

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

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

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

Petitioner,

Date Issued: March 5, 2012

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,  
Respondent.

OSSE  
STUDENT HEARING OFFICE  
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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND PROCEDURAL HISTORY**

The student is a \_\_\_\_\_ year old male, who is currently a \_\_\_\_\_ grade student attending School A. The student's current individualized education program (IEP) lists Speech or Language Impairment as his primary disability and provides for him to receive twenty-six and one half (26.5) hours per week of specialized instruction outside of the general education setting, and one (1) hour per week of speech-language pathology outside of the general education setting.

On January 11, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by unilaterally changing the student's least restrictive environment (LRE) and placement and/or transferring the student from School A to School B despite the consensus of the multi-disciplinary team (MDT) and the resulting harm that such a change would have on the student's educational process. As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, that DCPS maintain the student's placement at School A until the end of the 2011-2012 school year.

On January 24, 2012, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that an IEP meeting was held on January 9, 2011<sup>2</sup> and it was determined that the student's location of services would change to School B so that the student is provided

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<sup>1</sup> Personal identification information is provided in Appendix A.

<sup>2</sup> While the Respondent's Response indicated that the IEP meeting was held on January 9, 2011, all evidence in this case indicates that this is a typographical error. The IEP meeting referred to was held on January 9, 2012.

with a FAPE; DCPS did not change the student's placement, rather DCPS proposed a location of services where the student remains in an outside of general education setting 100% of the time; and location of services is an administrative decision left to the agency's discretion.

On January 24, 2012, the Petitioner filed a motion for "stay put." On January 26, 2012, Respondent filed a Response opposing "stay put," arguing that "stay put" refers to the student's educational placement and not location of services.

On January 30, 2012, Hearing Officer Seymour DuBow convened a prehearing conference and led the parties through a discussion of the issue, relief sought and related matters. The Hearing Officer issued the Prehearing Order on February 1, 2012. The Prehearing Order clearly outlined the issue to be decided in this matter and granted Petitioner's motion for "stay put" protections. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. Neither party disputed the issue as outlined in the Order.

On January 31, 2012, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement. Accordingly, the 45-day timeline began to run on February 11, 2012 and ends on March 26, 2012.

On February 17, 2012, Petitioner filed Disclosures including twenty-two (22) exhibits and eight (8) witnesses.<sup>3</sup> On February 17, 2012, Respondent filed Disclosures including seven (7) exhibits and five (5) witnesses.

On February 24, 2012, Hearing Officer Melanie Chisholm was assigned as the Hearing Officer in this matter.

The due process hearing commenced at approximately 9:09 a.m. on February 27, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2003. The Petitioner elected for the hearing to be closed however both parties agreed to allow an observer, for training purposes, from Petitioner's office. Petitioner's exhibits 1-19, 21-22 were admitted without objection. Petitioner's exhibit 20 was admitted with the redaction of names of students other than the student involved in this matter. Respondent's exhibits 1-7 were admitted without objection. The parties agreed that electronic communications between the Hearing Officer and the parties regarding scheduling will not be included in the record.

The hearing concluded at approximately 1:59 p.m. following closing statements by both parties.

### Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

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<sup>3</sup> A list of exhibits is attached as Appendix B. A list of witnesses is included in Appendix A.

## ISSUE

The issue to be determined is as follows:

1. Did DCPS deny a FAPE to the student by unilaterally changing the student's placement by transferring the student from the non-public day special education program of School A to the non-public day special education program of School B?

## 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. The student is a student with disabilities as defined by 34 CFR §300.8. (Petitioner's Exhibits 1, 13, 15 and 16)
2. The student is a senior in high school and placed in a private special education day school. (Petitioner's Exhibit 1; IEP Coordinator Testimony; Principal Testimony; Counselor Testimony; Mother Testimony)
3. The student's IEP prescribes twenty-six and one half (26.5) hours of specialized instruction per week outside of the general education environment and one (1) hour per week of speech-language pathology outside of the general education environment. The student does not have goals on his IEP for counseling or goals related to behavior. (Petitioner's Exhibit 1)
4. Transportation as a related service is included in the student's IEP. (Petitioner's Exhibit 1; Mother's Testimony)
5. The student is on track to graduate from high school in June, 2012. The student has been working to complete his community service hours required for graduation, has taken the SAT and ACT, and is in the process of applying to college. School A has assisted the student with completing the necessary applications for college entrance and completing the transition goals listed on his IEP. (Petitioner's Exhibits 6, 8 and 9; Respondent's Exhibit 2; IEP Coordinator Testimony; Principal Testimony; Counselor Testimony; Student Testimony)
6. The student is hard-working, able to work independently, polite, courteous, completes his assignments and stays focused. He is also quiet, shy and does not exhibit behavior problems. He is friendly and gets along well with his peers. (Petitioner's Exhibits 2, 3, 4, 6, 10, 11, 13 and 17; Principal Testimony; Counselor Testimony; Progress Monitor Testimony)
7. At times the student is anxious about life in general however he does not exhibit anxious behaviors and does not have counseling goals on his IEP. The student has experienced some anxiety regarding the proposed change from School A to School B however his mother does not have concerns regarding his emotional well-being and the counselor has been meeting with the student for approximately ten (10) minutes

