

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

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

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Student Hearing Office
February 26, 2014

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| STUDENT, ¹ |) | |
| through the Parent, |) | |
| |) | Date Issued: February 25, 2014 |
| Petitioner, |) | |
| |) | Hearing Officer: Virginia Dietrich |
| v. |) | |
| |) | |
| District of Columbia Public Schools |) | |
| |) | |
| Respondent. |) | |
| |) | |

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of _____ Student, filed a due process complaint notice on November 14, 2013, alleging that Student had been denied a free appropriate public education (“FAPE”) by the District of Columbia Public Schools (“DCPS”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that from February 2012 through January 2013, Student’s Individualized Education Program (“IEP”) IEP was insufficient in that it did not comport with a Hearing Officer Determination (“HOD”) and it did not meet Student’s educational need for a full-time therapeutic educational placement, and after January 2013, the IEP did not provide for a therapeutic setting and it had inappropriate goals. Petitioner also alleged that Student’s IEP had not been fully implemented by DCPS from February 2012 through the time of the filing of the amended complaint on 12/12/13. Lastly, Petitioner alleged that since February 2012, DCPS had failed to provide Student with a location of services/school that could implement the full-time therapeutic IEP that Student had needed all along.

DCPS argued that the IEPs were appropriate, the requirements of the HOD were fulfilled and services were delivered in accordance with the IEPs. DCPS also argued that during much of the time period that Petitioner alleges that DCPS denied Student a FAPE, Student was incarcerated out of state. DCPS asserted that Student’s poor performance and failing grades was

¹ Personal identification information is provided in Appendix A.

attributable to his excessive absences from DCPS schools and non-participation in class during the times of his enrollment.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the 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; and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on 11/14/13. A hearing officer was assigned to the case on 11/18/13. DCPS filed a response to the complaint on 11/25/13.

Petitioner waived the resolution meeting, but DCPS did not. The 30-day resolution period ended on 12/14/13, the 45-day timeline to issue a final decision began on 12/15/13 and the final decision was due by 02/25/14.

A prehearing conference was held on 12/04/13. At the time of the prehearing conference, a resolution meeting had not occurred. At the prehearing conference, Petitioner’s Attorney advised that Petitioner intended to amend the complaint. A Prehearing Order was issued on 12/04/13.

On 12/04/13, Petitioner filed Petitioner’s First Amended Due Process Complaint Notice. DCPS did not file a response to the motion. On 12/12/13, the assigned hearing officer issued an Order on Petitioner’s Motion To Amend and Second Prehearing Notice & Order, granting Petitioner’s motion and establishing a new timeline pursuant to 34 C.F.R. 300.508(d)(4). With the granting of the motion, the effective filing date of the complaint became 12/12/13, the 30-day resolution period ended on 01/11/14 and the final decision due date was 02/25/14. DCPS filed a response to the amended complaint on 12/23/13.

The case was reassigned to the undersigned Hearing Officer on 12/18/13.

On 12/16/13, Petitioner filed a Consent Motion to Reschedule Date of Due Process Hearing. On 12/19/13, DCPS filed Respondent Motion For Correction Of Petitioner To Reschedule Due Process Hearing. On 12/31/13, the undersigned Hearing Officer issued an Order on Consent Motion to Reschedule Date of Due Process Hearing and on Respondent Motion for Correction of Petitioner to Reschedule Due Process Hearing.

A second prehearing conference took place on 12/23/13. A Second Prehearing Order was issued on 12/23/13. An Amended Second Prehearing Order was issued on 12/31/13.

A resolution meeting took place on 01/14/14, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing.

On 01/28/14, DCPS filed District of Columbia Public Schools' Partial Motion To Dismiss Petitioner's Due Process Complaint, challenging the Hearing Officer's jurisdiction to decide Issues #1 and #2 of the complaint. On 01/29/14, Petitioner's Opposition to DCPS' Partial Motion to Dismiss was filed. On 02/09/14, an Order on DCPS' Partial Motion to Dismiss Petitioner's Due Process Complaint was issued. The Order denied DCPS' motion.

The due process hearing was scheduled for 02/12/14 and 02/13/14. On 02/11/14, parties agreed to begin and end their cases on 02/12/14 due to incoming inclement weather that was expected to result in closure of the Student Hearing Office on 02/13/14.

