

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened December 1, 2011, at the OSSE Student Hearing Office, 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2004.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age in the grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of emotional disturbance ("ED").

During the 2010-2011 school year ("SY") the student was enrolled in a residential placement, hereinafter referred to as "School A." The student's placement at School A was funded by the District of Columbia Public Schools ("DCPS"). At the end of school year SY 2010-2011 the student was "stepped down" from residential placement. The parent requested and DCPS agreed to fund the student's attendance at a private day school, hereinafter referred to as "School B." Within months of beginning at School B the student began to experience academic and behavioral regression. On October 11, 2011, DCPS convened a meeting with the parent at which the parent requested the student return to a residential program. DCPS agreed to place the student at what it considered to be a more restrictive placement than School B but less restrictive than a residential placement. The student was eventually expelled from School B as a result of her behavior and non-attendance. The parent then enrolled the student at her neighborhood DCPS high school, hereinafter referred to as School C.

On October 13, 2011, Petitioner filed the due process complaint alleging DCPS had failed to provide the student a residential placement and had convened an inappropriate team to determine the student's placement. Petitioner alleged the October 11, 2011, meeting did not include any of the student's teachers or a psychologist.

DCPS filed a written response to the complaint on October 31, 2011. DCPS asserted that on October 25, 2011, it issued a prior written notice for a more restrictive setting at a therapeutic day school. DCPS agreed that School B proved to be an inappropriate setting for the student, but disagreed that the student is in need of a residential placement and asserted the parent did not present a sufficient factual basis for returning the student to residential. DCPS asserted there had been no denial of a Free and Appropriate Public Education ("FAPE").

The resolution meeting was held October 24, 2011, and the matter was not resolved. The parties agreed to immediately proceed to a hearing. The 45-day timeline started on October 25, 2011, and the Hearing Officer's Decision ("HOD") is due December 8, 2011.

A pre-hearing conference was held October 31, 2011, during which the parties' positions regarding the complaint were addressed and the issues to be adjudicated were clarified. A pre-hearing order was issued November 3, 2011.

Petitioner originally sought as relief: (1) DCPS funding of a residential placement, and (2) compensatory education. At the hearing Petitioner's counsel stated that Petitioner was only seeking prospective relief in the form of a residential placement at _____ and was not seeking compensatory education.

ISSUES: ²

The issues adjudicated are:

1. Did DCPS deny the student a FAPE by failing to provide the student an appropriate residential placement?
2. Did DCPS deny the student a FAPE by failing to convene an appropriate IEP team at the October 4, 2011 meeting? ³

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-5 and DCPS Exhibit 1-9) that were all admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

FINDINGS OF FACT: ⁴

1. The student is age _____ in the _____ grade and has been determined eligible as a child with a disability under IDEA in need of special education and related services with a disability classification of ED. (DCPS Exhibit 3-1)
2. During SY 2010-2011 the student was enrolled in a residential placement, School A. DCPS funded the student's placement at School A. Prior to attending School A the student attended a full time special education day school. However, while at the full time day school the student would often leave school but not return home. (Dr. Marryshow's testimony)

² The alleged violation(s) and/or issue(s) listed in the complaint may not directly correspond to the issue(s) outlined here. However, the parties agreed at the hearing that the issue(s) listed here and as stated in the pre-hearing order are the issue(s) to be adjudicated.

³ Petitioner alleges the team did not include required members: special education teacher, regular education teacher and a psychologist.

⁴ The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may perhaps only cite one party's exhibit.

