

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

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

OSSE
STUDENT HEARING OFFICE
201 FEB 25 AM 9:35

STUDENT,¹
through the Parent,

Petitioner,

v.

District of Columbia Public Schools,

Respondent.

Date Issued: February 24, 2011

Hearing Officer: Virginia A. Dietrich

Case No:

Hearing Dates: 02/15/11 Room: 2009

02/16/11 Room: 2009

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of Student, filed a due process complaint notice on 12/22/10, alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA").

Petitioner complained that the District of Columbia Public Schools ("DCPS") denied Student a FAPE by failing to finalize Student's Individualized Education Program ("IEP") within a four (4) weeks period of time and by failing to provide Student with the therapeutic day program that the Multidisciplinary Team ("MDT") determined she needed on 12/03/10. For relief, Petitioner requested that DCPS place and fund Student in a non-public school and that Student receive an award of compensatory education.

DCPS, contesting that it had denied Student a FAPE, argued that Petitioner's gripe with DCPS was over an appropriate location of services that could implement Student's 01/13/11 IEP. DCPS did not dispute that on 12/03/10, the MDT that included Petitioner, agreed that Student was in need of full-time specialized instruction in a program with intensive behavior monitoring supports, and that Student's current high school could not provide such a program. DCPS asserts that it involved Petitioner in the decision making process by offering Petitioner choices with respect to school locations where the IEP could be implemented and did so within a reasonable amount of time. DCPS also asserts that it can provide a location of services in the least restrictive environment ("LRE") in a District of Columbia public school.

¹ Personal identification information is provided in Appendix A.

Hearing Officer Determination

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 E30, of the District of Columbia Municipal Regulations ("D.C.M.R."); and 38 D.C. Code 2561.02.

Procedural History

This Hearing Officer was assigned to the case on 12/23/10. A resolution meeting took place on 01/21/11, which was the last day of the 30-day resolution period. As a result, there was no adjustment to the timeline prescribed by IDEA at 34 C.F.R. 300.510; 300.515. Thus, the 45-day timeline to issue a final decision began on 01/22/11, with the hearing officer final decision due no later than 03/07/11.

A prehearing conference was held on 01/20/11, and a Prehearing Order was issued on 01/25/11 that specified that failure to object in writing to the disclosures of the opposing party by the close of business on 02/11/11 would result in the disclosures being admitted into evidence without objection. Neither party filed written objections to disclosures and neither party objected to the contents of the Prehearing Order within the three business days prescribed by the Prehearing Order.

The due process hearing was a closed hearing that began on 02/15/11 and concluded on 02/16/11. Petitioner was represented by Zachary Nahass, Esq. of James E. Brown & Associates and DCPS was represented by Harsharen Bhuller, Esq.. Neither party objected to the testimony of witnesses via telephone.

Petitioner presented the following six witnesses: Student (in person); Petitioner (in person); Petitioner's educational advocate (in person); a psychologist who qualified as an expert in clinical psychology (via telephone); the psychiatrist who conducted the independent psychiatric evaluation dated 10/30/10 (via telephone); and the Education Program Coordinator for The [redacted] in Laurel, MD (via telephone). DCPS presented the following four witnesses: a DCPS compliance case manager (via telephone); the Assistant Principal at [redacted] (via telephone); the Special Education Coordinator ("SEC") at [redacted] (via telephone); and the Academic Coordinator at [redacted] (in person).

At the start of the due process hearing, Petitioner objected to the introduction of one of the witnesses timely disclosed by DCPS; i.e., the witness who would provide testimony about the programming and services offered at [redacted] DCPS' disclosures specifically stated what this witness' testimony would be, so there was no surprise to Petitioner's Attorney who received the disclosures on 02/08/11. Petitioner herself was unaware that [redacted] was a proposed location of services until the morning of the due process hearing, and Petitioner felt at a disadvantage because she had not had the opportunity to view the program at [redacted] The Hearing Officer

Hearing Officer Determination

offered Petitioner the opportunity to continue the case so that Petitioner could have full knowledge of all proposed programs and location of services prior to proceeding with the due process hearing, but Petitioner declined.