The due process hearing took place on 02/12/14. Petitioner was represented by Alana Hecht, Esq. DCPS was represented by Tanya Chor, Esq. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person until 3:00 p.m., at which time Petitioner was excused. Both parties rested their cases at approximately 5:30 p.m. on 02/12/14. In the interests of time, both parties agreed to submit closing arguments no later than 5:00 p.m. on 02/18/14. Both Petitioner and DCPS timely submitted written closing arguments on 02/18/14.

Petitioner's Disclosure Statement, dated 02/05/14, consisted of a witness list of six (6) witnesses and documents P-1 through P-28. Petitioner's disclosures were admitted into evidence without objection.

DCPS' Disclosure Statement, dated 02/05/14, consisted of a witness list of six (6) witnesses and documents R-1 through R-7. DCPS' Disclosure Statement was revised to conform to page labeling requirements specified by the Second Prehearing Order and re-filed on 02/12/14. The content of DCPS' re-filed disclosures was identical to the initial filing. DCPS' re-filed Disclosure Statement was admitted into evidence without objection.

Petitioner presented the following three (3) witnesses in her case in chief: (1) Education Director at School D; (2) paralegal; and (3) senior educational advocate who qualified as an expert in special education relating to the development of IEPs and development of educational programming for students with special needs ("advocate/expert"). Petitioner presented no rebuttal evidence.

DCPS presented one witness: (1) special education coordinator ("SEC")/Local Education Agency("LEA") representative at School C who qualified as an expert in appropriate programming and behavioral interventions for students with Emotional Disabilities who are truant ("SEC/LEA").

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

Issue #1 – Whether DCPS denied Student a FAPE by failing to implement the Hearing Officer Determination ("HOD") dated 02/12/12; specifically, the Individualized Education Program ("IEP") that was developed on 02/22/12 failed to include the following provisions that were ordered by the HOD: (a) a therapeutic setting, (b) small group special education instruction

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in all academic subjects for the entirety of each academic classroom period during the school day; and (c) behavioral support services that included immediate crisis intervention as necessary.

Issue #2 - Whether DCPS denied Student a FAPE by failing to develop an IEP on 02/22/12 that was designed to meet Student's educational needs, in that the IEP failed to include (a) a therapeutic setting, (b) small group specialized instruction in all academic subjects for the entirety of each academic classroom period, (c) behavioral support services that included immediate crisis intervention as necessary; all of which were required by the 02/12/12 HOD and Student's current behavioral and academic needs, and (d) goals and present levels of performance that were sufficient to reflect Student's educational needs.

Issue #3 – Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on 01/31/13; specifically, the IEP failed to include (a) a therapeutic setting, (b) small group specialized instruction in all academic subjects for the entirety of each academic classroom period, (c) behavioral support services that included immediate crisis intervention as necessary; all of which were required by the 02/12/12 Hearing Officer Determination, and (d) goals and present levels of performance that were sufficient to reflect Student's educational needs.

Issue #4 – Whether DCPS denied Student a FAPE by failing to implement Student's 01/31/13 IEP; specifically, the IEP was not implemented at DCPS School B during the 2012/13 school year and not implemented at DCPS School C during the 2013/14 school year, in that each school failed to provide the full amount of specialized instruction outside of general education that was required by the IEP, which contributed to the poor academic and behavioral performance of Student.

Issue #5 – Whether DCPS denied Student a FAPE by failing to provide Student with a location of services during the 2012/13 school year and the 2013/14 school year that could service an IEP that required (a) all specialized instruction in academic areas to be provided outside of general education, (b) a therapeutic setting, (c) specialized instruction in a small group setting, and (d) behavioral support services that required crisis intervention, as necessary.

Issue #6 – Whether DCPS denied Student a FAPE by failing to provide Prior Written Notice (a) when DCPS told Student to attend DCPS School C at the beginning of the 2013/2014 school year, and (b) when Student's IEP was revised on 01/31/13 to reflect a different educational placement that consisted of more specialized instruction outside of general education.