3. In September 2009 a comprehensive psychological evaluation was conducted to determine the appropriate placement for the student. The evaluation recommended a residential placement for the student. As a result of the student's repeated episodes of absconding the student was placed in residential placement during SY 2009-2010 at School A. (Dr. Marryshow's testimony, Petitioner's Exhibit 4-11)
4. School A is an outdoor wilderness school and the students live outdoors in tents. It is an open campus, based on trust and not a secure facility. (testimony)
5. The student was at School A for two school years and made significant strides both academically and behaviorally. While at School A the student never made any attempt to abscond. By the end of SY 2010-2011, the staff at School A, DCPS and the parent thought the student could step down from the residential placement to a less restrictive setting. (Dr. Marryshow's testimony)
6. School A staff suggested at the time of her discharge that the student be in a school that provided structure, low student to teacher ratio and individual counseling and mentoring. However, School A did recommend a particular school or that the student be in a residential setting. School A staff observed that the student excels in small classes and responds well to limits and being challenged, as well as to adult interventions and she seeks adult approval. (testimony, DCPS Exhibit 5-4)
7. Several meetings were held to discuss possible placements for the student. The parent's first choice of schools was another residential program, but a less restrictive program than School A. However, this school was not an approved DCPS program. DCPS proposed two possible placements, one of which was a residential placement, (Dr. Marryshow's testimony, Petitioner's Exhibit 2-3, 2-5)
8. The parent reviewed the list of schools approved by DCPS and identified School B, a private school that required an extensive application process. The student met all the application requirements and was accepted to School B. The parent expected that the student would also be provided wrap-around therapeutic services to support her in attending School B.
9. School B is a small college prep high school for students who have struggled academically and emotionally. However, School B is not a therapeutic school and not a school for students with behavioral difficulties. School B has 56 students, 12 faculty and staff and one special education teacher. School B is on DCPS list of approved private day schools. The School B staff believed the student was ready and motivated to live at home and attend a rigorous academic program. School B believed the student would receive therapeutic services outside of school. (testimony)
10. School A staff was aware at the time of the student's discharge that she was moving to School B, a day program, and believed the student would be successful there. (testimony, DCPS Exhibit 5-4)
11. On August 18, 2011, School A provided DCPS and the parent a copy of the student's latest progress report. The report stated that the student was making sufficient progress

in all areas measured in the most recent reporting period from April 2011 through August 2011. (DCPS Exhibit 9)

12. The parent and student visited School B and understood that the school would provide an outstanding education and small class sizes, but that DCPS would provide wrap-around services. However, wrap-around services are not in the student's IEP. (Parent's testimony, DCPS Exhibit 3)
13. DCPS issued a prior written notice on August 19, 2011, transitioning the student from a residential program (School A) to a less restrictive program, School B, a full-time day program. (DCPS Exhibit 4-1)
14. The student's most recent IEP was developed on August 23, 2011. The parent and her educational advocate were present for the meeting. The IEP includes academic goals in the area of math, reading and written expression, and includes emotional/social/behavioral development goals. The IEP prescribes that the student be provided 30 hours per week of specialized instruction outside of general education and 3 hours per week of behavioral support services. The least restrictive environment ("LRE") section of the IEP states that the student should be out of general education. (DCPS Exhibit 3-1, 3-2, 3-2, 3-4, 3-5, 3-6, 3-7)
15. The student began at School A at the beginning of SY 2011-2012. However, two weeks into her attendance at School B, the student began to regress. (Parent's testimony)
16. On September 14, 2011, the parent's educational advocate contacted DCPS and requested an emergency meeting to discuss the student's educational needs and location of services. The advocate noted that although the student had made significant progress at School A her placement at School B had proved overwhelming and she had returned to her previous pattern of absconding. The advocate requested in the letter that the student's placement be changed from School B to a residential program. (Petitioner's Exhibit 2-8)
17. On October 4, 2011, DCPS convened a meeting with the parent at which the parent requested the student be placed in a different residential program than School A. DCPS manager of non-public unit, Mr. Ben Persett, represented DCPS. The parent's educational advocate was present at the meeting along with the head of school for School B, The parent participated by telephone. The meeting was not an IEP meeting but a meeting to discuss the student's placement and location of services. DCPS agreed to place the student at what it considered to be a more restrictive placement than School B but less restrictive than a residential placement, and with wrap around services. DCPS offered three placements for the student included the and Spectrum. DCPS stated that it would not refer the student to a residential treatment facility without first engaging the Department of Mental Health to determine whether the student requires a psychiatric residential treatment facility. (Mr. Persett's testimony, testimony, Petitioner's Exhibit 2-6)
18. During the October 4, 2011, meeting the Head of School A, agreed that School B was not an appropriate educational placement for the student. He

suggested that the student be in a therapeutic placement. The student had only attended school 13 out of 42 days. At the end of the first marking period at the end of October the student was expelled from School B for non-attendance and theft. No IEP meetings for the student were held at School B while the student attended. (testimony)