As well, DCPS objected to the introduction of Petitioner's witness from The DCPS' Attorney asserted that at the time of the prehearing conference, Petitioner's Attorney identified _____ as the location of services that she would seek funding for, and now Petitioner was seeking funding for Student to attend an entirely different non-public school, i.e., The _____. Despite both sides having received the opposing party's disclosures in a timely manner, both sides claimed unfair surprise by the contents of the disclosures.

Pursuant to 34 C.F.R. 300.512(a)(3), each party has the right to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five business days before the hearing. In this case, both parties timely filed disclosures in accordance with the deadline established by the Prehearing Order and both parties were on notice of the other party's intent to introduce specific evidence. Neither party objected in writing to the disclosures as was required by the Prehearing Order. Both party's objections were overruled, and the due process hearing proceeded.

Petitioner's disclosures dated 02/08/11, containing a witness list and Exhibits P-1 through P-23, timely filed and not objected to in writing by 02/11/11, were admitted into evidence without objection. Petitioner's supplemental disclosures dated 02/09/11, containing a witness list, was admitted into evidence without objection from DCPS. DCPS' disclosures dated 02/08/11, containing a witness list and Exhibits R-1 through R-10, timely filed and not objected to in writing by 02/11/11, were admitted into evidence without objection. Student's Attendance Summary from 16 Aug 2010 to 14 Feb 2011, was admitted into evidence as Hearing Officer Exhibit #1.

Parties were able to agree upon the following stipulations:

Stipulation #1 – The 01/13/11 IEP (P-10) reflects the service hours agreed upon at the 12/03/10 MDT meeting.

Stipulation #2 – _____ was not capable of providing 27.5 hours/week of specialized instruction.

Stipulation #3 – On 12/03/10, the MDT agreed that Student required 27.5 hours/week of specialized instruction and this level of services represented an increase from 20 hours/week of specialized instruction.

Stipulation #4 – As of 12/03/10, the MDT agreed that Student required a full-time therapeutic day placement.

Both parties presented opening and closing statements.

Hearing Officer Determination

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

Whether DCPS failed to develop an appropriate IEP by failing to classify Student as Emotionally Disturbed ("ED"), beginning on 12/03/10².

Whether DCPS failed to provide Student with an appropriate placement at beginning on 12/03/10.

For relief, Petitioner requests a finding of a denial of a FAPE on the above stated issues; DCPS to provide funding for Student to attend The _____ with transportation; DCPS to convene a MDT meeting within thirty (30) days of Student's enrollment at The _____ to review and revise Student's IEP as appropriate; and the Hearing Officer to grant an award of compensatory education for Student being denied a FAPE as a result of DCPS' failure to provide Student with an appropriate placement since 12/03/10.

During the due process hearing, Petitioner had the opportunity to present rebuttal evidence, but the Hearing Officer ruled that Petitioner was not allowed to present rebuttal evidence in the form of the testimony of a parent of an unrelated student who was not successful in the program at _____. There was already evidence in the record from the Academic Coordinator at _____ that not all students who attend _____ are successful in the program. Additionally, the Hearing Officer deemed irrelevant the experiences of an unrelated student with an alleged similar behavioral profile, to the determination of whether or not _____ was an appropriate location of services for the implementation of Student's IEP.

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. Stipulations #1 - #4 are incorporated as findings of fact.

#2. During the 2010-2011 school year, Student attended the _____ grade at _____ a high school of over 1500 students with 190 students in the special education setting. Although _____ can provide specialized instruction in a self contained classroom for the core content classes, it can only provide up to 20 hours/week of specialized instruction or up to 24 hours/week if specialized instruction includes learning lab.³ During the 2010-2011 school year, Student was not a behavior problem in the classroom or in the hallways; she simply cut classes or didn't go to school.⁴ _____ did not have intensive behavior monitoring supports.⁵ Student would simply leave the classroom and nothing would be done about it by school personnel.⁶

² At the due process hearing, Petitioner withdrew the allegation that DCPS had failed to provide Student with a dedicated aide beginning on 12/03/10, as there was no indication in any of the disclosure documents that a dedicated aide was part of Student's IEP. This specific allegation is dismissed with prejudice.

³ Testimony of Assistant Principal at _____

⁴ Testimony of Assistant Principal at _____ Student.

⁵ Testimony of Assistant Principal at _____

⁶ Testimony of Student.

