OSSE
Student Hearing Office
November 14, 2013

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],[1]

Petitioner,

v

[Local Education Agency],

Respondent.

Date Issued: November 14, 2013

Hearing Officer: Jim Mortenson

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on September 3, 2013. The Petitioner and Respondent are both represented by counsel. A response to the complaint was filed by the Respondent on September 13, 2013. A resolution meeting was held on that date and resulted in no agreements. A prehearing conference was convened on September 16, 2013, and a prehearing order was issued on that date.

The Petitioner filed a motion for "stay put" on September 17, 2013. The Respondent filed a reply in opposition to the motion on September 18, 2013. An Order on the motion was issued on September 19, 2013. The Order determined that the Student's then-current educational placement was the Public/Private Partnership.

[1] 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 parties exchanged disclosures on October 31, 2013. The Respondent moved for a continuance of the hearing on November 6, 2013, one day prior to the scheduled hearing due to one if its witnesses having an emergency. The Respondent was able to obtain a substitute witness and the motion become moot. The substitute witness was permitted to testify via telephone.

The due date for this Hearing Officer's Determination (HOD) is November 17 2013. This HOD is issued on November 14, 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. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the IHO is:

> Whether the Respondent changed the Student's educational placement without the involvement of the Parent when it unilaterally determined the Student would be moved from the Non-Public School to the Attending School for the 2013-2014 school year?

The Petitioner is seeking for the Student to continue to participate in the Public/Private Partnership for the remainder of the current school year.

The Respondent unilaterally determined the Student would be moved from the Non-Public School to the Attending School when it refused to place the Student in the specific educational placement the IEP team discussed at the team meeting.

IV. EVIDENCE

Five witnesses testified at the hearing, three for the Petitioner and two for the Respondent. The Petitioner's witnesses were: the Educational Consultant, T.A.; The Student's Special Education Teacher, J.F.; and the Student's School Social Worker, E.B. The Respondent's witnesses were the Progress Monitor, L.H., and the Assistant Principal, S.B. All of the witnesses testified credibly and any discrepancies in testimony were minor or immaterial.

Nine of the Petitioner's 11 disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. Two of the Respondent's six disclosures were entered into evidence. 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.

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 with a disability enrolled at the Attending School and currently placed in the Public/Private Partnership pursuant to the Order of September 19, 2013.[2] The Student has been determined eligible for special education and related services as a result of meeting the definition for intellectual disability.[3]
2. The Public/Private Partnership program was to aid in the transition of students from the segregated Non-Public School to the public school, and ensured an effective transition through the use of a dedicated special education teacher (J.F.), a low student/teacher ratio for transitioning students, and a full inclusion program.[4]
3. The Student attended the Non-Public School during the 2012-2013 school year and had been there for several years.[5]
4. On July 12, 2013, the Respondent sent the Petitioner a letter informing her that "[t]he location of services for IEP implementation for you or [Student] for the 2013-2014 school year is [Attending School.] No changes to your IEP are being proposed at this time."[6] This letter upset the Petitioner because a meeting to review the Student's IEP and placement was pending and had not yet been held.[7]
5. On July 30, 2013, and IEP team meeting, referred to as an "LRE Transition-IEP Meeting" by the Respondent, was convened, including the Petitioner.[8] The purpose of the meeting was to "[d]iscuss and review current student data to determine and prepare [Student] for

[2] P 4, Testimony (T) of S.B., Order of September 19, 2013.
[3] P 4.
[4] P 4, T of J.F.
[5] T of T.A.
[6] P 2, P 6.
[7] T of T.A.
[8] P 4.

participation in a Lesser Restrictive Educational Environment and, 2. To update [Student's] IEP as necessary to document educational and related service needs."[9]

6. The team discussed the July 12, 2013, letter the Petitioner had received and the LEA Representative (L.H.), advised the team that the letter had been sent in error and that "the Team's input will be reviewed and considered in determining [Student's] location of services for next school year."[10]
7. The LEA Representative proposed the Student's educational placement be changed from the Non-Public School to an inclusion setting in a less restrictive environment where he would have access to non-disabled peers.[11] The team agreed this was appropriate for the Student.[12] The team, largely Non-Public School staff, discussed the Public/Private Partnership the Respondent and Non-Public School had and its program implementation at the Attending School.[13] The LEA Representative did not share any information about alternative programs or specific placements with the team, and believed that would have been inappropriate to do because it would have led to the IEP team making a determination about the Student's location of services.[14]
8. The Petitioner advised the team she wanted the Student in the Public/Private Partnership program and the majority of the IEP team agreed with that.[15] The LEA Representative only said she would send the team's notes to the programming office for a placement determination.[16]

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[9] P 4.
[10] P 4.
[11] P 4, T of L.H.
[12] P 4, T of T.A.
[13] P 4.
[14] P 4, T of L.H.
[15] P 4.
[16] P 4, T of L.H.

