

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

Petitioners,

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

OSSE
Student Hearing Office
November 12, 2013

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**¹

Student presently attends a nonpublic special education school located in the District of Columbia. On August 26, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public Schools. On September 9, 2013, DCPS filed its Response to the Complaint.

The parties concluded the Resolution Meeting process by participating in a resolution session on September 26, 2013. No agreement was reached, but the parties agreed not to prematurely end the resolution period. Therefore, the 45-day period for this case began on September 26, 2013 and will end on November 9, 2013.

On October 21, 2013, the hearing officer conducted a prehearing conference and determined, in a October 24, 2013 Prehearing Order, that the claims to be adjudicated, defenses asserted, and relief requested were as follows: ***Petitioner's Claims:*** (i) Alleged failure to provide an appropriate placement/location of services for SY 13/14; (ii) Alleged denial of FAPE due to predetermination of the educational placement/location of services for SY 2013/14 pursuant to DCPS's internal agenda (and the subsequent alteration of the IEP to comport with the program at the assigned DCPS location of services); and (iii) Alleged failure to afford Parents a meaningful opportunity to participate in the IEP process. ***DCPS Defenses:*** (i) Student is a parentally-placed private student and Child Find is not at issue, so the matter must be dismissed; (ii) On June 13, 2013, DCPS proposed an IEP for Student that made FAPE available and Parents rejected it; (iii) Location of services is an administrative decision within the LEA's discretion in which that parents do not have a right to be involved; (iv) DCPS was not required to provide an IEP to Student but did so anyway, and when Parent rejected it there was no obligation to provide additional proposals; and (v) Because a previous HOD awarded reimbursement for SY 11/12 and SY 12/13, the prior hearing officer did not change Student's placement but merely provided reimbursement. ***Relief Requested:*** (i) DCPS to be ordered to maintain Student at his current private school for SY 13/14 with all services recommended by the IEP team on 5/14/13 (and if

¹ This section sets forth only the basic procedural history. Other events, including motions practice, may have taken place that are not listed here.

appropriate, DCPS to reimburse parents for any educational expenses related to maintaining Student at the private school).

By their respective letters dated October 23, 2013, Petitioner disclosed twelve documents (Petitioner's Exhibits 1-12) and DCPS disclosed nineteen documents (Respondent's Exhibits 1-19).

The hearing officer convened the due process hearing on October 30, 2013, as scheduled.² All documents disclosed by both parties were admitted into the record without objection. Thereafter, the hearing officer received opening statements and Petitioner's testimonial evidence before adjourning for the day.

The hearing officer reconvened the due process hearing on November 1, 2013 to allow DCPS an opportunity to present its case. After the conclusion of DCPS's testimonial evidence, the hearing officer agreed to hold the record open until 11:59 pm on Monday, November 4th to allow the parties time to file written closing statements.³ The hearing officer then brought the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

1. Did DCPS fail to provide an appropriate placement/location of services for SY 2013/14?
2. Did DCPS deny Student a FAPE by predetermining Student's educational placement/location of services pursuant to DCPS's internal agenda (and subsequently altering the IEP to comport with the program at the assigned DCPS location of services)?
3. Did DCPS fail to afford Parents a meaningful opportunity to participate in the IEP process?

FINDINGS OF FACT⁴

1. Student _____ currently attends a nonpublic full-time special education day school located in the District of Columbia.
2. Student was determined eligible for special education and related services
His initial disability classification was developmental delay. However, in the fall of 2011, Student's disability classification was changed to Autism.⁵

² Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

³ The written closing statements were timely filed by both parties.

⁴ To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁵ Petitioner's Exhibit 3 at 6.

