

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

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

STUDENT,¹)
through the Parent,)
)
Petitioner,)
)
v.)
)
District of Columbia Public Schools)
)
)
Respondent.)

Date Issued: April 2, 2012
Hearing Officer: Virginia A. Dietrich

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

Background

Petitioner, the mother ("Parent") of _____ year old Student, filed a due process complaint notice on January 23, 2012 alleging that the District of Columbia Public Schools ("DCPS") had denied Student a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Act ("IDEA").

Petitioner alleged that (1) DCPS had changed Student's educational placement when it issued a Prior Written Notice from the nonpublic day school that Student was attending to a separate educational program contained within a public day school, and (2) the educational program at the public school could not implement Student's Individualized Education Program ("IEP").

DCPS asserted that at the IEP Team meeting that took place in December 2011, everyone, including Petitioner, agreed to the contents of Student's IEP. However, Petitioner did not agree with the location of services. DCPS argued that it did not change Student's educational placement because it did not change Student's IEP and that it had merely exercised its sole administrative discretion in changing the location of services where the IEP would be implemented. DCPS argued that Petitioner failed to meet her burden of proof on both issues.

¹ Personal identification information is provided in Appendix A.

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Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

The due process complaint was filed on 01/23/12. This Hearing Officer was assigned to the case on 01/25/12.

Neither Petitioner or DCPS waived the resolution meeting; however, a resolution meeting did not take place. The resolution period ended on 02/22/12, the 45-day timeline to issue a final decision began on 02/23/12 and the final decision was due on 04/07/12.

The due process hearing was a closed hearing that took place on 03/27/12 and 03/29/12. Petitioner was represented by Maria Blaeuer, Esq. and DCPS was represented by Linda Smalls, Esq. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person on 03/27/12, but was not present on 03/29/12. Petitioner did not present any additional witnesses on 03/29/12, and DCPS rested its case without presenting any witnesses. The hearing on 03/29/12 began and concluded with closing arguments.

Petitioner presented five witnesses: Petitioner; Student's community based intervention specialist; a psychologist who qualified as an expert in school psychology with an emphasis on conducting and interpreting psychological evaluations and providing educational recommendations; Founding President, CEO and former Head of School at School; and Student's community based mental health therapist.

DCPS elected not to present any witnesses.

Petitioner's disclosures were dated 08/28/11, but corrected on the record to 03/20/12. The disclosures contained a witness list and Exhibits P-1 through P-15. Exhibits P-1 through P-15 were admitted into evidence without objection.

DCPS' disclosures dated 03/20/12, containing a witness list and Exhibits R-1 through R-9, were admitted into evidence without objection.

Parties agreed to the following stipulations of fact:

#1. Student, born is a resident of the District of Columbia. Student currently attends School and has not stopped attending School during the pendency of this litigation.

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- #2. An IEP meeting occurred on 12/02/11.
- #3. At the 02/02/11 IEP Team meeting, there were no substantive changes to Student's IEP.
- #4. On 02/02/11, DCPS issued a Prior Written Notice, changing Student's location of services from School to School to School to
- #5. The IEP dated 02/02/11 erroneously stated that Student was to be provided with 30 minutes of behavioral support services in general education; it should have been 30 minutes/week of behavioral support services outside of general education.

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

Whether DCPS denied Student a FAPE by changing Student's educational placement on 12/02/11, when DCPS issued a Prior Written Notice that changed Student's location of services from School to School to School to

Whether could implement Student's IEP.

For relief, Petitioner requested a finding that Student was denied a FAPE on each of the issues presented, and that DCPS fund Student at School for the remainder of the 2011/2012 school year and for the 2012/2013 school year.

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, age resides in the District of Columbia and receives special education services as a child with a disability.³

#2. On 02/02/11, the IEP Team met and reviewed Student's IEP. The IEP that was finalized on 02/02/11 classified Student with a Specific Learning Disability and prescribed 27 hours/week of specialized instruction and 30 minutes/week of behavioral support services, with all services to be provided outside of general education. The IEP specified that Student was to receive the following classroom accommodations: repetition of directions, simplification of oral directions, reading of test questions, translation of words and phrases in certain subjects, use of

² The second issue in the complaint, i.e., whether DCPS denied Student a FAPE by violating the stay put provisions of the IDEA by changing Student's current placement from School to School to School to during the pendency of the due process proceedings, was subsumed in the first issue at the time of the due process hearing, as it involved a question of whether or not the educational placement was changed.

³ Stipulation #1.