Hearing Officer Determination

#3. Beginning in mid-November 2010, after Student was released from an in-patient psychiatric hospitalization, Petitioner opted not to send Student to [redacted] Student ran away from home a lot and avoided coming to school or she came to school but avoided attending class because she knew she would be picked up at school and returned home. Rather than take the yellow DCPS school bus that Petitioner had arranged for, Student opted to stay home.⁷ During the 2010-2011 school year, Student had 134 excused absences and 206 unexcused absences from classes, and Student was recorded as present in school for 14 days.⁸

#4. At the MDT meeting on 12/03/10, Student's disability classification was changed to Multiple Disability ("MD"), to include Emotional Disability ("ED") and Learning Disability ("LD"), with ED as the primary disability. Student's specialized instruction was increased to 27.5 hours/week. The MDT agreed that [redacted] was unable to implement 27.5 hours/week of specialized instruction and provide strong behavioral support monitoring, and agreed to send a referral packet to the Least Restrictive Environment ("LRE") Unit so that an appropriate location of services could be identified within 30 days, and Petitioner would be given an opportunity to view the prospective locations of services.⁹ The DCPS compliance case manager agreed to expedite the determination of the location of services to the extent that she could; however, she was not the entity responsible for identifying the locations for services. She was simply the person relaying the information between the LRE Unit and Petitioner's Attorney.¹⁰

#5. Student requires a therapeutic day school program with staff trained in therapeutic techniques, and a program with a greater degree of behavior monitoring and smaller class size than what is found in a regular high school.¹¹

#6. Student, in the [redacted] grade, has an IEP that was finalized on 01/13/11 that prescribes 27.5 hours/week of specialized instruction, 60 minutes/month of speech-language pathology services, and 30 minutes/week of behavioral support services, with all services to be provided outside of general education, in a program with a small class size within a self-contained class that has a low student-teacher ratio in a school location with a strong behavioral support monitoring system in place. Student is slated to exit high school with a diploma.¹²

#7. During the third week of January 2011, Petitioner's Attorney became aware through DCPS' Attorney and the DCPS compliance case manager that DCPS was offering [redacted] and [redacted] as possible public locations where Student's 01/13/11 IEP could be implemented.¹³ It was the responsibility of Petitioner's Attorney to respond to the DCPS compliance case manager about whether Petitioner accepted or rejected [redacted] but Petitioner's Attorney never responded.¹⁴

⁷ Testimony of Petitioner, Student.

⁸ Hearing Officer Exhibit #1.

⁹ P-9; Testimony of DCPS compliance case manager.

¹⁰ Testimony of DCPS compliance case manager.

¹¹ Testimony of psychiatrist, psychologist, Petitioner; P-9; P-13; P-14.

¹² P-10.

¹³ P-3; Testimony of DCPS compliance case manager.

¹⁴ Testimony of DCPS compliance case manager.

Hearing Officer Determination

#8. Student's neighborhood high school that services both disabled and nondisabled students, has a student population of 560 students with 180 students in its special education program. The special education program has self-contained classes with no more than 15 students in the class (some classes with all ED students) with 3 adults in every self-contained class, and with highly qualified or dual certified teachers in core content classes. The school can make arrangements for any type of special education services to be provided if an existing staff member cannot provide them. The school generally conducts a 30-day review of all new special education students to determine whether or not the student actually needs all classes outside of general education. is not a therapeutic day school because it services nondisabled peers; however, it is a school with a therapeutic ED program that utilizes behavior modification techniques that include positive reinforcement and the services of social workers and ED specialists. If ED students leave class, a monitoring system is in place to immediately track the student and get the student back to class or to a designated room to work on resolving the problem behaviors.¹⁵ can provide the services in Student's 01/13/11 IEP and is the least restrictive environment proposed by DCPS because it can implement Student's IEP, it is Student's neighborhood school and it provides access to nondisabled peers.