3. Student also has a significant sensory processing disorder, with the result that he requires a fair amount of movement, he requires support to stay regulated, and he suffers from auditory hypersensitivity, which means that he is fearful of unexpected noises, unexpected noises cause him to become dysregulated, and it is hard for him to filter out and ignore environmental sounds.⁶
4. Student began attending the current nonpublic school in November 2011 as a unilateral parental placement after Parents challenged DCPS's proposed IEP and educational placement for Student. The nonpublic school serves Students from pre-K through grade 12 with a variety of disabilities, including learning disabilities, attentional issues, autism spectrum disorder, and traumatic brain injury.⁷
5. Prior to his attendance at the current nonpublic school, Student attended a DCPS school, where he exhibited significant behavior problems that included physical aggression towards his peers and adults, problems staying focused and on task, and toileting accidents. Student attended pre-kindergarten at the DCPS school for SY 2010/11, and he attended kindergarten at the DCPS school for a portion of SY 2011/12.⁸
6. On October 11, 2012, an independent hearing officer determined that DCPS denied Student a FAPE during SY 2011/12 by failing to propose an appropriate IEP for Student, because the IEP proposed by DCPS failed to provide for full-time specialized instruction outside of the general education setting and did not include a behavior intervention plan ("BIP") and/or a dedicated aide to assist in addressing Student's behavioral needs. The hearing officer further determined that the current nonpublic school provided Student with appropriate programming to successfully meet Student's needs. Accordingly, the hearing officer awarded Petitioners reimbursement for the portion of SY 2011/12 Student attended the current private school, as well as reimbursement for the cost of the current private school for SY 2012/13. The hearing officer also ordered DCPS to convene an IEP meeting for Student no later than May 15, 2013 to begin developing an IEP for Student for SY 2013/14.⁹
7. On May 14, 2013, DCPS convened an IEP meeting for Student at the current private school. The IEP team determined that Student would be provided with 30 hours per week of specialized instruction, 60 minutes per week of speech and language therapy services, and 90 minutes per week of occupational therapy services, with all instruction and related services to be provided outside general education. The team also agreed upon Student's IEP goals and agreed that DCPS would transfer the agreed-upon contents of the private school's Individualized Learning Program ("ILP") form Student onto DCPS's IEP form.¹⁰
8. A 30-hour IEP at the nonpublic school is a full-time IEP.¹¹
9. Near the conclusion of Student's May 14, 2013 IEP meeting, the team began discussing what location of services would be assigned for implementation of Student's IEP for SY

⁶ Testimony of educational advocate; Petitioner's Exhibit 6 at 1.

⁷ Petitioner's Exhibit 2 at 16; testimony of associate head of nonpublic school.

⁸ Petitioner's Exhibit 2 at 6 and 8-9.

⁹ Petitioner's Exhibit 2 at 20-21.

¹⁰ Petitioner's Exhibits 5 and 6; testimony of associate head of nonpublic school.

¹¹ Testimony of associate head of nonpublic school.

2013/14. Parents requested that Student be allowed to remain at the current private school, but the DCPS LEA representative proposed that Student attend the high functioning autism (“HFA”) program at the DCPS school Student attended prior to attending the current private school. The LEA representative indicated that the program was not yet in existence but would be in place at the DCPS school for SY 2013/14. Parents, Petitioners’ counsel and Parents’ educational advocate asked questions about the proposed program and location of services and expressed their opinion that a transition to the proposed program would be harmful to Student. The LEA representative placed a telephone call to a DCPS Instructional Design Specialist, who provided the team with details about the HFA program and answered questions posed by various team members.¹²

10. Parents attended Student’s May 14, 2013 IEP team meeting. They were allowed to fully participate in the meeting, and no one prevented them from participating in the meeting.¹³
11. DCPS did not receive the nonpublic school’s ILP for Student until approximately three weeks after the May 14, 2013 meeting, after multiple requests by DCPS. Thereafter, on June 13, 2013, DCPS issued its IEP for Student. However, despite the May 14, 2013 IEP team’s agreement that DCPS would merely transfer the contents of Student’s ILP to its IEP form, DCPS’s June 13, 2013 IEP reduced Student’s hours of service to 25 hours per week of specialized instruction, 240 minutes per month of speech-language services, and 240 minutes per month of occupational therapy services, with all instruction and related services to be provided outside general education.¹⁴
12. DCPS students spend 32.5 hours in school each day from opening bell to closing bell.¹⁵
13. DCPS intended Student’s June 13, 2013 IEP to represent a transfer of the information from Student’s ILP at the nonpublic school to the DCPS IEP form, and all parties knew that the information was to be transferred onto a DCPS IEP form. There was no June 13, 2013 meeting, despite the indications to the contrary on the front of the IEP. The information about meeting attendees actually concerns the May 14, 2013 meeting.¹⁶
14. On June 21, 2013, DCPS issued a formal location of services letter indicating that assigned the location of services for implementation of Student’s IEP for SY 2013/14 was the HFA program at the DCPS school Student previously attended. The letter also indicated that no changes to Student’s IEP were being proposed at that time.¹⁷
15. The HFA program at the proposed DCPS school can provide Student with 25 hours of specialized instruction outside of general education and the related services listed on his DCPS IEP.¹⁸
16. In August 2013, Father and Parents’ educational advocate attended a meeting at the proposed DCPS school for Student for SY 2013/14. The DCPS representatives at the

¹² Petitioner’s Exhibit 6; testimony of compliance case manager; testimony of Father; testimony of associate head of nonpublic school.