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calculators, extended time on time on subtests, and breaks during and between subtests. The IEP also specified that Student was to be provided with a classroom setting that included a location with minimal distractions, preferential seating and small group testing. Lastly, the IEP specified that Student was to graduate from high school with a high school diploma.⁴ There were no substantive changes to Student's IEP at the meeting.⁵ The entire IEP Team agreed with the level of services and upon a 100% outside of general education setting.⁶

#3. On 02/02/11, DCPS issued a Prior Written Notice, changing Student's location of services from School to Petitioner disagreed with the location of services.⁸

#4. is a program that provides intensive special education services for middle and high school students with behavioral, emotional, learning and other disabilities in the least restrictive environment in classrooms co-located at several DCPS campuses, including students have the opportunity to participate in social, academic and recreational activities with nondisabled peers. At Students are able to earn DCPS academic credits.⁹

#5. At both disabled and nondisabled children use the same doorways to enter and exit the school building and can mingle in the hallways; children with an IEP eat separately from nondisabled students; and there were 17 desks in one of the classrooms designated for the students.¹⁰

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.

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).

⁴ R-3, Stipulation #5.

⁵ Stipulation #3.

⁶ R-2.

⁷ R-4.

⁸ P-2.

⁹ R-02, R-07.

¹⁰ Psychologist.

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“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).

The first issue to be determined is whether DCPS denied Student a FAPE by changing Student’s educational placement on 12/02/11, when DCPS issued a Prior Written Notice that changed Student’s location of services from School to Petitioner alleged that a change of placement occurred because differed from Student’s current nonpublic school in that was not a separate day school, did not service children with Specific Learning Disabilities, and provided academic instruction for high school credits via the use of classroom computers instead of through teacher instruction.

“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). A recent ruling in this jurisdiction firmly establishes that the educational placement is the child’s IEP, and that the school designated by the public agency to implement the child’s IEP is the location of services. *Johnson v. District of Columbia*, 2012 L 883125 (D.C.C., March 16, 2012). 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.

The term "change in educational placement" is not defined in the IDEA. Whether or not a change in educational placement occurs must be determined on a case-by-case basis. *Letter to Fisher*, 21 IDELR 992 (1994). A change in placement occurs when there is a substantial change in the student's educational program. 71 Fed. Reg. 46,588 (2006).

The inquiry becomes more complex when no changes from the prior year's IEP are proposed, and the option on the continuum remains the same, but the District proposes to change only the location, i.e., the school or facility located within the District in which the student's IEP and option on the continuum will be implemented. If the District determines, based on the student's individual needs, that the student should have the same educational program and opportunities for interaction with his or her nondisabled peers as he or she had during the placement at the previous school, the change in location alone would not constitute a change in educational placement. This is because under these circumstances, the change in location alone would not substantially or materially alter the child's educational program. *Id.*

Petitioner failed to meet her burden of proof that Student’s educational placement changed when DCPS issued a Prior Written Notice to at the IEP Team meeting on 02/02/11. Student’s IEP did not require that his services be implemented in a separate school; Petitioner failed to present any evidence that did not service students with Specific

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Learning Disabilities; and Petitioner failed to offer any evidence that the academic instruction at was provided via computers instead of through teacher instruction.

The only evidence that Petitioner offered about the educational program at was that at both disabled and nondisabled children use the same doorways to enter and exit the school building and can mingle in the hallways; children with an IEP eat separately from nondisabled students; and there were 17 desks in one of the classrooms designated for the students. Although the change in location would increase Student's exposure to nondisabled peers because he was currently attending a separate nonpublic school, the exposure was only to the extent of entering and exiting the building and walking in the same hallways and this limited exposure was not prohibited by Student's IEP. The evidence revealed that nondisabled students were segregated from disabled students during lunch and there was no evidence in the record that Student would receive any of his academic instruction with nondisabled peers. There was no evidence in the record that Student's educational program, i.e., the type and amount of services to be received according to his IEP, would change when he attended school at . The Hearing Officer determines that the Prior Written Notice to was a change in the location of services and it did not result in a change in Student's educational program or placement.

The second issue to be determined is whether could implement Student's IEP. Petitioner alleged that the problem with was that the school could not provide Student with a full-time out of general education setting; all instruction for credit was to be provided to Student by a computer; and the program at was designed for children with an Emotional Disturbance and not for Student who has a Specific Learning Disability.

DCPS, as the local education agency, is responsible for providing Student with a free appropriate public education. 34 C.F.R. 300.1, 34 C.F.R. 300.17, 34 C.F.R. 300.101, 5 D.C.M.R. E-3000.1. A free appropriate public education or FAPE means special education and related services that are provided in conformity with an IEP and includes an appropriate school. 34 C.F.R. 300.17. "A public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement." 71 Fed. Reg. 46,588 (2006). Thus, the location of services must be able to implement the IEP.

Petitioner failed to offer sufficient evidence to meet her burden of proof that could not provide Student with the services prescribed by Student's IEP. The only specific evidence in the record about was that both disabled and nondisabled children use the same doorways to enter and exit the school building and are able to mingle in the hallways; children with an IEP eat separately from the non-disabled students; and there were 17 desks in one of the classrooms designated for the students. That evidence was insufficient for Petitioner to sustain her burden of proof that could not implement Student's IEP.

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ORDER

The complaint is **DISMISSED** with prejudice. Petitioner failed to meet her burden of proof on any of the issues presented.

All relief requested by Petitioner 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).

Date: April 2, 2012

/s/ Virginia A. Dietrich
Hearing Officer