#9. Petitioner was aware that was a possible location of services for the implementation of Student's 01/13/11 IEP and visited the school. Petitioner was not satisfied with as the location of services because she was under the impression that only provided services using the inclusion model whereby the service provider provides services within the general education classroom. She was not aware that offered self-contained classrooms in a separate ED program.¹⁶ Petitioner's dissatisfaction with as a possible location of services was never communicated back to the DCPS compliance case manager via her attorney.¹⁷

#10. Approximately one week prior to the due process hearing, the DCPS compliance case manager received information that Student was trying to enroll in a non-public school, and as a result, DCPS offered as a possible placement for the location of services because unlike was a small school devoted exclusively to special education students and it had an intensive behavior monitoring and management program.¹⁸ The offer of as a public school that could implement Student's IEP became known to Petitioner's Attorney via the disclosures timely sent to him on 02/08/11 and also by an email communication to him from the DCPS compliance case manager on 02/14/11.¹⁹ Petitioner herself did not become aware of as a possible public school location until the morning of the due process hearing.²⁰

#11. is a full-time therapeutic special education public school in the District of Columbia with a student population of approximately 80 students, all with a primary disability classification of ED and many of them arriving with a history of absconding and class cutting. The school provides special education services to 9th and 10th graders in classrooms of no more

¹⁵ Testimony of Assistant Principal at

¹⁶ Testimony of Petitioner.

¹⁷ Testimony of DCPS compliance case manager.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Testimony of Petitioner.

Hearing Officer Determination

than 10 students with 2 adults assigned to each class. All teachers are certified by DCPS as special education or content certified teachers. The school employs 9 behavior technicians, 6 social workers, one psychologist, and 9 security guards. The security guards and behavior technicians populate the hallways on each floor of the school. provides an intensive behavior monitoring program that provides crisis intervention if a student walks out of class by immediately intercepting and redirecting the student. The school also employs a token economy incentive program to help keep students motivated. The school is stricter than a regular high school in that more time is spent processing with students rather than imposing immediate consequences. has graduated students who have gone to college or Job Corps, but not all attending students have been successful. can provide 27.5 hours/week of specialized instruction and speech-language related services and behavioral support services in the form of individual and group counseling, all outside of general education, and there is space available for Student in a grade classroom. Additionally, Student can receive Carnegie units at to fulfill her diploma requirements. is a therapeutic day school that can implement Student's 01/13/11 IEP by providing the specialized instruction and related services hours and the intensive behavior intervention supports that Student's IEP requires.²¹ is the second least restrictive public school proposed by DCPS where Student's IEP can be implemented in that it does not allow access to nondisabled peers.

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:

"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. 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 addressed is whether DCPS failed to develop an appropriate IEP by failing to classify Student as ED, beginning on 12/03/10. Petitioner claims more specifically that from 12/03/10 until 01/13/11, DCPS failed to finalize Student's IEP to reflect the increase in specialized instruction and a change in Student's disability classification to include ED. Petitioner argues that DCPS was delayed by four calendar school weeks in producing a paper copy of the IEP (the Hearing Officer takes judicial notice of a two week vacation recess from school by DCPS during the last two weeks of December 2010), and as a result, Student was denied a FAPE. Petitioner cites 34 C.F.R. 300.320 as the statute violated that requires DCPS to

²¹ Testimony of Academic Coordinator at Shadd.

Hearing Officer Determination

provide Student with an IEP or written statement that among other things, contains a statement of the special education and related services to be provided to the child as well as a statement of the program modifications or supports for school personnel that will be provided to the child.

DCPS argued that in accordance with the least restrictive environment requirements, DCPS formulated an IEP that could confer educational benefit on 12/03/10 and that Petitioner failed to demonstrate harm by the fact that the IEP was not finalized until 01/13/11.

“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).

On 12/03/10, it was the consensus of the MDT that included Petitioner, that Student’s IEP be revised to include 27.5 hours/week of specialized instruction, the disability category of ED, and a full-time therapeutic day placement. The MDT also agreed that within 30 days, DCPS would solicit from the LRE Unit possible locations of services where Student’s IEP could be implemented.²² And, it was the elements of the IEP formulated on 12/03/10 that the LRE Unit used to locate possible location of services where Student’s IEP could be implemented. However, the actual IEP document that reflected the agreement of the MDT on 12/03/10 was not finalized until 01/13/11.²³

Petitioner’s form over substance argument did not persuade the Hearing Officer that DCPS violated a statutory provision of the IDEA and that Student was denied a FAPE. On 12/03/10, DCPS formulated/developed an IEP that classified Student as ED. Special education and related services are based on the identified needs of the child and not on the disability category in which the child is classified. See Comments to the Federal Register, Vol. 71, No. 156, page 46549 (referring to the definition of a child with a disability). There was no evidence in the administrative record that the IEP formulated on 12/03/10 was insufficient in content or inaccurate in the identification of Student’s disability or educational needs. Petitioner failed to prove that the delay in providing a paper copy of the IEP violated the spirit and intent of the IDEA. And, assuming arguendo that the facts could be interpreted to conclude that DCPS violated the IDEA by taking four weeks to produce a finalized copy of the IEP, Petitioner did not offer any evidence that this delay harmed Petitioner or Student in any way that caused a denial of a FAPE. See 34 C.F.R. 300.513(a).

Petitioner failed to meet her burden of proof on the issue of whether DCPS failed to develop an appropriate IEP by failing to classify Student as ED, beginning on 12/03/10.

The second issue to be addressed is whether DCPS failed to provide Student with an appropriate placement at _____ since 12/03/10. Petitioner argued that pursuant to 34 C.F.R. 300.115, DCPS must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities or special education and related services. Petitioner asserts

²² Finding #4.

²³ Finding #1, Stipulation #1.

Hearing Officer Determination

that (a) on 12/03/10, the school that Student was attending, was no longer able to provide the services that Student needed when her IEP was revised to include 27.5 hours/week of specialized instruction in a school program with an intensive behavior monitoring support system, and (b) DCPS failed to make a placement available that could implement the IEP developed on 12/03/10.

DCPS does not dispute that was no longer able to meet Student's educational needs as of 12/03/10.²⁴ DCPS asserts that on 12/03/10, DCPS formulated an IEP reasonably calculated to confer educational benefit and then proceeded, as agreed upon by the MDT, to determine an appropriate location of services within 30 days. And, DCPS asserts that it did include Petitioner in the placement decision making process by offering her three possible public school locations where Student's newly designed IEP could be implemented,²⁵ and these location offerings were made within a reasonable amount of time. DCPS denies that it did not make a FAPE available to the Student as is required by 34 C.F.R. 300.1; 300.17; 300.115.

The fact that as of the date of the due process hearing Student was still enrolled at and had excessive absences from school, had more to do with the volitional acts of Petitioner, Petitioner's Attorney and Student, than the actions or inactions of DCPS.

34 C.F.R. 300.116 requires that the placement decision be made by a group of persons that includes the parents, be made in conformity with the least restrictive environment provisions of the IDEA and that the child's placement be based on the child's IEP and be as close as possible to the child's home, and to the extent possible, the child is to be educated in the school that he or she would attend if not disabled. The least restrictive environment provisions of the IDEA require that to the maximum extent appropriate, children with disabilities are to be educated with children who are nondisabled and removal of children with disabilities from the regular educational environment should occur only if the nature or severity of the disability is such that regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. See 34 C.F.R. 300.114.

34 C.F.R. 300.115 and 34 C.F.R. 300.116 taken together, requires DCPS to find a location of services that can implement Student's IEP, and the placement is where Student's IEP can be implemented. As stated in *O.O. by Pabo v. District of Columbia*, 573 F. Supp. 2d 41 (2008), 51 IDELR 9, the school system must not only design an IEP, it must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP. In the pending case, the evidence showed that DCPS offered Petitioner two school locations where Student's IEP could be implemented. DCPS offered a location of services that included nondisabled peers and a location of services that excluded nondisabled peers (Shadd), and both offerings were made within a reasonable amount of time.

The agreed upon plan was for DCPS to send a referral packet to the DCPS LRE Unit so that a location(s) of services could be identified and the resulting possibilities would be relayed from the LRE Unit via the DCPS compliance case manager to Petitioner through Petitioner's Attorney. Petitioner would have the opportunity to view the proposed location(s) of services and

²⁴ Finding #4.

²⁵ Findings #7, #10.

Hearing Officer Determination

work with DCPS to determine an appropriate location where Student's IEP could be implemented. Meanwhile, Student would remain at _____ until an appropriate location of services was found.

During the third week of January 2011, DCPS notified Petitioner via Petitioner's Attorney of two possible public school locations where Student's 01/13/11 IEP could be implemented, and it was the understanding of the DCPS compliance case manager that Petitioner's Attorney would respond back to DCPS about Petitioner's agreement or disagreement with the proposed locations. DCPS waited for a response from Petitioner via Petitioner's Attorney, but Petitioner's Attorney never responded.²⁶ The testimony of the DCPS compliance case manager in this regard was very credible and was not refuted by Petitioner.

Even if there was a slight delay in DCPS identifying locations of services beyond the 30 days anticipated, it did not result in the denial of a FAPE. Student was not attending school anyway due to the volition acts of herself and Petitioner that predated the 12/03/10 MDT meeting.²⁷ Student's testimony was very believable that the structure of _____ a public high school with nondisabled peers, was too loose for her because she could leave class at will without repercussions. Student was also believable that she performed better in the class that had a very small teacher to student ratio and where she received a considerable amount of individualized attention and she avoided the class where she did not receive this level of individualized attention.

The reasons that Petitioner cited for not sending Student to _____ were also believable; i.e., the school was too loosely structured for Student, Student could come and go at will without repercussion, Student got into a lot of trouble at _____ Student hung out at school with a negative peer group, and Student ran away from home and school on a regular basis. However, it was the more credible testimony of Student that provided clarity to the entire situation. Student did not like her home environment and ran away regularly, and if she went to school, she knew that she would be picked up there on a missing persons warrant. Therefore, Student avoided school. The Hearing Officer concludes that overall, Student's failure to attend school or class beginning in November 2010 was entirely volitional on the part of Student and Petitioner, and the real reasons for non-attendance were home based rather than school based.

In mid January 2011, DCPS identified _____ as a public high school with nondisabled peers that could implement Student's IEP.²⁸ _____ had a smaller student body than _____ and had the smaller class size, self-contained classrooms and the intensive behavior monitoring system that Student required.²⁹ Theoretically, this school could implement Student's IEP; but it was arguably not an appropriate placement due to the fact that Student might be very distracted by the presence, activities and lack of strict structure that nondisabled peers experienced at _____. However, it was within the purview of DCPS to offer this possible school location because it was the least restrictive environment where Student's IEP could be implemented. Petitioner was not locked into this school as the location of services, it

²⁶ Findings #7, #9.

²⁷ Finding #3.

²⁸ Findings #7, #8.

²⁹ Findings #5, #6, #8.

Hearing Officer Determination

was just a possibility to be explored by Petitioner. Petitioner did view the program at [redacted] and was dissatisfied, but this information was never conveyed back to DCPS.³⁰ DCPS, awaiting Petitioner's response to the proposed locations of [redacted] and [redacted] did nothing further to advance the goal of identifying possible locations of services until the week before the due process hearing when the DCPS compliance case manager received information that Student was trying to enroll in a non-public school. This information spurred DCPS to conclude that perhaps Petitioner was interested in a location of services that excluded nondisabled peers, and so DCPS offered to Petitioner the location of [redacted] a special education public school that only services students with a primary disability classification of ED, with a small school population and a small teacher to student ratio, and with a strong behavior monitoring system in place.³¹

The Hearing Officer determines that [redacted] can implement Student's 01/13/11 IEP and is the second least restrictive environment where Student's IEP can be implemented. It is a small special education school with a small teacher to student ratio and an intensive behavior monitoring program and it can meet the academic and behavioral needs identified in Student's IEP.

38 D.C. Code 2561.02(c) prescribes the order of priority in placing a special education student: Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA: (1) DCPS schools, or District of Columbia 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. DCPS is not required to consider a private school placement when appropriate public placement options are available.

In the pending case, DCPS took appropriate action within a reasonable amount of time to identify locations where Student's 01/13/11 IEP could be implemented and convey this information to Petitioner via Petitioner's Attorney. DCPS offered appropriate possible locations along the continuum of services where Student's IEP could be implemented in the form of [redacted] and [redacted]. Therefore, DCPS did not violate the IDEA by failing to provide Student with an appropriate placement since 12/03/10 and DCPS did not deny Student a FAPE. Petitioner failed to meet her burden of proof on this issue.

All relief requested by the Petitioner in the complaint is denied.

This complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

³⁰ Finding #9.

³¹ Findings #10, #11.

Hearing Officer Determination

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: February 24, 2011

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner (U.S. mail)
Petitioner's Attorney: Zachary Nahass, Esq. (electronically)
DCPS' Attorney: Harsharen Bhuller, Esq. (electronically)
DCPS (electronically)
SHO (electronically)