¹³ Testimony of Father.

¹⁴ Petitioner’s Exhibit 3 at 12; Respondent’s Exhibit 17 at 12; testimony of associate head of nonpublic school.

¹⁵ Stipulation of DCPS at the due process hearing.

¹⁶ Stipulation of DCPS at the due process hearing.

¹⁷ Petitioner’s Exhibit 4; Respondent’s Exhibit 18.

¹⁸ Testimony of instructional design specialist.

meeting explained that the HFA program was designed to accommodate the needs of DCPS students who were in the Applied Behavioral Analysis (“ABA”) program for students with significant needs but had progressed to the point of needing more inclusion services. The DCPS representatives stated that Student would be placed in a class with 8 students at the kindergarten to second grade level with developmental ages ranging from birth to four years old, and there would be 1 teacher and 2 para-educators in the classroom. The curriculum would include the use of discrete trial instruction, a highly systematic method of teaching based on the ABA, and a reading curriculum that focuses solely on memorization of sight words and is primarily used for children who cannot learn using the balanced literacy model which focuses on phonological skills, fluency and comprehension, in addition to sight words. The DCPS representatives also indicated that Student and his classmates would have lunch and recess, and take specials, such as Art and Music, with the general education population. At the time of the visit, there was nothing in Student’s proposed classroom, although the current school year would begin a day or two later, and there was no equipment in the occupational therapy room.¹⁹

17. The goal of the HFA program is to provide mainstreaming opportunities in general education for the students in the program as appropriate. Student’s proposed HFA classroom includes students who spend a portion of their time in the self-contained classroom and the remainder of the school day in general education. There are also students in the classroom who spend the entire school day in the classroom.²⁰
18. Parents visited the proposed DCPS school on October 8th, when school was in session, for approximately one hour.²¹
19. The proposed DCPS school is a very large school that recently has been renovated and has a very loud audio system. Student would have to travel through the building on a daily basis to get to the cafeteria, playground and occupational therapy room. The occupational therapy room is on an upper floor of the building, it’s located on a major corridor, and the room is separated from the main corridor by glass. Hence, students and faculty walking by the room can see into it through the glass. Similarly, the proposed classroom for Student is located on the ground floor near the front of the building, and there is glass at the front of the building, so the students would be able to see anyone walking down to the main entrance of the building. The noise level at the school and the glass windows in the rooms Student would use would be very distracting for Student, particularly the noise level because unexpected noises cause Student to totally shut down.²²
20. For the current school year at the nonpublic school, Student has been placed in a class with a total of 7 students – 1 kindergartener, 3 first graders, and 3 second graders, who are all verbal and on an academic level similar to Student’s. There is a lead certified special education teacher in the class, as well as two part-time assistant teachers. Student receives occupational therapy and speech/language therapy sessions through a combination of pullout and push-in services, and his curriculum includes the use of a balanced literacy model. The school uses a variety of sensory aids for Student, including elastic bands on chairs, weighted vests, and fidget boxes. The school’s charges for

¹⁹ Testimony of educational advocate; testimony of Father.

²⁰ Testimony of instructional design specialist; testimony of DCPS program manager.

²¹ Testimony of Father.

²² Testimony of educational advocate; testimony of Father.

tuition and related services have been established by OSSE, and the school has no discretion to alter those rates.²³

21. Student has made progress at the nonpublic school, but he still suffers from auditory hypersensitivity and attentional challenges, and he is not yet ready to be transitioned into a less restrictive environment because the high noise level and many distractions inherent in a general education setting will be problematic for Student.²⁴

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:

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner's claims.