Petitioner requested the following relief:

- (1) A finding of a denial of a FAPE on the issues presented;
- (2) DCPS to fund tuition and transportation at nonpublic School D;
- (3) DCPS to revise Student's IEP to include a therapeutic setting, small group instruction, crisis intervention as necessary, and appropriate goals and levels of performance; and
- (4) An award of compensatory education consisting of at least 2 credit recovery classes to address Student's lack of academic progress, 100 hours of tutoring, and 50 hours of

mentoring to address the harm to Student's self-esteem, to compensate Student for (a) missed instruction in a small group, therapeutic setting from 02/22/12 through the time of the filing of the amended complaint, and (b) missed specialized instruction due to DCPS' failure to provide the required amount of specialized instruction outside of general education during the 2012/13 and 2013/14 school years.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

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 is fifteen years old and a resident of the District of Columbia. Petitioner is Student's mother.² At all relevant times, Student was a child with a disability.

#2. On 02/12/12, a Hearing Officer Determination ("HOD") was issued that ordered: (1) DCPS to convene an IEP Team meeting within 10 days and revise Student's IEP to reflect an educational placement that is "therapeutic" and will provide the Student with small group special education instruction in all academic subjects for the entirety of each academic classroom period during the school day; (2) Such educational placement shall provide the Student with behavioral support services for one hour per week; (3) Such educational placement shall provide the Student with immediate behavioral support services if the Student threatens others or threatens himself during the school day; (4) Such educational placement shall have counselors that are qualified to provide counseling to school students; and (5) Such placement may be in a public school operated by DCPS.³ The HOD did not define the word "therapeutic" or "educational placement."

#3. Therapeutic means a supportive and consistent program where the entire staff work together to help a student change behaviors.⁴ A therapeutic environment is one where students with behavioral problems and emotional concerns have services available to them that includes counseling to address a crisis.⁵

#4. On 02/22/12, the Multidisciplinary Team met in fulfillment of the HOD and developed an IEP for Student. Neither Petitioner nor Student attended the meeting. Student was classified with a Specific Learning Disability.⁶ The 02/22/12 IEP prescribed the following services for Student: 10 hours/week of specialized instruction outside of general education and 1 hour/week of behavioral support services outside of general education, and reading instruction in a small, pull-out setting for 45 minutes/day to address difficulties with reading. Student's IEP stated that Student responded much better in a small group cooperative or one-on-one setting and

² Petitioner.

³ P-9-29.

⁴ Advocate/expert.

⁵ SEC/LEA.

⁶ P-11-1.

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those settings should be utilized as much as possible with Student in his inclusion setting in the academic areas of mathematics, reading, and written expression.⁷ The 02/22/12 IEP complied with the academic educational requirements of the HOD Order. The 02/22/12 IEP also complied with the HOD requirement that Student was to receive 1 hour/week of behavioral support services. One of the emotional/social/behavioral support goals on Student's IEP was that Student develop a therapeutic relationship with his behavioral support services provider. The IEP also provided for the development of an incentive program to improve Student's attendance, motivation, completion of class assignments and improvement with social interactions towards peers and adults.⁸

#5. The 02/22/12 IEP was developed while Student was enrolled at DCPS School A.⁹ Student was withdrawn from DCPS School A on 04/10/12 and transferred to a public school outside of the District of Columbia. Student's next reenrollment in DCPS was on 11/05/12 when he began attending DCPS School B.¹⁰

#6. There was no evidence in the record about the type or quantity of IEP services provided to Student or about Student's academic adjustment while Student attended DCPS School A from 02/22/12 through 04/10/12.

#7. On 01/31/13, while Student attended DCPS School B, the IEP team met and conducted an annual review of Student's IEP. Student, Petitioner and Petitioner's advocate were in attendance.¹¹ At that time, Student had 36 unexcused absences.¹² Student's special education teacher hadn't seen him during the entire month of January 2013.¹³ The IEP, consisting of 7.5 hours/week of specialized instruction in reading, 2.5 hour/week¹⁴ of written expression, 5 hours/week of mathematics, 10 hours/week of specialized instruction and 1 hour/week of behavioral support service, with all services to be provided outside of general education, was considered to be a full-time IEP.¹⁵ At the meeting on 01/31/13, Petitioner asked for and received an IEP with full-time instruction outside of general education.¹⁶ All team members, including Petitioner, agreed with the full-time outside of general education IEP.¹⁷

#8. No formal Prior Written Notice of the changes made in Student's educational program that resulted in the full-time 01/31/13 IEP, was issued by DCPS; however, at the 01/31/13 meeting, Petitioner was provided with a copy of the 01/31/13 IEP that contained the changes requested by Petitioner. Petitioner was satisfied with the IEP at that time.¹⁸

⁷ P-10-3, P-10-6, P-10-9.

