OSEP 1994). Changing the Student’s location of services from Education Campus to Nonpublic School substantially alters the Student’s educational program and is a change in placement. What is pertinent in making the placement decision will vary, at least to some extent, based upon the child's unique and individual needs. *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994).

The Neuropsychologist, who provided direct services to the Student, stated the Student requires a full time school with specialized programming geared for students with social learning and limited cognitive and academic skills. She recommended the Student be placed in a therapeutic special education, self-contained school for students with learning and developmental disorders. The DCPS Social Worker, who provided counseling services to the Student, stated the Student needs constant adult supervision to secure his safety and recommended the Student be transferred to a school that can meet his needs, be safe, and access an education program that can be tailored to his intellectual needs. The January 29, 2015 IEP team noted the Student’s disability

³ Pursuant to 34 C.F.R. § 300.115(a), DCPS “must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.” The continuum, in general, ranges from the least restrictive to the most restrictive: instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115(b)(1) and *H.H. v. Indiana Bd. of Special Educ. Appeals*, 50 IDELR 131 (N.D. Ind. 2008).

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keeps him from accessing the general education curriculum and the Student can benefit from a full time program for students with specific learning disabilities.

The IEP team also agreed the Student was not safe at Education Campus. Therefore, after the Student was released from YSC, rather than return the Student to Education Campus, the Petitioner unilaterally placed the Student at Nonpublic School. The Student attends Nonpublic School on a regular basis and is enrolled in classes to obtain a DC High School diploma. There is an average of 8 to 10 students per class and related services are provided in the classrooms. He is making progress since he enrolled at Nonpublic School.

The Petitioner requested the Student attend a special school on October 14, 2014. DCPS informed the Petitioner that it would first need to have the LRE team conduct an observation before changing the Student's placement or location of services. DCPS did not make a referral to the LRE team until February 6, 2015. The LRE team conducted 3 observations and developed a report on May 11, 2015; 7 months after the Petitioner's request. DCPS argues that the IEP team should review the LRE team's report before determining the Student's education placement and location of service. Given the fact that the Student was observed on four occasions prior to the LRE team referral and the DCPS social worker and the Neuropsychologist, who are familiar with the Student, made recommendations regarding the Student's placement; it seems that the IEP team does not require information from the LRE team to make a placement determination. Based upon the evidence the Hearing Officer concludes that at the May 7, 2015, the IEP team failed to provide an appropriate location of services. Consequently, the Hearing Officer will direct in the order below that the Student attend Nonpublic School.

Relief

The Petitioner requests the Hearing Officer to order DCPS to place the Student at Nonpublic School for the 2015-2016 school year. In addition, the Petitioner requests the Hearing Officer requests DCPS to fund the Student's placement at Nonpublic School from the date the Student was placed there until the end of the 2014-2015 school year as compensatory services. Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program." *Reid v. District of Columbia*, 401 F.3d 522 & 524. The Hearing Officer finds the IEP team failed to provide the Student with an appropriate location of services. However, through self-help, the Petitioner was able to obtain a FAPE for the Student by unilaterally placing the Student at Nonpublic School. Therefore, Hearing Officer denies the Petitioner's request for compensatory services.

Pursuant to 34 C.F.R. § 300.148(c), if the parents of a student with a disability, who previously received special education and related services under the authority of a public agency, enroll the student in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. The cost of reimbursement may be reduced or denied if at the most recent IEP Team meeting that the parents attended prior to removal of the child

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from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency, including stating their concerns and their intent to enroll their child in a private school at public expense or at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the parent's intent to enroll their child in private school at public expense. 34 C.F.R. § 300.148(d) The Neuropsychologist notified DCPS that the Student was to be enrolled in Nonpublic School one day before the Student enrolled at Nonpublic School. However, a one day notice from the Neuropsychologist does not comport with the requirements of 34 C.F.R. § 300.148(d).

Pursuant to 34 C.F.R. § 300.148(e)(2)(ii), the cost of reimbursement may, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if the Student would be seriously emotionally harmed by remaining in the program. The Hearing Officer finds that the Petitioner was reasonable in enrolling the Student at Nonpublic School because it Education Campus was not safe for the Student. Therefore, the Petitioner is entitled to tuition reimbursement.

ORDER

- (1) DCPS shall place the Student at Nonpublic School and provide transportation to Nonpublic School for the 2015-2016 school year;
- (2) Within 20 school days of issuance of this order, DCPS shall convene an IEP team meeting at Nonpublic School to review and revise the Student's IEP to provide full time services;
- (3) DCPS shall issue a prior written notice to the Petitioner, placing the Student at Nonpublic School at the end of the meeting;
- (4) At the same IEP team meeting, the Petitioner shall provide an invoice and copies of checks paid to Nonpublic School and DCPS shall reimburse the Petitioner for her out-of-pocket tuition expenses, if any, from May 7, 2015 to the end of the 2014-2015 school year;
- (5) If the Petitioner did not pay tuition, DCPS is not responsible for any reimbursement;
- (6) For every day of delay by the Petitioner, DCPS shall have a day to convene the IEP team meeting described above;
- (7) The IEP team meeting described above shall be scheduled through counsel for the Petitioner; and
- (8) No further relief is granted.

IT IS SO ORDERED.

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).

Date: July 21, 2015

/s/ John Straus
Hearing Officer

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Copies to:

Petitioner (U.S. mail)

Petitioner's Attorney: Donovan Anderson, Esq. (electronically)

DCPS' Attorney: Steven Rubenstein, Esq. (electronically)

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