19. On October 25, 2011, DCPS issued a prior written notice for the student to a private full time special education therapeutic day program. DCPS denied the parent's request that the student be returned to a residential placement setting. (DCPS Exhibit 7)
20. The parent did not visit and believed it was located too far for the parent to reasonably be able to visit the school and might pose more risk for the student to abscond. The parent's educational advocate encouraged the parent to enroll the student at her DCPS neighborhood school until a due process hearing could be convened. (Dr. Marryshow's testimony, Parent's testimony)
21. The parent enrolled the student in her neighborhood DCPS senior high school, School C. After the student began attending the neighborhood school the parent was contacted by DCPS and asked if the student could attend the Spectrum program as an interim placement during the pendency of the due process hearing. The parent was in agreement but was not provided a prior written notice and received conflicting information as to which DCPS program the student was to attend. (Parent's testimony)
22. DCPS scheduled an IEP meeting for the student; however, because of scheduling conflicts the parent and her educational advocate did not attend and the meeting was rescheduled. The IEP meeting was scheduled at School C to discuss her IEP and educational placement on December 6, 2011. (Parent's testimony)
23. The parent wants the student to be placed back in residential placement at The parent has since visited and was pleased with the program. Her previous concern and reason for rejecting that program when it was initially offered by DCPS was unfounded. (Parent's testimony)
24. At the time of the hearing the parent had not seen the student in two days. The student called the parent the night before the hearing and told her she was coming home. The parent believed that the student has met other students at School C and began staying at her classmates' homes instead of coming home in the evening. (Parent's testimony)
25. The student has been admitted to a private full time special education program resident group home located in Bristol, Virginia, approximately an hour from Washington D.C. There are 45 students and approximately 80 staff members and approximately ten teachers. Students are grouped by age. Boys and girls are separated. The student would be placed in a residential home for girls ages 16 and under. A husband and wife live in the house with the girls Students are under staff supervision at all times. The program can implement the student's IEP. The school has licensed therapists who tend to the therapeutic needs of the students. The school staff interviewed the student and she visited and she toured the school. The student teacher ratio varies

three to 10 students per teacher. There are regular education students and those seeking their GED. There are some students with ED classification. The cost of the program is per day all services included. Students usually stay from 6 to 9 months. The student will be able to receive credits toward her DCPS high school diploma. The school also provides transition services and also makes vocational skills training available to students. She has been accepted into the program. testimony, Petitioner's Exhibit 5, DCPS Exhibit 8)

CONCLUSIONS OF LAW:

Pursuant to IDEIA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE.

Pursuant to IDEIA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. ⁵ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

34 C.F.R. § 300.17 provides that a free appropriate public education or FAPE means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324.

Issue 1: Did DCPS deny the student a FAPE by failing to provide the student an appropriate residential placement?

Petitioner alleges that as of the start of SY 2011-2012 the student was stepped down from a residential placement to a less restrictive setting, a private day school, and since then the student has experienced academic, social/emotional and behavioral regression. Petitioner alleges the student is again in need of a residential placement that the parent requested at the October 4, 2011, IEP meeting.

⁵ The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the 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.

Conclusion: There was insufficient evidence presented that the student is in need of a residential placement. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

34 C.F.R. § 300.114 provides:

(a) General.

(1) Except as provided in Sec. 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and Sec. Sec. 300.115 through 300.120.