- every other week to discuss the student's stress related to the transition.  
(Petitioner's Exhibits 1 and 13; Counselor Testimony; Mother Testimony)
8. At the student's January 9, 2012 IEP meeting, the LEA proposed a change in location of services from School A to School B. No other changes were made to the student's IEP. (Respondent's Exhibits 2 and 3; IEP Coordinator Testimony; Principal Testimony; Counselor Testimony; Progress Monitor Testimony)
  9. School A is a private special education day school which serves students in grades 6-12. School A serves students with learning disabilities (LD), attention deficit and hyperactivity disorder (ADHD), other health impairment (OHI) and multiple disabilities (MD). The school's Certificate of Approval (COA) issued by the State educational agency in 2007 does not include an endorsement for the school to serve students with emotional disturbance (ED) however there are students with ED enrolled at the school who display timid or depressive behaviors. Currently, the school has 34 students enrolled and serves these students in a small class setting, typically five (5) students, with a teacher-student ratio of 1:5. School A is located in the northeast quadrant of the District and is approximately 1.89 miles from the student's home. (Petitioner's Exhibit 21; IEP Coordinator Testimony; Principal Testimony)
  10. Of the six (6) teachers at School A who taught the student from September 5, 2011-February 24, 2012, one (1) is content certified in the State of Maryland, one (1) is certified for regular education in all content areas in the District of Columbia, one (1) is certified as a substitute teacher in the District of Columbia, one (1) is certified in special education in the State of California, and the remaining two (2) have no certifications. (Respondent's Exhibits 4 and 5; IEP Coordinator Testimony; Principal Testimony; Progress Monitor Testimony)
  11. The two (2) teachers with special education certifications at School A teach full course loads. School A teachers do not have common planning time or consult regarding the implementation of student IEPs. (IEP Coordinator Testimony; Principal Testimony)
  12. The student's current location of services is not providing the student with a FAPE. DCPS is in the process of removing the DCPS students enrolled at School A to other locations. (Respondent's Exhibit 3; Progress Monitor Testimony; Principal Testimony)
  13. School B is located in the northeast quadrant of Washington, DC and is approximately 6.26 miles from the student's home. The school serves students in grades 9-12 and has classroom population of 10-12 students. The staff-to-student ratio is 1:5. The school has the capacity to serve 125 students. The School B site houses two separate programs. One program is designed to help students who have educational difficulties with an emotional or behavioral component. The second program specializes in serving students with LD with or without accompanying diagnosis of ED, autism, speech/language deficits, neurological and OHI, intellectual disabilities and MD. The school has been in operation since 2002 and offers a diploma track for students. School B offers a Senior Class Advisor, social workers, a transition team, a College Summit Program, an SAT Testing Center and career training coursework. (Petitioner's Exhibits 21 and 22; Respondent's Exhibit 6)

## 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:

### Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See 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); 20 U.S.C. §1415(i)(2)(C)(iii).

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The Court in *Rowley* stated that the Act does not require that the special education services "be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 200-203. The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seq., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The IEP is the primary vehicle for ensuring that a disabled child's educational program is individually tailored based on the child's unique abilities and needs. *See* 20 U.S.C. §1414(d); 34 CFR §§300.320-300.324. Designing an appropriate IEP is necessary but not sufficient. The public agency must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP. *See O.O. v. District of Columbia*, 573 F. Supp. 2d 41 (D.D.C. 2008).

An appropriate educational placement must be provided for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 CFR §300.17; 34 CFR §§300.114-300.120. However, "educational placement," as used in IDEA means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); *see also, A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) (*citing AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004)). Hence, school districts are afforded much discretion in determining which school a student is to attend. *See White, supra*. The Comments to the Federal Regulations note that "placement" refers to points along the

continuum of placement options available for a child with a disability and "location" refers to the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. 71 Federal Register 46540:46588 (14 August 2006).

