

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
 Student Hearing Office
 810 First Street, N.E., 2nd Floor
 Washington, DC 20002

STUDENT,¹)
 through the Parents,)
)
 Petitioners,)
)
 v.)
)
 District of Columbia Public Schools)
)
 Respondent.)

Date Issued: September 21, 2011
 Hearing Officer: Virginia A. Dietrich

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 STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

Background

Petitioners, the parents of _____ year old Student, filed a due process complaint notice on July 25, 2011 alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”). At the time the complaint was filed, Student was a child with a Specific Learning Disability and had an Individualized Education Program (“IEP”) that prescribed 100% specialized instruction and related services, all outside of general education. Petitioners claimed that the location of services that District of Columbia Public Schools (“DCPS”) chose for Student in August 2011 could not implement Student’s IEP; therefore, the placement was inappropriate. Petitioners requested a placement at a non-public school that services students with disabilities.

DCPS asserted that when DCPS issued a Prior Written Notice to Petitioners in August 2011, indicating that Student would attend _____ School for the 2011-2012 school year, the identification of _____ was a location of services decision and not a placement decision, that it was within DCPS’ discretion to choose the location of services and that Student’s May 2011 IEP could be implemented at _____ DCPS contended that Student had not been denied a FAPE.

¹ Personal identification information is provided in Appendix A.

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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; Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."), and 38 D.C. Code 2561.02(c).

Procedural History

The due process complaint was filed on 07/25/11. This Hearing Officer was assigned to the case on 07/27/11. A resolution meeting took place on 08/01/11 at which time the parties agreed to end the 30-day resolution period and proceed to a due process hearing. The 30-day resolution period ended on 08/01/11, the 45-day timeline to issue a final decision began on 08/02/11, and the final decision was due on 09/15/11. The due process hearing was originally scheduled for 08/30/11, but was continued to 09/15/11 at the request of Petitioners. As a result of the continuance, the final decision was due on 09/25/11.

The due process hearing was a closed hearing that took place on 09/15/11.

Neither party objected to the testimony of witnesses via telephone. Petitioners participated in the hearing in person.

Petitioners presented three witnesses: Petitioner, the mother; Special Education Coordinator ("SEC") at _____ School _____ and Director, Academy PG County. DCPS presented one witness: SEC at _____

Petitioners' disclosures dated 08/25/11, containing a witness list and Exhibits P-1 through P-3, were admitted into evidence without objection. DCPS' disclosures dated 08/23/11, containing a witness list and Exhibits R-01 through R-06, were admitted into evidence without objection.

The sole issue to be determined in this Hearing Officer Determination is as follows:

Whether DCPS denied Student a FAPE by failing to timely provide Student with a school program/placement for the 2011-2012 school year that could implement an IEP with 26.5 hours/week of specialized instruction, 4 hours/month of behavioral support services and 4 hours/month of speech-language services, all outside of general education and in a small, structured setting.

For relief, Petitioners requested a finding that Student was denied a FAPE and that DCPS fund and place Student at _____ Academy PG County, a non-public school, with transportation.

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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, age [redacted] is a special education student with a Specific Learning Disability who attended a public school in the District of Columbia during the 2010-2011 school year.²

#2. When the Multidisciplinary Team met on 05/25/11, the team agreed that Student required 100% specialized instruction outside of general education in a small, self-contained classroom with a small teacher to student ratio.³ Based on Student's cognitive and academic deficits and level of maturity, an IEP was developed that prescribed 26.5 hours/week of specialized instruction, 4 hours/month of speech-language services and 4 hours/month of behavioral support services, with all services to be provided outside of general education.⁴ Without specialized instruction, Student was unable to access the curriculum. Student's IEP also specified that she would graduate from high school with a diploma.⁵ The team agreed that a request for the identification of a location of services for the 2011-2012 school year would be sent to the DCPS least restrictive environment team.⁶

#3. On 08/01/11, DCPS issued a Prior Written Notice to Student's neighborhood school, [redacted] as the location of services where Student's IEP could be implemented.⁷