⁸ P-10-11.

⁹ P-11-13.

¹⁰ P-4-3.

¹¹ P-12-1, P-13.

¹² P-13-1.

¹³ P-13.

¹⁴ The IEP stated 2.5 minutes/week, an obvious error.

¹⁵ Paralegal, advocate/expert, SEC/LEA.

¹⁶ P-13-5.

¹⁷ P-12-7, P-13-5, advocate/expert.

¹⁸ Advocate/expert.

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#9. The 01/31/13 IEP did not contain any baseline data because none was available to the IEP Team. Student's absences and refusal to complete assignments prevented the collection of relevant and current data. Student had excessive absences and received some failing grades.¹⁹ At the conclusion of the IEP Team meeting on 01/31/13, both DCPS and Petitioner agreed that due to the lack of current assessment data, the best course of action was to complete an educational assessment of Student, complete a Functional Behavioral Assessment to determine the underlying reasons for Student's behaviors that interfered with learning, and then develop a Behavior Intervention Plan that would address Student's behaviors.²⁰ Meanwhile, Student's IEP had been amped up to provide Student with full-time special education services. This agreed upon plan of action to get a handle on the breadth and scope of Student's educational needs could not be carried out because Student became incarcerated out of state.²¹

#10. Student again left DCPS in March/April 2013, as a result of detention in a juvenile detention facility in another state.²² Student reenrolled in DCPS School C in Aug/Sept 2013 following his release from that out of state juvenile detention.²³ However, Student again was detained in an out of state juvenile detention facility for an unknown period of time between Aug/Sept 2013 and 11/12/13,²⁴ and then again for a two-week period beginning on or about 11/12/13.²⁵ Student's next subsequent reenrollment in DCPS School C occurred on 12/11/13.²⁶ During the periods of time that Student was incarcerated out of state, Student received educational services from the school associated with the juvenile detention facility.²⁷

#11. Student's lack of regular attendance in class and/or school at DCPS School C and his refusal to complete assignments while in class, from the beginning of the 2013/14 school year through 12/12/13 (date of amended complaint) prevented Student from taking advantage of any services offered and making progress towards his IEP goals.²⁸ Student's absences were directly correlated to receiving failing grades.²⁹

#12. DCPS School C was capable of implementing Student's 01/31/13 IEP.³⁰ Student rarely attended DCPS School C, but when Student did attend, DCPS provided specialized instruction and behavior support services to Student in accordance with Student's IEP when Student was present and receptive to receiving services. At DCPS School C, Student's educational program consisted of a self-contained program with classrooms populated by a special education teacher, two aides and no more than 12 students. The special education coordinator, teachers and psychologists were available on a daily basis to assist with crisis intervention. Behavioral technicians and instructional aides were both trained in de-escalation

¹⁹ P-4-5, P-4-6, P-14-11.

²⁰ P-13-3, paralegal, advocate/expert.

²¹ Paralegal.

²² Paralegal.

²³ Petitioner, R-4-1.

²⁴ R-6-7,

²⁵ Paralegal, R-1-2.

²⁶ P-2-15.

²⁷ R-1-2.

²⁸ R-6-1, SEC/LEA.

²⁹ P-4-5, P-5-2, SEC/LEA.

³⁰ SEC/LEA.

and crisis intervention. Additionally, instructional aides were qualified to modify the instruction provided by the general education teacher and assist students with completing assignments. The instructional aides accompanied special education students to their elective classes that were taught by general education teachers and the instructional aides provided instructional support to students.³¹

#13. DCPS School C had a truancy counselor and licensed social workers that were available on a daily basis to provide counseling and assist with crisis intervention. The school also had a crisis intervention room where Student could deescalate with the assistance of staff. DCPS School C was capable of providing special education services outside of general education to Student³² and did provide special education services outside of general education to Student when he was present in school to receive the services.³³

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 first issue to be determined is whether DCPS denied Student a FAPE by failing to implement the Hearing Officer Determination (“HOD”) dated 02/12/12; specifically, the Individualized Education Program (“IEP”) that was developed on 02/22/12 failed to include the following provisions that were ordered by the HOD: (a) a therapeutic setting, (b) small group special education instruction in all academic subjects for the entirety of each academic classroom

³¹ SEC/LEA.