In the present case, the Petitioner argued that the Respondent changed the student's "placement" from School A to School B and the change in placement would result in harm to the student. The Petitioner offered that the school change constitutes a change in placement because of a significant change in programming offered by School B, a difference in the size of the student population, a difference in the types of disabilities served by the schools, a difference in the distance of the school from the child's home and that School B was not the student's "LRE." The Petitioner also argued that the mid-year change would cause the student considerable stress and interfere with the student's ability to complete his transition goals and graduate at the end of the 2011-2012 school year. The Respondent argued that School A is unable to implement the student's IEP because it is unable to provide specialized instruction given that the majority of the instructional staff is not certified in special education and/or the content area in which the teacher is teaching.

While the Petitioner presented evidence regarding the programming offered at School A, the Petitioner did not present any evidence regarding the programming offered at School B. Therefore the Hearing Officer is unable to conclude that there is a difference in the programming between School A and School B. Likewise, while the Petitioner presented evidence that School A has a student population of 34 students, the record contains evidence that School B has the capacity to serve 125 students but no evidence as to how many students are actually enrolled at School B. Therefore, the Hearing Officer is unable to conclude that there is a difference in the size of the school population between School A and School B. Even if evidence were presented confirming that 125 students are enrolled at School B, there is no evidence that suggests that a larger school is inappropriate for the student.

The student is polite, courteous and does not exhibit behavior problems. He is also quiet and shy. School A serves students with LD, ADHD, OHI and MD. While School A's COA does not carry an endorsement to serve students with ED, the school does serve students with ED. The ED students served by School A display timid or depressive behaviors. The School B site houses two separate programs. One program is designed to help students who have educational difficulties with an emotional or behavioral component. The second program, the program proposed by DCPS, specializes in serving students with LD with or without accompanying diagnosis of ED, autism, speech/language deficits, neurological and OHI, intellectual disabilities and MD. The Petitioner alleged that School A is inappropriate for the student because the school serves students with ED. However the Hearing Officer is unable to conclude that there is a difference in the types of disabilities served by School A and the School B site proposed by DCPS.

School A is located in the northeast quadrant of the District and is approximately 1.89 miles from the student's home. School B is located in the northeast quadrant of the District and is approximately 6.26 miles from the student's home. While the urban nature of the District of Columbia makes the 4.37 mile difference more significant than in suburban or rural areas, given that the student is receiving transportation as a related service, the Hearing Officer is unable to

conclude that the difference in the distances from the student's home to School A and School B is considerable.

The student's IEP prescribes 26.5 hours of specialized instruction per week outside of the general education environment and one (1) hour per week of speech-language pathology outside of the general education environment. The student's IEP Team has concluded that the student requires these services in a private special education day school setting. Both School A and School B are private special education day schools. The proposed change from School A to School B does not change the student's "least restrictive environment" as alleged by Petitioner.

The student is quiet and shy but is also friendly and gets along well with his peers. He does not have counseling goals on his IEP to address any atypical behaviors related to stress or anxiety. While the student has experienced some anxiety regarding the proposed change from School A to School B, his mother does not have concerns regarding his emotional well-being and the counselor has been meeting with the student for approximately ten (10) minutes every other week to discuss the student's stress related to the transition.

The student has been working to complete his community service hours required for graduation, has taken the SAT and ACT, and is in the process of applying to college. School A has assisted the student with completing the necessary applications for college entrance and completing the transition goals listed on his IEP. The Petitioner argued that if the student transfers from School A to School B then he will not be able to complete his transition goals and may not complete all graduation requirements. School B offers a Senior Class Advisor, social workers, a transition team, a College Summit Program, an SAT Testing Center and career training coursework. School B also has a diploma track which allows students to receive a high school diploma. A mid-year transfer is not ideal. However the Hearing Officer is unable to conclude that the stress of a transfer would be overwhelming for the student or that School B is unable to support the student in completing his transition goals and outstanding graduation requirements.

The Respondent offered considerable evidence regarding the certification of teachers at School A. Of the six (6) teachers at School A who taught the student from September 5, 2011-February 24, 2012, one (1) is content certified in the State of Maryland, one (1) is certified for regular education in all content areas in the District of Columbia, one (1) is certified as a substitute teacher in the District of Columbia, one (1) is certified in special education in the State of California, and the remaining two (2) have no certifications. The Petitioner argued that the two (2) teachers who hold a special education certification consult with all other teachers in order to provide students with specialized instruction. The Hearing Officer is not convinced by this argument. Both teachers who are certified in special education have full course loads and no evidence was presented to suggest that teacher share a common planning time or in any other way collaborate with regard to the implementation of students' IEP goals and objectives.