#4. [redacted] could not implement Student's 05/25/11 IEP because it could not provide Student with 100% specialized instruction in a self contained classroom outside of general education. Although [redacted] was able to provide Student with three classes outside of general education, i.e., resource room instruction, [redacted] had to provide Student with 1-2 core classes in the general education curriculum in order for Student to receive credits towards her high school diploma. In the general education classes, Student did not receive any specialized instruction⁸ and resource classroom instruction at [redacted] would result in Student receiving only partial credits.⁹ Student's class schedule that consisted of a combination of resource room and general education classroom instruction represented the most intensive special education services that Spingarn SHS could provide.¹⁰

#5. [redacted] Academy PG County can implement Student's 05/25/11 IEP and is an appropriate placement for Student. [redacted] Academy PG County is a non-public special education school that has a Certificate of Approval from the District of Columbia Office of the State Superintendent of Education. The school can provide Student with the specialized

² P-1.

SEC.

⁴ P-1, SEC.

⁵ P-1.

SEC.

⁷ R-1.

SEC, Petitioner.

SEC.

SEC, Petitioner.

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instruction and related services prescribed in Student's 05/25/11 IEP in a small school setting and in self-contained classes with a small teacher to student ratio.¹¹

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 overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

"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*, 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The sole issue to be determined is whether DCPS denied Student a FAPE by failing to timely provide Student with a school program/placement for the 2011-2012 school year that could implement an IEP with 26.5 hours/week of specialized instruction, 4 hours/month of behavioral support services and 4 hours/month of speech-language services, all outside of general education and in a small, structured setting.

In accordance with the least restrictive environment provisions of the IDEA, i.e., DCPS must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114. Student's IEP, dated 05/25/11, required that she receive all of her special education services outside of the general education setting.

Pursuant to 34 C.F.R. 300.116, the educational placement of a child with a disability must be a placement decision that is made in conformity with the least restrictive provisions of

¹¹ Director, Academy PG County.

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the IDEA and the child's placement must be based on the child's IEP. "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).

Petitioners met their burden of proof on this issue. "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*, 41 IDELR 119 (2004). In this case, Student's placement was effectively changed by the Prior Written Notice that relocated Student to

Student's program at _____ was materially different from what the IEP prescribed in that Student received classes in the general education setting and this was contrary to the prescription of the IEP that all classes were to be provided outside of general education. The evidence was clear that Student did not receive any specialized instruction in at least one of her core academic classes. Without specialized instruction, Student was unable to access the curriculum. The _____ SEC credibly testified that a core class in the general education setting was necessary in order for Student to receive credits towards a high school diploma. The record revealed that _____ could not provide Student with the necessary instruction outside of general education that would enable her to earn credits towards her high school diploma, as she would receive only partial credits for resource room instruction. The record also revealed that _____ could not provide the level of services prescribed by Student's IEP. The program of classes provided to Student at _____ did not meet the requirements of Student's IEP. Student's IEP could not be implemented at _____ and Student's placement at _____ was inappropriate.

A party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing the IEP, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). See *Catalan ex rel E.C. v. District of Columbia*, 478 F. Supp 2d 73, 75 (D.C.C. 2007). The Hearing Officer determines that Student was denied a FAPE because the services provided to Student at _____ were not provided in accordance with her IEP, as is required by 34 C.F.R. 300.323(c)(2), and the incongruity was material. The evidence was clear that Student could not access the curriculum without specialized instruction. Student was deprived of an educational benefit by DCPS' failure to provide her with 100% specialized instruction as was required by her IEP.

Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student: (1) DCPS schools, or District of Columbia

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public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia. 38 D.C. Code Section 2561.02(c).

The program and placement proposed by Petitioners at Academy PG County is appropriate for Student. School PG County is a non-public school that can implement Student's IEP. It is a school that can provide 100% specialized instruction to Student in a small classroom setting, as is required by Student's IEP. No other public placement was proposed by DCPS.

ORDER

(1) DCPS shall fund and place Student at Academy PG County, with transportation, so that within 30 calendar days of the date of this Order, Student may enroll.

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: September 21, 2011

/s/ Virginia A. Dietrich
Hearing Officer