³² P-13.

³³ P-13-1, advocate/expert.

period during the school day; and (c) behavioral support services that included immediate crisis intervention as necessary.

A parent may file a complaint on any matter relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. 34 C.F.R. 300.507(a).

Free appropriate public education or FAPE means special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate school and are provided in conformity with the IEP. 34 C.F.R. 300.17.

“Educational placement” means educational program, not the particular institution where that program is implemented.” *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), 39 IDELR 182. A placement is not a physical location, but a program of educational services offered to the student. *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992).

“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).

Petitioner failed to meet her burden of proof that Student was denied a FAPE because the 02/22/12 IEP did not comport with the HOD. The HOD specified that the IEP should include small group instruction in all academic classes throughout the day. The HOD did not specifically state that all services were to be provided outside of general education, as argued by Petitioner. The HOD only stated that Student was to receive small group instruction in every academic class throughout the day. Student’s IEP prescribed 10 hours/week of specialized instruction outside of general education and the services to be provided within general education were to be provided in a small group cooperative or one-on-one setting and those settings were to be utilized as much as possible with Student in the inclusion setting in the academic areas of mathematics, reading and written expression. The IEP provided for 1 hour/week of behavioral support services outside of general education, as required by the HOD. The Hearing Officer determines that the IEP complied with the academic educational requirements and the 1 hour/week of behavioral support requirements of the HOD.

“Therapeutic” was not specifically defined in the HOD. Therapeutic means a supportive and consistent program where the entire staff work together to help a student change behaviors.³⁴ A therapeutic environment is one where students with behavioral problems and emotional concerns have services available to them that includes counseling to address a crisis. The 02/22/12 IEP did not expressly contain a provision that Student be provided with immediate behavioral support services if he threatened to harm himself or others. However, the IEP included a emotional/social/behavioral support IEP goal for Student to develop a therapeutic relationship with his behavioral support services provider. The IEP also provided for the development of an incentive program to improve Student’s attendance, motivation, completion

³⁴ Advocate/expert.

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of class assignments and improvement with social interactions towards peers and adults. The Hearing Officer determines that the 02/22/12 IEP provided for therapeutic support services for Student.

There was no evidence in the record that the locations of services, either DCPS School A or DCPS School B did not have crisis intervention services available. If failure to include specific crisis intervention services on Student's 02/22/12 IEP was arguably a deviation from the HOD, it was not a material one. Student had behavioral support services available to him outside of the general education setting and one of his goals on the IEP was for Student to develop a therapeutic relationship with his behavioral support services provider. One may infer that the behavioral support services provider could and would provide crisis intervention. The actual implementation of crisis intervention would be more telling; however, there was no evidence in the record of any behavioral incidents that occurred while the 02/22/12 IEP was in effect. And, if it were later determined that the lack of specific crisis intervention services on Student's IEP was a material deviation, Petitioner failed to show any harm. There was no evidence in the record that the type of situation occurred where Student needed to avail himself of direct and immediate behavioral support or crisis intervention services and it was unavailable to him.

DCPS School C had crisis intervention services available that could be provided even though crisis intervention wasn't a specific component of Student's 01/31/13 IEP. Therefore, the Hearing Officer cannot conclude that simply because the 02/22/12 IEP did not specifically state that Student was entitled to crisis intervention services, that Student was not provided with it while the 02/22/12 IEP was in effect, and therefore denied a FAPE. The record was devoid of evidence about the actual services provided to Student while the 02/22/12 IEP was in effect at both DCPS School A and DCPS School B.

The HOD stated that the educational placement was to have counselors that were qualified to provide counseling to students. There was no evidence in the record that DCPS School A or DCPS School B did not have counselors available to provide counseling.