The Petitioner argued that the IDEA definition of highly qualified special education teachers does not apply to teachers in private schools. *See* 34 CFR §300.18. While 34 CFR §300.18(h) does state that the requirements in 34 CFR §300.18 do not apply to teacher hired by private elementary schools and secondary schools, the District of Columbia requires nonpublic

special education schools or programs that serve District of Columbia students with disabilities to provide special education and related services in accordance with the student's IEP and afford the student all the rights he or she would have if served by a public agency. 5 DCMR §A-2805.1. Moreover, 5 DCMR §A-2823.2 requires that effective no later than school year 2011-2012, each member of the teaching staff at a nonpublic special education school shall hold a teaching certification from the state or district in which the school is located, to the same level as required for teaching staff in public schools of that state or district. Each member of the teaching staff at School A does not hold a teaching certification from the District of Columbia. In fact, only one (1) of the student's first semester teachers holds a teaching certification from the District of Columbia and that teacher's certification is in general education.

The Petitioner also argued that the courts in *Holmes* and *Block* prohibit a mid-year transfer of a student. In *Holmes*, the court found that the LEA's proposed placement, under the circumstances in the case which included that the proposed placement was in a start-up posture and the student was a senior, was not an appropriate placement. The court emphasized that "the appropriate place for this youngster is to permit him to finish the remaining seven months of his high school education in the environment that he has been accustomed to over the past three years." See *Holmes v. District of Columbia*, 680 F. Supp. 40, 41-42 (D.D.C. 1988). In *Block*, the Hearing Officer found that while a school may be appropriate for a student if he begins the school year there, it is not necessarily appropriate to inject the student into that school part-way through the school year. See *Block v. District of Columbia*, 748 F. Supp. 891 (D.D.C. 1990); see also *Burger v. Murray County School Dist.*, 612 F. Supp. 434, 437 (N.D. Ga.1984) ("Obvious advantages inhere to any child who is permitted to learn in a stable environment. This advantage may have even more meaning to a handicapped child.").

In both of these cases, the court found that it was inappropriate to transfer a child mid-year to another school. However, the current matter is distinguished from these cases. Specifically, in both cases cited by Petitioner, the students' locations prior to the proposed change were deemed to be appropriate for the student. In the present case, the student's current location of services is inappropriate because the student is unable to receive the specialized instruction indicated on his IEP. Further, in *Holmes*, the LEA proposed a start-up school. See *Holmes* at 42. School B has been operating since 2002. In *Block*, the student had documented problems interacting with peers and high anxiety. See *Block* at 894. In the present case, the student has neither problems interacting with peers nor high anxiety. While the student is quiet and shy, he has only reported being anxious about "life in general." This anxiety has raised no concerns with the student's mother or other IEP Team members.

"The touchstone of 'educational placement' is not the location to which the student is assigned but rather the environment in which educational services are provided. Where a change in location results in a dilution of the quality of a student's education or a departure from the student's least restrictive-compliance setting, a change in educational placement occurs." *AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004). In the present case, the Petitioner did not prove by a preponderance of the evidence that the change in location from School A to School B would result in a dilution of the quality of the student's education or a departure from the student's least restrictive compliance setting. The Hearing Officer is persuaded by the Respondent's assertion that its proposal of a change of location is to enhance

the quality of the student's education by providing the specialized instruction prescribed in the student's IEP by a school which employs certified special education teachers.

The Hearing Officer concludes that despite Petitioner's assertion to the contrary, the Respondent's decision to change the location of the student's school did not constitute a change in placement. *See e.g., J.S. v. Lenape Regional High School District Board of Education*, 102 F.Supp.2d 540 (D.N.J. 2000) (school district's transfer of LD student from one school to another school within same district did not constitute change in placement where the two schools had slightly different student demographics but there was no substantive difference between the two class settings). Petitioner failed to demonstrate that School B could not implement the services and setting provided in the student's IEP, that the Respondent did not comply with procedural safeguards, or that the Respondent could not provide an appropriate educational environment reasonably calculated to provide educational benefit to the student for the remainder of the 2011-2012 school year.<sup>4</sup>

### ORDER

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

The due process complaint in this matter is **dismissed** with prejudice. All relief sought by Petitioner herein is **denied**.

### 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).

Date: March 5, 2012

  
Hearing Officer

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<sup>4</sup> While the Respondent is the prevailing party in this matter, the Hearing Officer urges the Respondent to meet with Petitioners to *collaboratively* identify an appropriate location of services to which the student will feel comfortable transitioning for the remainder of his secondary education.