Appropriateness of Location of Service for SY 2013/14

Under IDEIA, a public agency must provide an appropriate educational placement/location of services for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate elementary school and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17. Hence, where there is no contention that the student's IEP is inappropriate, the determination of whether the current location of services is appropriate turns on whether the school can implement the student's IEP. *See Hinson v. Merritt Educational Ctr.*, 579 F.Supp.2d 89, 104 (D.D.C. 2008) (to show placement is inappropriate, plaintiff must show school is unable to implement the IEP as written); *T.T. v. District of Columbia*, 2007 U.S. District Lexis (D.D.C. July 23, 2007) (plaintiffs' challenge to public schools selected by DCPS was rejected where plaintiffs could not prove public schools were unable to implement the student's IEP).

In the instant case, although Student's June 13, 2013 IEP provides for only 25 hours per week of specialized instruction in addition to the related services of occupational therapy and speech language services, there is no dispute that Student's May 14, 2013 IEP team intended to provide Student with a full-time out-of-general education placement, and DCPS was charged with merely transferring the information from Student's full-time ILP at the current nonpublic school to the DCPS IEP form. As a result, for purposes of this analysis, Student's IEP will be deemed to provide him with full-time services outside of general education.

A review of the evidence in this case reveals that although Student continues to require a full-time out of general education program, DCPS has assigned Student to attend an HFA program that is designed for students who require more inclusion services and that has a goal of providing students with mainstreaming opportunities in general education. Moreover, while Student would be able to receive all of his specialized instruction outside of general education in the self-

²³ Testimony of associate head of nonpublic school; testimony of educational advocate; testimony of Father

²⁴ Testimony of educational advocate; testimony of Father.

contained HFA classroom, many of Student's classmates currently spend a portion of the school day in general education, and the entire class, including Student, would have lunch, recess and all specials with the general education population.

The evidence further reveals that although Student has made progress at the current nonpublic school, he continues to suffer from auditory hypersensitivity and attentional challenges, and he is not yet ready to be transitioned into a less restrictive environment because the high noise level and many distractions inherent in a general education setting will be problematic for Student. Nevertheless, DCPS assigned Student to attend a large DCPS school with a loud audio system, where he will have to travel through the building on a daily basis to get to the cafeteria, playground and occupational therapy room. The occupational therapy room is located on an upper level of the school on a major corridor and is separated from the corridor by a wall of glass, and Student's proposed classroom is located on the ground floor near the front of the building with glass on the side facing the walkway to the main entrance of the building.

Based on the evidence set forth above, the hearing officer concludes that Petitioners have met their burden of demonstrating that the location of services proposed by DCPS for Student for SY 2013/14 is inappropriate because it cannot provide Student with the full-time out-of-general-education setting he requires, the school building is too noisy in light of Student's auditory hypersensitivity, and the rooms where Student would be placed will provide too many distractions in light of his attentional issues.

“Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is ‘reasonably calculated to enable the child to receive educational benefits.’” *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). “Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment.” *Id.*, 556 F.Supp.2d at 37 (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley*, *supra*, 456 U.S. 176, 202)).

In the instant case, the evidence reveals that the current nonpublic school is providing Student with educational programming appropriate to meet his needs, with the result that Student has is receiving educational benefit and making academic progress at the nonpublic school. The nonpublic school is also able to provide Student with his least restrictive environment, which is a full-time setting out of general education, and the school does so in a setting that addresses Student's sensory processing disorder and attentional issues. As a result, Student is also making behavioral progress at the nonpublic school. Moreover, the school charges rates established by OSSE for tuition and related services. Based on these factors, the hearing officer concludes that the current nonpublic school is appropriate for Student, and the hearing officer has determined to award Petitioners funding for Student to continue attending the current nonpublic school for SY 2013/14 as a remedy for the denial of FAPE found herein.

**Alleged Predetermination of the Location of Services for SY 2013/14
(and Subsequent Alteration of the IEP)**

Pursuant to IDEA, in determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a)(1). However, “‘placement’ refers to the overall educational program offered, not the mere location of the program.” *Roher v. District of Columbia*, 1989 WL 330800, *3 (D.D.C. 1989); *see also, White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted) (educational placement as used in IDEA means educational program, not the particular institution where the program is implemented); *Johnson v. District of Columbia*, 839 F.Supp.2d 173, 177 (court noted that the fundamental flaw in the plaintiffs’ argument was the underlying assumption that the student’s educational placement was the physical school he attended).