Petitioner failed to meet her burden of proof on the totality of Issue #1.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to develop an IEP on 02/22/12 that was designed to meet Student's educational needs, in that the IEP failed to include (a) a therapeutic setting, (b) small group specialized instruction in all academic subjects for the entirety of each academic classroom period, (c) behavioral support services that included immediate crisis intervention as necessary; all of which were required by the 02/12/12 HOD and Student's current behavioral and academic needs, and (d) goals and present levels of performance that were sufficient to reflect Student's educational needs.

The IEP is a written statement for each child with a disability that includes a statement of the child's present levels of academic achievement and functional performance; and a statement of measureable annual goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and a statement of the special education and related services and supplementary aids and services that will be provided to enable the child to advance appropriately toward attaining

the annual goals and to be involved in and make progress in the general education curriculum. 34 C.F.R. 300.320.

For an IEP to be appropriate, it must be “reasonably calculated to enable the child to receive educational benefits.” *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176, 206-207 (1982).

Petitioner failed to meet her burden of proof on (a), (b), (c) of Issue #2, for the reasons stated above in Issue #1. The Hearing Officer determines that Student’s 02/22/12 IEP was reasonably calculated to confer educational benefit. Student was hardly available to receive IEP services due to out of state detention in a juvenile facility and absences from class when he was not detained out of state. Under these circumstances, it was impossible to ascertain the effectiveness of the implementation of the IEP. It was virtually impossible to determine what Student’s educational needs were; he was hardly available to receive services.

Petitioner also failed to meet her burden of proof that the Student was denied a FAPE due to insufficient goals and present levels of performance on the 02/22/12 IEP. There was no evidence in the record about Student’s aptitude or performance in school from 02/22/12 through December 2012. For most of that time period, Student was in an out of state juvenile detention facility. And, from January 2013 until his next juvenile detention in March/April 2013, Student had excessive absences from class and did not turn in class work. At the 01/31/13 IEP meeting, all members of the team agreed that there was insufficient data to determine Student’s needs. That is why the team decided to conduct assessments so that the IEP could be revised to reflect Student’s actual academic performance.

With respect to aspect (d) of Issue #2, it was clear from the evidence that Student’s excessive absences and unwillingness to turn in class work and homework interfered with data collection from January 2013 through March/April 2013 and since the beginning of the 2013/14 school year. Therefore, a baseline for measurement of performance and achievement could not be ascertained.

The Hearing Officer determines that the IEP goals could not be deemed inappropriate absent a current baseline of functioning, which was impossible to ascertain due to Student’s history of absences from school and class and due to his failure to complete homework and class assignments. Petitioner failed to meet her burden of proof on Issue #2(d).

The third issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP on 01/31/13; specifically, the IEP failed to include (a) a therapeutic setting, (b) small group specialized instruction in all academic subjects for the entirety of each academic classroom period, (c) behavioral support services that included immediate crisis intervention as necessary; all of which were required by the 02/12/12 Hearing Officer Determination, and (d) goals and present levels of performance that were sufficient to reflect Student’s educational needs.

Petitioner failed to meet her burden of proof on Issue #3. On 01/31/13, the IEP requirements mandated by the 02/22/12 IEP were just about stale. Per 34 C.F.R. 300.324(b)(1),

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the IEP must be reviewed annually to determine the child's progress towards attaining the goals and revised as necessary to address any lack of expected progress. On 01/31/13, the IEP team was entitled to take a fresh look at Student's academic progress and design a new educational program as necessary. The IEP team was not required to follow the specifications of the 02/12/12 HOD and the 02/22/12 IEP in perpetuity.

Student was only in DCPS School B from the development of the 01/31/13 IEP through March/April 2013. Subsequently, he was incarcerated through the end of that academic year. The record was not clear as to how many days Student actually was enrolled in a DCPS school from the beginning of the 2013/14 school year through the date that the amended complaint was filed, i.e., 12/12/13. Student was incarcerated twice during that time period; once for an unknown period of time and then for two weeks beginning on or about 11/12/13. The record was clear through documentation and the credible testimony of the SEC/LEA at DCPS School C that Student's excessive absences from school interfered with him being able to take advantage of the services offered. Student's educational needs could not be assessed because he was not present in a DCPS school long enough for them to be assessed. The Hearing Officer determines that it was impossible to conclude that Student's 01/31/13 IEP was inappropriate for any reason; Student wasn't in school enough for the IEP to be implemented in such a way that the effectiveness or appropriateness of the services could be measured. That is why on 01/31/13, the IEP team decided to conduct assessments in order to determine the breadth and scope of Student's educational needs.