(2) Each public agency must ensure that--

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.116 provides:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--

(a) The placement decision--

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including Sec. Sec. 300.114 through 300.118;

(b) The child's placement--

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

A student's placement is to be in the least restrictive environment and ***in a school that is capable of meeting the student's special education needs.*** See Individuals with Disabilities Education

Improvement Act of 2004, 20 U.S.C. § 1402 (9) (D) (“FREE APPROPRIATE PUBLIC EDUCATION- The term ‘free appropriate public education’ means special education and related services that include an appropriate preschool, elementary school, or secondary school education in the state involved” [and] “are provided in conformity with the individualized education program”); § 1401 (29) (D) (“The term ‘special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability [. . .].”); 34 C.F.R. § 300.17 & 39; 34 C.F.R. § 300.116 (placement is to be based on student’s IEP as determined by team including the parents); 34 C.F.R. § 300.327 & 300.501 (c); D.C. Mun. Regs. Tit. 5E § 3013.1-7 (LEA to ensure that child’s placement is based on the IEP); and D.C. Mun. Regs. Tit. 5E § 3000.

Placement decisions can only be made after the development of the IEP. Only after the IEP has been developed does the multidisciplinary team (“MDT”) have a basis for determining where the student’s needs can be served. Should the process be reversed, the child’s IEP would be written to conform with a predetermined setting, possibly denying the child a free and appropriate public education (“FAPE”). *Spielberg v. Henrico County Public School*, 853 F.2d 256, 441 IDELR 178 (4th Cir. 1988).

In the case at hand the student had been in a residential placement for two full school years and had made sufficient academic and behavioral progress for the student to be “stepped down” to a less restrictive setting. Although the parent initially wanted the student to be placed at a residential setting she believed to be less restrictive, after that location was not available she chose, and DCPS agreed, to place the student in a private day program. It appears that the student went immediately from a highly restrictive structured program to a program of far less restriction. Within weeks of attending this program the student began to display behaviors that resulted in her being placed in the residential program initially.

On August 23, 2011, an IEP team, including the parent, developed an IEP that prescribed a program for the student and a LRE. It appears that the student’s IEP that was developed in August 2011, as the student left the residential program, may not have ever been implemented at School B, as there is no indication the student received behavioral support services in school as the IEP required. However, a failure to implement the IEP was not an issue raised in this complaint. The issue raised is that the student is in need of residential placement.

It appears in hindsight that the student was actually not “stepped down” gradually but thrust into an educational setting with little support for issues that quickly resurfaced. The parent now appears to have reversed her prior decision on a placement option that was made available by DCPS when the student was leaving School A, but is no longer one of the options because it exceeds the student’s needs pursuant to her current IEP. The IEP does not prescribe a residential placement. Even with the parent’s testimony that the student is staying away from home and often missing school, it is not clear based on this testimony alone that a residential placement is necessary. The therapeutic day program that DCPS is offering and is more restrictive than School B and is a logical step up in restriction without going all the way to residential placement. At this juncture it seems reasonable that the placement DCPS has offered and has issued a prior notice for is a logical next step.

The parent testified that neither she nor the student has visited _____ and her greatest concern is its distance from the student's home and travel time given that it is a day program. This alone is not a sufficient basis to exclude this location. The Hearing Officer concludes that based on the student's current IEP, and the prior notice issued by DCPS that student's current placement is _____ and there was scant evidence presented by Petitioner to indicate the program is inappropriate. The Hearing Officer thus concludes Petitioner did not meet its burden of proving that that the student is in need of a residential placement and certainly not that the student's current IEP, placement and LRE are inappropriate.

Issue 2: Did DCPS deny the student a FAPE by failing to convene an appropriate IEP team at the October 2011 meeting?

Petitioner alleges the team did not include required members: special education teacher, regular education teacher and a psychologist.

Conclusion: The evidence demonstrates that change in the student's location of services from School A to Youth in Transition was a change that did not require an IEP team. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

34 C.F.R. § 300.116 provides:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--

(a) The placement decision--

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options...