9. The team wanted a representative from the Attending School to be involved in the meeting to answer questions about the Attending School, if the Student was not part of the Public/Private Partnership program, and the LEA Representative advised no such representative would be present.[17] The Respondent does not permit its representatives to discuss specific schools or programs for placement.[18]
10. On July 31, 2013, the Respondent prepared a prior written notice concerning the change in the educational placement, stating only that the Student was moving to a "combination inclusion setting."[19] The notice did not address the discussed Public/Private Partnership, nor the Attending School.[20]
11. On August 6, 2013, the Respondent notified the Petitioner that the Student would be attending the Attending School and had to withdraw from the Non-Public School.[21]
12. The Student is currently at the Attending School in the Public/Private Partnership program and attends inclusion classes that are co-taught with a general education teacher and special education teacher.[22] Had the Student not been in the Public/Private Partnership program, he would have been in special education classes with a computer program providing access to the general education curriculum, and a special education teacher, when outside of the general education setting.[23] The use of computer-based instruction was not discussed by the IEP team.[24]

[17] T of T.A.
[18] T of L.H., T of J.F.
[19] R 4.
[20] R 4.
[21] R 5.
[22] T of J.F.
[23] T of S.B.
[24] P 4, R 4.

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. 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 (7th Cir. 2007). Of course, the IEP is to be written by the IEP team. *See*, 34 C.F.R. § 300.324.

3. In this case, the IEP team met and discussed the Student moving to a less restrictive environment. It is apparent the Respondent had already determined the Student's educational placement would be changed to a less restrictive setting prior to the IEP team meeting, not because of the letter stating so, which was sent in error to the Petitioner, but based on the stated "purpose" of the IEP team meeting. When the team discussed the Public/Private Partnership which is felt would be appropriate for the Student's transition into a less restrictive setting, the Respondent failed to act on that one way or the other (agreeing and proposing it, or refusing it). The Respondent's reasoning - that making this determination would amount to determining the location of service - has no basis in law. While it is true an

LEA can determine the location of services as an administrative matter when there are "two or more equally appropriate locations that meet the child's special education and related services needs[,]" there is no evidence in this case that such competing locations were discussed by the IEP team or that they even existed. The IEP team discussed the Public/Private Partnership at the Student's neighborhood school (Attending School) that would be appropriate for his transition to the less restrictive environment, and the Respondent failed to meaningfully participate in that discussion (again, demonstrating it either had already determined the Student's placement or that it objected to the IEP team making the placement determination.) There was no rejection, or at least an articulated reason to reject this by the Respondent. In fact, the LEA representative at the meeting simply refused to even acknowledge the discussion. Such behavior does not justify the Respondent's de facto refusal of the discussed Public/Private Partnership at the Attending School. What the Respondent's behavior did was cut the Petitioner, and the entire IEP team, out of the decision-making process regarding the Student's educational placement. This was an improper denial of the Petitioner's due process rights under IDEA and D.C. law. And she was not able to effectively evaluate the placement the Respondent unilaterally determined for her under the guise of a "location" determination. Had the Petitioner been involved with the placement determination, she would have learned about the various aspects of the programming awaiting her child at the Attending School outside of the Public/Private Partnership. Perhaps the most significant factor was the use of a computer program, as opposed to a teacher, to deliver instruction in the general education curriculum, with the assistance of a special education teacher. This was not the educational programming determined by the IEP team because it was never discussed. In contrast, the team did discuss

the Public/Private Partnership and the Petitioner learned that the student/teacher ratio was low, that it was a full inclusion program, and that students have the full support of the staff. Given this was the only program discussed, it should have been the program the Student was placed in, and the placement determination was the IEP team's determination to make.

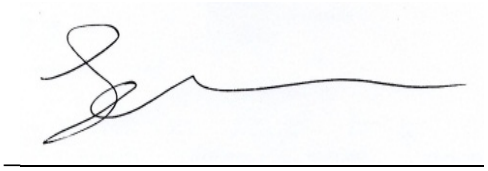
VII. DECISON

The Respondent unilaterally determined the Student would be moved from the Non-Public School to Attending School when it refused to place the Student in the only specific program the IEP team discussed when it determined to change his educational placement.

VIII. ORDER

The Student will remain with the Public/Private Partnership until the conclusion of the 2013-2014 school year.

IT IS SO ORDERED.



Date: November 14, 2013

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).