The 01/31/13 IEP provided Student with full-time specialized instruction outside of general education, thereby negating Petitioner's allegation that the IEP failed to provide for small group specialized instruction in all academic subjects for the entirety of each academic classroom period. This was the IEP that Petitioner requested on that date and her request was granted. Any challenges to the appropriateness of the 01/31/13 IEP fall on deaf ears. The record was clear that on 01/31/13, Petitioner and her advocates were satisfied with the full-time IEP.

The testimony of both Petitioner's advocate and expert was credible that at the 01/31/13 IEP meeting, the IEP Team, including Petitioner and Petitioner's representatives, all agreed that current data was not available to develop current and appropriate goals due to the absence of baseline data. Due to Student's absences and not turning in schoolwork and homework, no current data was available to determine whether or not the existing goals were appropriate or needed to be revised. The record was also clear and convincing that on 01/31/13, Petitioner and her advocates fully agreed with the decision to conduct academic achievement assessments in order to ascertain Student's current levels of academic performance.

The fourth issue to be determined is whether DCPS denied Student a FAPE by failing to implement Student's 01/31/13 IEP; specifically, the IEP was not implemented at DCPS School B during the 2012/13 school year and not implemented at DCPS School C during the 2013/14 school year, in that each school failed to provide the full amount of specialized instruction outside of general education that was required by the IEP, which contributed to the poor academic and behavioral performance of Student.

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Each public agency must ensure that as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. 34 C.F.R. 300.323(c)(2).

Student was only enrolled at DCPS School B for a maximum of two months while the 01/31/13 IEP was in effect, i.e, through Feb-Mar 2013. From Feb or Mar 2013 through the end of the 2012/13 school year, Student was detained in a juvenile detention facility in another state, during which time Student received educational services through the detention facility. While Student was incarcerated in another state, DCPS was not responsible for providing Student with special education services.

Petitioner's witnesses, both the advocate/expert and the paralegal, were not credible that at the conclusion of the 01/31/13 IEP meeting, DCPS School B indicated that it could not service an IEP that required all specialized instruction to be provided outside of general education, gave no alternative location of services and intimated that Petitioner should file a due process complaint. Neither the advocate/expert's notes nor the paralegal's notes reflected such an important statement about the inability of DCPS to implement the IEP.³⁵ The advocate testified that her notes were a fair and accurate representation of what transpired at the meeting, yet her notes failed to include that very important detail that Student's IEP could not be implemented at DCPS School B.

The record contains no information about what services were provided to Student from 01/31/13 until Mar or April 2013, when Student became incarcerated out of state. Without that specific information, it is impossible for the Hearing Officer to determine whether or not the failure to implement the IEP claim could be substantiated, whether or not it was a material failure if there was a failure to implement the IEP, and whether or not Student suffered educational harm as a result.

The advocate's testimony also was not believable that she requested the 01/31/13 IEP meeting because someone from a nonpublic vocational school had contacted her stating that DCPS School B was inappropriate for Student. Nowhere in the advocate's notes was the nonpublic vocational school mentioned as a possible school placement for Student.

Petitioner failed to meet her burden of proof that DCPS School B was incapable of implementing Student's 01/31/13 IEP or that DCPS School B did not make the IEP services available to Student. Student's failing grades were due to his excessive absences and non-performance when present.

The SEC/LEA testified knowledgeably and credibly that Student's 01/31/13 IEP could be implemented at DCPS School C and that the services in Student's IEP were made available to Student when he was present in school and willing to take advantage of the services offered. Petitioner offered no evidence to counter the testimony of the SEC/LEA.

While Student's elective courses of Physical Education, Art and ROTC at DCPS School C were taught by a general education teacher, the electives were taught in a self-contained

³⁵ See P-13.

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environment of special education students with a trained instructional aide available to help students with understanding the class curriculum, if necessary. Although this instruction is arguably a technical deviation from the IEP in that the teacher was not a special education teacher, the Hearing Officer determines that it was not a material deviation from the IEP. Specialized instruction was provided to students by the instructional aides. Moreover, Petitioner offered no proof of harm. Student was hardly available to receive the services. There was no evidence in the record that Student actually attended any elective class.

Petitioner failed to meet her burden of proof on the totality of Issue #4.

The fifth issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with a location of services during the 2012/13 school year and the 2013/14 school year that could service an IEP that required (a) all specialized instruction in academic areas to be provided outside of general education, (b) a therapeutic setting, (c) specialized instruction in a small group setting, and (d) behavioral support services that required crisis intervention, as necessary.

DCPS is required to provide Student with a location of services or school that can implement his IEP. 34 C.F.R. 300.17.

Petitioner failed to meet her burden of proof on the totality of Issue #5. As discussed under Issue #4 herein, Petitioner's witnesses were not believable that the 01/31/13 IEP could not be implemented at DCPS School B. The evidence in the record was clear and convincing that Student's IEP could be implemented at DCPS School C.

The sixth issue to be determined is whether DCPS denied Student a FAPE by failing to provide Prior Written Notice (a) when DCPS told Student to attend DCPS School C at the beginning of the 2013/2014 school year, and (b) when Student's IEP was revised on 01/31/13 to reflect a different educational placement that consisted of more specialized instruction outside of general education.

34 C.F.R. 300.503(a) states that written notice must be given to the parents of a child with a disability a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child, and 34 C.F.R. 300.503(b) states that the notice must include a description of the action proposed or refused by the agency... a description of each evaluation procedure, assessment, record, or report the agency used as a basis of the proposed or refused action... a description of other options that the IEP Team considered and the reasons why those options were rejected... and a description of other factors that are relevant to the agency's proposal or refusal.

(a) Petitioner failed to meet her burden of proof that Student was denied a FAPE by DCPS' failure to provide Petitioner with Prior Written Notice that Student was required to attend DCPS School C. The testimony of the advocate/expert was credible that when Student was released from detention in a juvenile detention facility in another state, Petitioner, on her own volition, enrolled Student at DCPS School C because Student's previous school, DCPS School B, had closed. DCPS did not provide DCPS School C as Student's location of services for the

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2013/14 school year. The Hearing Officer determines that no Prior Written Notice was required because the location of services was not designated by DCPS. And even if it was, the location of services is an administrative decision that can be made solely by DCPS provided that the location of services is able to implement Student's IEP. DCPS School C was capable of implementing Student's 01/31/13 IEP. Petitioner was totally satisfied with the services in Student's 01/31/13 IEP.

While the IDEA requires parental participation in educational placement decisions, it does not mandate that parents be involved with site selection. *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), 39 IDELR 182. Therefore, a change in site location is an administrative decision solely within the discretion of DCPS provided that the assignment is made consistent with the child's IEP and the decision of the group determining placement. Federal Register, Vol. 71, No. 156, p. 46,588 (2006).

(b) Petitioner and two of Petitioner's representatives attended the meeting where the 01/31/13 IEP was created. Petitioner sought a full-time IEP and DCPS agreed to a full-time IEP. The changes to the IEP were discussed by all and agreed to by all. Petitioner had no disagreement with the finalized IEP. The Hearing Officer determines that the IEP itself constituted sufficient notice of the changes to Student's educational placement. Even if the lack of an actual Prior Written Notice were to be determined to be a procedural violation of the IDEA, no harm was shown. Petitioner's right to participate in decision making was not impeded; she fully participated in the decision making meeting and was totally satisfied with the outcome. The 01/31/13 IEP increased Student's services to a full-time services outside of general education; therefore, Student was not deprived of an educational right or benefit. Petitioner failed to meet her burden of proof on this aspect of Issue #6 as well.

ORDER

Petitioner failed to meet her burden of proof on all of the issues presented.

This complaint is **DISMISSED WITH PREJUDICE**.

All requested relief is denied.

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).

2013-0637
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Date: February 25, 2014

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:
Petitioner: (U.S. mail)
Petitioner's Attorney: Alana Hecht, Esq. (electronically)
DCPS' Attorney: Tanya Chor, Esq. (electronically)
DCPS (electronically)
SHO (electronically)