A review of the evidence in this case confirms Petitioners’ contention that DCPS predetermined the location of services for Student and announced that decision near the end of Student’s May 14, 2013 IEP meeting. However, as the selection of a location for implementation of a student’s IEP is an administrative decision that is within the discretion of the LEA, the hearing officer concludes that DCPS’s predetermination of Student’s location of services, in and of itself, did not deny Student a FAPE. *See Johnson v. District of Columbia, supra*, 839 F.Supp.2d at 178 (since there was no challenge to the student’s IEP itself, the District was free to place the student at any facility it determined could provide the services required by the IEP); *White v. Ascension Parish School Bd.*, 343 F.3d 373, 380 (“state agencies are afforded much discretion in determining which school a student is to attend”); *see also, A.M. v. District of Columbia*, 933 F.Supp.2d 193 (D.D.C. 2013) (DCPS’s determination of physical school student was to attend did not constitute predetermination of student’s “placement”).²⁵

On the other hand, the evidence in this case is clear that Student’s May 14, 2014 IEP team developed Student’s educational program for SY 2013/14 using the current nonpublic school’s ILP form, which was subsequently provided to DCPS so that it could transfer the program onto a DCPS IEP form. However, DCPS failed to faithfully transfer the contents of the ILP to its IEP form and instead reduced Student’s hours of specialized instruction and altered his related service hours. As a result, to prevent any potential denial of FAPE, the hearing officer will order DCPS to revise Student’s IEP so that it accurately reflects the services Student’s May 14, 2014 IEP team determined he should receive. *See Letter to Armstrong*, Office of Special Education Programs (28 IDELR 303 June 11, 1997) (states must set up due process system which gives hearing officers authority to order any relief necessary to ensure student receives a FAPE).

**Alleged Failure to Afford Parents a Meaningful Opportunity to
Participate in the IEP Process**

Pursuant to IDEA, a hearing officer may determine that there has been a denial of FAPE where procedural inadequacies significantly impede the parents’ opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents’ child. 34 C.F.R. § 300.513(a)(2)(ii); *see also, Eley v. District of Columbia*, 2012 WL 3656471, *8 (D.D.C. August 24, 2012) (IDEA guarantees that the parents of a disabled child participate in any group that

²⁵ This case highlights the distinction between a location of services and an educational placement, thereby also highlighting the inapplicability of the cases cited in support of this claim in Petitioner’s Closing Argument Memorandum, all of which concern placement instead of location of services.

makes decisions concerning the child's educational placement); *Lesesne v. D.C.*, 447 F.3d 828 (D.C. Cir. 2006) (procedural violations that seriously deprive parents of their participation rights are actionable).

In the instant case, Petitioners assert that DCPS denied Student a FAPE by failing to afford Parents a meaningful opportunity to participate in the IEP process. However, the evidence in this case reveals that Parents participated fully in Student's May 14, 2013 IEP meeting, along with their current counsel and their educational advocate. Indeed, Parents have presented no challenge whatsoever to the goals, service hours, or any other component of the ILP that was developed for Student at the meeting. To the contrary, Parents have assigned as error DCPS's failure to faithfully adhere to the ILP when transferring its contents to DCPS's IEP form. As a result, it is clear that Parents were allowed an opportunity to meaningfully participate in the IEP process. See e.g., *A.M. v. District of Columbia*, supra, 933 F.Supp.2d at 199 (parent fully participated in IEP process where, *inter alia*, she attended multiple IEP meetings, made comments at those meetings, and was accompanied by a skilled special education attorney). Under these circumstances, the hearing officer concludes that Petitioners failed to meet their burden of proof on this claim.

ORDER

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

1. DCPS shall fund Student's attendance at the current nonpublic school for SY 2013/14 by paying the OSSE-established rates for Student's tuition and related services for SY 2013/14.
2. DCPS shall revise Student's IEP so that it accurately reflects the following services that Student's May 14, 2014 IEP team determined Student requires: 30 hours per week of specialized instruction, 60 minutes per week of speech and language therapy services, and 90 minutes per week of occupational therapy services, with all instruction and related services to be provided outside general education.
3. All remaining claims in Petitioner's August 26, 2013 Complaint are **DENIED AND DISMISSED WITH PREJUDICE**.

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: 11/9/2013

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer