# DC Office of the State Superintendent of Education

Office of Review & Compliance
Student Hearing Office
1150 5th Street, S.E.
Washington, D.C. 20003

OSSE
STUDENT HEARING OFFICE
2012 APR -2 AM 8:35

**CONFIDENTIAL**

| | |
|---|---|
| STUDENT[1], by and through Student's Parent<br><br>Petitioners,<br><br>v.<br><br>DCPS<br><br>Respondent. | HEARING OFFICER'S DETERMINATION<br><br>Impartial Hearing Officer:<br>Joseph Selbka |

## I. Introduction and Procedural Background

Before the undersigned is a complaint filed by Parent on behalf of her son, Student.

1. Student is a year old who is eligible for special education and related services from the District .

2. On January 17, 2012, Parent filed the instant amended complaint. DCPS filed a response on February 1, 2012

[1] Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

3. On January 26, 2012, the parties conducted an initial resolution conference. The parties have not waived the resolution session nor agreed to end the resolution period before thirty days had run, and thus the resolution period continued to February 16, 2012. The parties reaffirmed at the prehearing conference that the resolution period ran until February 16, 2012[2] (even though the parties did not complete the OSSE resolution session form properly). Thus, the 45 day timeline started to run on February 17, 2012, and ends on April 1, 2012.

4. On February 23, 2012, the undersigned held a prehearing conference.

5. On February 28, 2012, the undersigned served a prehearing order on the parties. No party objected to the contents of the prehearing order, and thus it is binding on the parties pursuant to the ASP's and the language of the order.

6. During the course of the prehearing process, Student filed a notice of intent for stayput contending that School constituted an integral part of the placement. However, the District agreed in writing that it would not change the location of Student's services until this decision was completed (P7-1,2,3). Thus, Student has been attending NBVS for the duration of this complaint and has never actually been transferred to the HRDCA.

7. Both parties timely provided their proposed exhibits to one another, and at hearing, neither party had any objections to the other party's marked exhibits. Thus, at hearing, the undersigned admitted Parent Exhibits ##1-22 without objection and District Exhibits ##1-10 without objection.

8. At the hearing, Parent called the following witnesses: Parent, Student, CK, DD, TK. The District called the following witnesses: TST, JS.

## II. Issues to Be Decided

9. The issues raised by the Student[3], (including the relief requested, and the response of the District), present the following issues, defenses and requested relief for determination by the Hearing Officer. The Due Process Complaint issues are stated as follows:

Whether the District's proposed placement (located at School of D.C.) is appropriate (designed to provide Student with FAPE). Specifically, the Student contends (1) that the programs and services available at School of D.C. can not provide Student FAPE. Rather, according to the Student, Student requires the

[2] The undersigned recorded the parties' agreement as to the ending date of the resolution period in the prehearing order, and neither party objected to said order at any point in time.

[3] At the hearing, Student, for the first time, argued that the Student should be entitled to relief because the District "predetermined" the placement—the District determined Student's placement without obtaining input and considering information the Parent might have. This claim is not in the complaint and was not mentioned in the prehearing order. As such, the undersigned cannot, by law, rule on that issue. 34 CFR 300.511(d).

programs and services at School in order to obtain FAPE; and (2) that the District's proposed placement will not provide Student FAPE because the proposed placement changes the location of Student's school (from School to School of D.C) in the middle of the school year. The Student contends that because of Student's unique needs, the change in school location will significantly harm Student's ability to benefit from special education.

The Student's only requested relief is an order requiring a prospective placement at School for the remainder of Student's school career (an additional year and three months).

The District contends as a defense that School is not able to provide Student FAPE. Specifically, according to the District, School in unable to provide the necessary related services as required by Student's IEP; and School does not have sufficient certified staff to implement Student's IEP.

## III. Jurisdiction

10. The due process hearing was held and a decision in this matter is being rendered, pursuant to 4 U.S.C.A. 1400 et seq., and its implementing regulations, 34 CFR 300 et seq. and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

## IV. Findings of Fact

### Student's Current IEP and Current Location for Services

11. Student is a year old who is classified as LD. He is currently receiving services at School and has been attending for the 2011-2012 school year. Although the District has proposed to change the location of Student's placement, the District has maintained the location of services during the course of these proceedings (P7-1, P7-2).

12. Student has very low cognitive ability when compared with his peers (P11-2, P11-3, P11-10). Student is in a nondegree program, and is attempting to obtain a vocational certificate (P11-14). He is also still learning basic math and reading skills (*Id.*).

13. Student has been training to become a mechanic during this school year (CK testimony), and has been taking some carpentry classes since the beginning of this year. Student's transition plan requires 30 minutes per day in vocational training as a mechanic (P11-12). Student spends approximately half his day on vocational training at (CK testimony).

14. Student is also provided with an 11 month school year at (Parent testimony, DD testimony).

15. has a teacher to student ratio of approximately 1:5 (one teacher for every five students) (DD testimony).

16. is a relatively small school with approximately 26 students (CK testimony, DD testimony). has an autoshop garage and a carpentry shop (DD Testimony). offers vocational classes in (among other things) automotive technology and carpentry (DD testimony). Most of the students are high-school aged (DD testimony). The school is also relatively quiet due to the layout of the school and student body size (CK testimony, DD testimony).

17. Student does not act out or have behavior problems (DD testimony). It appears that Student was improperly marked as eligible under the disability term "ED"[4] (CK testimony; JS testimony). However, Student does have problems with transitions and he does have problems learning in noisy environments (CK testimony).

18. also does not use certified special education teachers for its vocational training—particularly its automotive mechanical classes[5] (DD testimony, JS testimony). For several months in 2011 and early 2012, did not have a contract with an occupational therapist to provide occupational therapy services for Student (DD testimony, JS testimony).

19. Student was thus not provided his occupational therapist for much of his 2011 school year (DD testimony, JS testimony). Student later decided to forego occupational therapy services rather than be transferred from (Student testimony).

20. For several months in 2011 and early 2012 (and according to the District, up until the present time), did not provide records to the District pursuant to the District's requirements (JS testimony). Specifically, personnel were and are supposed to record and input data related to provision of related services into the District's "SEDS" database (JS testimony). personnel stated that this failure to provide the related services data arose because District personnel used to input the data, and now personnel[6] are being trained to provide the data in question (DD Testimony).

21. Because of failures to keep records properly, and the District's well founded belief that was not using certified teachers for all classes and not

---

[4] This fact, in and of itself, is irrelevant as to determining the appropriateness of Student's placement because, regardless of Student's disability term, his placement must be based upon Student's unique needs and abilities.

[5] The undersigned rejects Student's claim that because a special education teacher is occasionally in a class and teaching the "book portions" of the class, is in compliance with the DC laws. Rather, certified teachers must teach Student for all portions of the class. This is the meaning of the letter and spirit of the federal and state laws regarding licensure of teachers.

[6] The Student's closing argument spends a great deal of time on what the District could have done in its dispute with The undersigned is not going to adjudicate the dispute between and the District. It is irrelevant to these proceedings except to the extent that cannot provide Student with FAPE.

providing related services to all students, the District chose to remove all District students (including Student) from NBVS (JS Testimony).

**The December 15, 2011, IEP Meeting and the District's Proposed Location of Services.**

22. On December 15, 2011, the District held an IEP meeting wherein the District proposed to change Student's location of services to (DCPS Ex. pp. 17, 23).

23. Prior to the IEP Meeting, the District chose the as the location of services without input from the Parent (JS Testimony).

24. is in building with more than 100 students (Parent testimony, TST testimony). There are two programs in the building which houses one program primarily for LD eligible students and one program primarily for ED students (TST testimony). is a program primarily for LD students (TST testimony). does have many high school age students with similar disabilities to Student (TST testimony).

25. is, therefore, much noisier than (Parent testimony).

26. also has no automotive shop and cannot provide an automotive technology vocational program (TST testimony).

27. school year is only ten months (TST testimony; JS testimony).

28. has a teacher and teacher assistant in each classroom, and classes cannot have more than 10 students (TST testimony).

29. generally allows students to spend about half their school day in vocational training (TST testimony). also has both diploma and vocational certificate programs (TST testimony).

30. The District has placements where Student can learn automotive technology (JS Testimony).

31. The District did not take into account transition issues Student might have in choosing as Student's new location of services (JS Testimony). The District did not propose to provide Student with an 11 month school year like the school year at (JS Testimony). The District did not consider whether a noisy environment would be problematic for Student (JS Testimony).

## V. Conclusions of Law

**Burden of Proof and Authority of Hearing Officers**

32. The burden of proof lies with the party filing the due process complaint in a special education administrative hearing. *Schaffer v. Weast* 546 U.S. 49 (2005). In this case, the burden of proof lies with the Student.

33. In the present case, Student argues that it is not his burden to show that is an appropriate placement. Rather it is only Student's burden to show that the transfer to would result in an inappropriate placement and/or cannot implement Student's IEP. This is true. However, contrary to Student's arguments, if he meets his burden, he is not entitled to remain at Rather, the undersigned has authority to enter an order to ensure that Student is receiving a free appropriate public education ("FAPE"). If cannot provide Student with FAPE, the undersigned has the authority to enter an order ensuring that Student will be placed at a location where Student will receive FAPE. *See Forest Grove School District v. T.A.,* 557 U.S. 230 (2009) (purpose of due process review is to allow courts and by extension hearing officers to fashion relief designed to provide students with FAPE).

34. In administrative proceedings, hearsay is admissible as long as it is relevant and material. *Otto v. Securities and Exchange Commission,* 253 F.3d 960, 966 (7th Cir. 2001). To the extent hearsay is admitted without objection, the evidence can be given its natural weight. *Sykes v. District of Columbia,* 518 F.Supp.2d 261, 49 IDELR 8 (D.D.C. 2007).

35. Inferences are conclusions of fact derived from the evidentiary facts introduced at hearing. *Smith v. Tri-R Vending,* 249 Ill.App.3d 654, 661 (1993). Hearing officers can make reasonable inferences from the evidence adduced at trial. However, like in all administrative adjudications, the inferences must be supported by facts proved or admitted. *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 814-815 (1990)(Scalia, j. dissenting). The inferences must be drawn from facts through a process of logical reasoning. *Id.* Thus, the hearing officer must draw an accurate and logical bridge between the evidence and result. *Frobes v. Barnhart,* 467 F.Supp.2d 808, 817 (N.D. Ill. 2006). Moreover, any inference a hearing officer makes must be supported by substantial evidence. Substantial evidence means relevant evidence that a reasonable mind might accept as adequate to support his/her conclusions. *Frobes v. Barnhart*, 467 F.Supp.2d 808, 817 (N.D. Ill. 2006).

**Law of Change of Placements and Failure to Implement an IEP**

36. In general, a school district has administrative discretion as to the location where children with disabilities will attend school. *Concerned Citizens and Parents for Continuing Education at Malcolm X School (PS 79) v. New York Board of Education,* 629 F.2d 751 (2nd Cir. 1980) *cert denied,* 449 U.S. 1078. Moreover, a school district has discretion to close down any of its schools for any reason and the closing of the school will ordinarily not amount to a change in placement for the students previously attending the school. *Id.*

37. However, a change in location may constitute a change in placement if the location would result in a fundamental change in the IEP or the change in location would result in the elimination of a significant aspect of the IEP (because the IEP cannot be implemented at the school district's new proposed location). *Lunceford v. District of Columbia Board of Education,* 745 F.2d 1577, 1582 (D.C. Cir. 1984); *Savoy v. District of Columbia,* 112 LRP 8777 (D.D.C. 2012).

38. Even if there is no change in placement, a student can be denied FAPE because a change in location resulted (or in this case, will result) in a material failure to implement the Student's IEP. *Savoy v. District of Columbia, supra, See also, Van Duyn ex rel. Van Duyn v. Baker School District 5J,* 502 F.3d 811 (9th Cir. 2007) and *Houston Independent School District v. Bobby R.,* 200 F.3d 341 (5th Cir. 2000).

39. There are exceptions to the general rule that the district has administrative discretion to choose a location for provision of special education. Specifically, if: (1) a district changes a location for a student mid-year; (2) a district changes a location in the last year of high school; or (3) a student would be harmed by a change in location—then a parent/student can require the district to keep a student in a specific location. *Block v. District of Columbia,* 748 F.Supp. 891 (D.D.C. 1990); *Holmes v. District of Columbia,* 680 F.Supp. 40 (D.D.C. 1988); *Z.W. v. Smith,* 210 Fed.Appx. 282 (4th Cir. 2006). In such cases, a hearing officer has discretion to find the proposed location of services inappropriate based upon the harm of the transfer. *Id.*

40. However, contrary to Student's contention in his post-hearing brief, these exceptions only apply if the original location of services can appropriately implement the Student's placement and provide the student with FAPE. In *Z.W.* the parents' argument challenging the change in location was premised on the original location being appropriate to implement the student's IEP. *See* 210 Fed.Appx. at 287. In *Block,* the District Court affirmed the hearing officer's HOD based upon a factual finding that the student's initial location was appropriate to implement the Student's IEP. *Block,* 748 F.Supp. at 897. In *Holmes,* the District Court specifically found that the student's initial location was appropriate to implement the student's IEP. *Holmes,* 680 F.Supp. at 42.

41. Therefore, the undersigned holds that, in order for Student to invoke the exceptions set forth above, the original location has to be able to implement Student's IEP and provide Student FAPE (a free appropriate public education) moving forward. To hold otherwise would require a school district (and a hearing officer) to keep a student in an inappropriate placement in violation of IDEA. This cannot be the law. See *Forest Grove School District v. T.A., supra*—the purpose of due process hearing review is to provide relief so that a student will receive FAPE.

**Conclusions of Law Related to Provision of FAPE**

42. In order to provide a student FAPE, a school has to meet SEA standards (usually state educational standards, but, in this case, the educational standards set forth in the law

of the District of Columbia by the Office of the State Superintendent of Education ("OSSE")). 20 U.S.C.A. 1401(9); *Winkelman v. Parma City School District,* 550 U.S. 516 (2007). *See also Rowley v. Board of Education of Hendrick Hudson Central School District, Westchester County,* 458 U.S. 176, 203 (1982).

43. OSEP requires the SEA to establish and maintain qualifications so as to ensure that all teachers providing instruction to children with disabilities are highly qualified and trained. 34 CFR 300.146(b); 34 CFR 300.156(a).

44. OSSE has complied with the federal regulations, and requires at least one of the vocational instructors at NBVS for every class to be a certified special education teacher and all vocational instructors to be certified vocational education teachers. 5E DCMR 1601.1 (2009); 5A DCMR 2823.2(2009); 5 DCMR 1627; 5 DCMR 1647.

45. Contrary to Student's claims in closing argument, the fact that a private school is given a certificate of approval from OSSE does not relieve the private school of its responsibilities to follow the DCMR[7]. 5A DCMR 2801.3.

## VI. Discussion (Including Factual Inferences, Credibility Findings, and Application of Law to Fact)

46. The undersigned finds that a change of location from to would amount to a change of placement because of the central nature of Student needing to learn automotive technology to receive an educational benefit from the IEP. Student's transition plan contains a requirement that Student receive instruction in automotive technology, and Student had been working on becoming a mechanic for an entire school year. To change this aspect of the IEP is such a fundamental change in the nature of the services provided to Student so as to amount to a change in placement. In making this determination, the undersigned relies not only on the fact that the IEP requires automotive technology instruction to be provided to Student, but also the fact that this Student has worked extensively to obtain a mechanic's certificate, and all that work would be lost if he were transferred to a location without an automotive technology program. As such, is an inappropriate location of services for Student on this basis alone.

47. Similarly, to send Student to would be a violation of implementation of Student's IEP. The failure to provide automotive technology training would be a material violation of the IEP, and thus, a denial of FAPE to Student.

[7] The Student in his closing brief argued that licensure for vocational classes is not required pursuant to language on OSSE's website. None of this information was presented as evidence at hearing, and therefore the undersigned cannot rely upon it—as random statements on OSSE's website are not legal authority. The Student also has tried in argument to make a distinction between vocational classes that are designed to obtain "Carnegie Units" and Student's program. No evidence or legal authority was supplied by Student for this contention, and therefore the undersigned rejects it as unsupported by the record and the clear language of the DCMR.

48. The undersigned makes an inference and finds that in conjunction, the loss of the automotive technology program as a result of the transfer (and thus a loss of all the vocational training Student has thus so far had at the transition effects of the transfer on Student; the fact that the transfer would result in a one month loss of educational services; and the fact that is too noisy for Student to learn as effectively as Student learns at will result in the District's proposed transfer causing an educational harm to Student. The undersigned relies upon the testimony of CK that these issues would cause a loss of educational benefit to Student (and possibly cause Student to drop out of school all together); and the testimony of JS that the District and IEP team failed to consider these issues before proposing as Student's new location for services. The undersigned rejects the testimony of TST that would be appropriate for Student as TST was unable to state how would address these issues and admitted Student would have trouble completing the vocational program at

49. Therefore, the undersigned finds that, even if could have been an appropriate location of services for Student's placement for Student in the abstract (notwithstanding the fact that cannot carry out the automotive technology instruction portion of Student's IEP), transferring Student to in the middle of the school year without considering the effects on Student renders inappropriate as a location of services for Student- especially the lack of an automotive technology instruction program. As such, the proposed change of location amounts to a change in placement. Moreover, because of the effects of the transfer on Student (as set forth above), the undersigned makes a factual inference that cannot properly implement Student's IEP.

50. The undersigned finds, however, that is not an appropriate location of placement for Student as it does not use certified teachers for its vocational classes. As such, cannot provide Student with FAPE because does not meet state educational standards regarding qualifications of teaching personnel.

51. As such, the District is entitled (and, indeed required) to transfer Student from to another appropriate location of services for placement. However, in order to adopt a new location, the District (through its representatives on the IEP Team and through a properly revised IEP) has to address any implications to Student's learning and/or implementation of Student's IEP which arise from the change of location.

52. An appropriate placement would be one which: (1) can provide Student with training with automotive technology vocational training; (2) which provides Student with 11 months of educational services (which may be accomplished through provision of ESY services); (3) which addresses Student's problems with transitions; and (4) which takes into account that Student needs a quiet environment to work in (or some accommodation to allow Student to learn despite his problems with noisy environments).

53. The Student has met his burden that the proposed change of location at would amount to a change of placement and would be a denial of FAPE because cannot implement Student's current IEP.

## VII. Order

54. The District shall not effectuate a transfer to Student shall remain at until the District can determine a new location of services and revise Student's IEP as described in this order.

55. Within 21 calendar days, the IEP Team shall meet. The District members of the IEP Team may investigate and have tentative proposed locations for services available to present to the IEP Team prior to the IEP meeting. Any new proposed location must be able to implement all aspects of the Student's IEP including vocational instruction in automotive technology. Student's new location of services must provide for 11 months of instruction (which may be accomplished through an 11 month program or through ESY).

56. The IEP Team must also determine the effects of transitioning to the new location of services. As such, the IEP Team shall determine what accommodations and other services Student needs to transition to Student's new location of placement; including but not limited to: (1) how to accommodate the Student's sensitivity to noise; (2) how transition to a new location will affect Student's learning; and (3) whether the composition of the student body at the new location will affect the implementation of the IEP. The IEP Team shall adopt all accommodations and/or additional services necessary to ameliorate any deficits to Student's learning caused by the transfer to a new location. Student' IEP shall be revised and amended to include all such accommodations and/or additional services.

57. The IEP Team shall only consider as a possible location of services for Student if the IEP Team can verify that, as of the date of the IEP meeting, can implement the terms of Student's IEP- including having properly certified teachers teach every class that Student attends (vocational classes and otherwise).

58. If the IEP Team agrees to a new location of services in accordance with this HOD and revises Student's IEP in accordance with the requirements of this HOD, the District shall then transfer Student from to the new agreed-upon location of services.

59. If the IEP Team cannot agree on a new location of services for Student, then, after the IEP Team revises Student's IEP in accordance with the requirements of this HOD, the District shall determine an appropriate location of services for Student in accordance with the requirements of this HOD and transfer Student from to his new location of services.

Dated this 31st day of March, 2012.

/S Joseph P. Selbka
Joseph Selbka, Esq.
Hearing Officer

**NOTICE OF APPEAL RIGHTS**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).