34 C.F.R. § 300.501(c) provides:

(c) Parent involvement in placement decisions.

(1) Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.

(2) In implementing the requirements of paragraph (c)(1) of this section, the public agency must use procedures consistent with the procedures described in Sec. 300.322(a) through (b)(1).

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by a group without the involvement of a parent, if

the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.

Generally, in the District of Columbia the IEP Team⁶ also functions as the placement team but IDEA does not mandate it. *See* D.C. Mun. Reg. tit. 5-E § 3001.1 (definition of "IEP team"). Placement decisions need not be made by an IEP team. Note that 34 C.F.R. §300.116(a)(1) does not require the IEP team to make the placement decision. Because IDEA does not assign any particular name to the placement team, MDT is generally used.

In the case at hand the parent requested a meeting soon after the student began attending School B. DCPS convened a meeting on October 4, 2011, that included the parent, her educational advocate and the head of the student's current placement at the time. This meeting was not an IEP meeting nor did it purport to be based on the testimony provided by _____ and _____

It is clear under IDEA that a full IEP team is required when the IEP is developed and the services, goals and LRE are determined. However, an IEP team is not necessarily required when a location of services is determined. Although typically the placement and location of service decisions are made in an IEP meeting, there is no requirement under IDEA that these decisions include all individuals required by an IEP team. The language of 34 C.F.R. § 300.116 and §300.321 are distinct. The personnel required in an IEP team are not the same individuals required for a placement decision. In addition, when it comes to a location of services verses the students LRE and placement there is precedent for the determination of a location of services being made by the school district. Although it is probably helpful to involve the parent in the location of services decision, as DCPS apparently attempted to do repeatedly in the past for this

⁶ 34 CFR §300.321 provides: The public agency must ensure that the IEP Team for each child with a disability includes--

- (1) **The parents of the child;** (emphasis added)
- (2) Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);
- (3) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
- (4) A representative of the public agency who--
 - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
 - (ii) Is knowledgeable about the general education curriculum; and
 - (iii) Is knowledgeable about the availability of resources of the public agency.
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in paragraphs (a)(2) through (a)(6) of this section;
- (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (7) Whenever appropriate, the child with a disability.

student.

In *White v. Ascension Parish Sch. Bd.* 343 F. 3d 373 the appeals court held the IDEA did not prohibit the district from making the administrative decision about where to provide services. While the Act requires parental participation in "educational placement" decisions, such "placement" refers to educational programming, not physical location. "Educational placement", as used in the IDEA, means educational program not the particular institution where that program is implemented," the court explained. While the IDEA requires parental participation in educational placement decisions, it does not mandate that parents be involved with site selection, the court emphasized, finding support in *Sherri A.D. v. Kirby*, 19 IDELR 339 (5th Cir. 1992).

In the case at hand there has been no change in the IEP, no change in the services and no change in the student's LRE. Consequently, DCPS was justified in issuing a notice of placement for a location that could implement the student's IEP and it did this with the notice issued for the student to attend

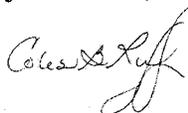
As previously stated, the student's current IEP does not prescribe an residential placement and even with the parent's testimony that the student is staying away from home and often missing school, it is not clear based on this testimony alone that the therapeutic day program that DCPS is offering, is not appropriate. At this juncture it seems reasonable that the placement DCPS has offered and issued a prior notice for is a logical next step for the student. The Hearing Officer concludes that based on the student's current IEP, and the prior notice issue by DCPS that student's current placement is and there was no evidence presented by Petitioner that would indicate the program is inappropriate. The Hearing Officer concludes Petitioner did not meet its burden in proving that DCPS convened an inappropriate team on October 4, 2011, in reviewing and determining where the student would attend school.

ORDER:

The complaint is hereby dismissed with prejudice.

APPEAL PROCESS:

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. §1415(i)(2).



Coles B. Ruff, Esq.
Hearing Officer

Date: December 8, 2011