

**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
February 24, 2014

STUDENT, ¹)	
through the Parent,)	
)	Date Issued: February 23, 2014
Petitioner,)	
)	Hearing Officer: Virginia Dietrich
v.)	
)	
District of Columbia Public Schools)	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

Student was a child with a disability who attended nonpublic School D, a full-time special education school. Student performed well academically at the school; however, as Student grew older, he recognized the need to interact socially with peers who did not have such severe disabilities. So his quest for a full-time special education school with higher functioning peers began. Petitioner filed a complaint on Student’s behalf in August 2013, requesting placement at a higher level functioning full-time special education school, School C. What Student got instead was a Hearing Officer Determination (“HOD”) that gave him a very specific Individualized Education Program (“IEP”) with some classes inside of general education and some classes outside of general education. That HOD found School C to be an inappropriate school placement. DCPS, in an effort to implement the specifics of the HOD, offered Student a public high school where all requirements of the HOD could be met except one. DCPS offered Petitioner an equitable alternative to the unmet requirement because there was no public or nonpublic school that could implement the HOD in totality. Petitioner rejected it.

Petitioner then filed a due process complaint notice on December 11, 2013, alleging that Student had been denied a free appropriate public education (“FAPE”) by the District of Columbia Public Schools (“DCPS”) in violation of the Individuals with Disabilities Education Act (“IDEA”). Petitioner alleged that DCPS had failed to implement a HOD dated 10/30/13, that required DCPS to provide Student with a program that met all of the IEP requirements delineated in the HOD. Petitioner argued that the HOD required DCPS to provide Student with

¹ Personal identification information is provided in Appendix A.

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the specific IEP elements delineated in the HOD even if it means that a special classroom has to be created just for Student. Alternatively, Petitioner is requesting placement in nonpublic School C, the very school that she had sought placement at in the prior litigation, but which was rejected as inappropriate by that hearing officer.

DCPS argued that it diligently tried to find a program and a school where Student's IEP, as amended per the Order of the HOD, could be implemented. According to DCPS, it was impossible to find a school, either public or nonpublic, that could provide specialized instruction in a class size of no more than 12 students within the general education setting in all of Student's academic classes. DCPS offered the closest fit available, which was public School B, and tried to remediate the one IEP requirement that it could only partially fulfill by offering Student the services of an instructional aide and tutoring. DCPS asserted that it had not failed to comply with the HOD by failing to provide Student with a location of services that could implement the IEP.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations; and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on 12/11/13. This Hearing Officer was assigned to the case on 12/12/13. DCPS timely filed a response to the complaint on 12/19/13 and made no challenges to jurisdiction.

Neither Petitioner nor DCPS waived the resolution meeting. The resolution meeting took place on 01/09/14, at which time parties agreed to let the resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period ended on 01/10/14, the 45-day timeline to issue a final decision began on 01/11/14 and the final decision is due by 02/24/14.

A prehearing conference took place on 01/16/14. A Prehearing Order was issued on 01/20/14.

The due process hearing was a closed hearing that took place on 02/04/14. Petitioner was represented by Miguel Hull, Esq. DCPS was represented by Justin Douds, Esq. Maya Washington, Esq. joined the hearing as co-counsel for DCPS late in the afternoon. Neither party objected to the testimony of witnesses by telephone. Petitioner and Student participated in the hearing in person. Despite lengthy settlement discussions at the beginning of the hearing, the complaint could not be resolved.

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Petitioner's Disclosure Statement, undated, but filed and served on 01/28/14, consisted of a witness list of six (6) witnesses and documents P-1 through P-24. There were two sets of exhibits labeled as P-22. The second set was renumbered appropriately as P-23. Petitioner's witness list and documents P-1 through P-24 were admitted into evidence without objection.

DCPS' Disclosure Statement, dated, served and filed on 01/28/14, consisted of a witness list of five (5) witnesses and documents R-1 through R-8. R-2-2 was an incomplete page. DCPS' Disclosure Statement was admitted into evidence without objection.

Petitioner presented the following five (5) witnesses in her case in chief: (1) Petitioner; (2) Student; (3) School C Admissions Director; (4) educational advocate; and (5) an expert in the implementation of IEPs and development of compensatory education plans. Due to limited availability of witnesses, parties agreed that the expert in the implementation of IEPs and development of compensatory education plans would be presented after DCPS had presented its case. Petitioner did not present any rebuttal evidence.

DCPS presented the following three (3) witnesses: (1) Special education coordinator ("SEC") at School A ("School A SEC"); (2) SEC at School B ("School B SEC"); and (3) DCPS compliance case manager ("compliance case manager").

The sole issue to be determined in this Hearing Officer Determination is as follows:

Issue #1 – Whether DCPS denied Student a FAPE by failing to implement Student's IEP as determined by a Hearing Officer Determination ("HOD") dated 10/30/13; specifically, since the IEP was amended on 11/15/13, Student's current location of services, School A, could not implement the IEP and DCPS had not provided a location of services that could implement the IEP.

Petitioner requests the following relief:

- (1) A finding of a denial of a FAPE on the issue presented;
- (2) DCPS to fund Student at School C; and
- (3) Compensatory education consisting of tutoring in specialized instruction for DCPS' failure to implement Student's IEP since 11/15/13.

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

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

#1. Student is _____ a resident of the District of Columbia. Petitioner is Student's mother.² Student is a child with a Specific Learning Disability.³

² Petitioner.

#2. Student attended School D for three years. School D is a full-time outside of general education nonpublic school. At School D, Student's classroom was comprised of 6-7 students with a teacher and an instructional aide. Student was not a behavior problem and did not have an attendance problem. Student received good grades and adjusted well there. Student was not as socially delayed as other students at School D. As Student matured and advanced academically, he wanted to change schools in order to have a more appropriate peer group and a more challenging academic program.⁴

#3. On or about Spring 2013, Petitioner sought a change of school placement from School D to School C.⁵ School C also is a nonpublic full-time special education school, but the student population there does not have the severity of disabilities that School D has.⁶ DCPS refused to fund placement at School C; rather, it offered Student placement at a public school. Petitioner refused the public school placement and instead enrolled Student at a public charter school, School A. On August 16, 2013, Petitioner filed a due process complaint in order to obtain a Hearing Officer Determination ("HOD") placing Student at School C.⁷ Student began attending School A at the beginning of the 2013/14 school year and has struggled academically ever since.⁸ Among other things, School A cannot provide Student with specialized instruction outside of general education.⁹

#4. The due process complaint filed in August 2013 did not yield the result that Petitioner sought. On 10/30/13, the presiding hearing officer specifically rejected School C, a full-time nonpublic special education school, as an appropriate school to meet Student's educational needs because it could not educate Student with typically developing peers. That hearing officer determined that Student did not need a full-time outside of general education IEP; rather, Student could be co-taught.¹⁰

#5. The HOD, issued on 10/30/13, rewrote Student's IEP to include:

- (A) Instruction in a school that has access to typically developing peers;
- (B) An "inclusion" classroom for English classes, ELA classes, History classes, Social Studies class, and other classes that require a substantial amount of reading and/or writing. Such classes shall be led by a special education teacher and a general education teacher. These classes must provide the Student with explicit and systematic instruction in a structured group setting;
- (C) A small, structured, self-contained classroom for math. Such classroom shall have a modified approach to instruction, with explicit and systematic special education instruction;
- (D) No more than 12 students in any of the Student's academic classes;
- (E) A special education teacher in every academic classroom;

³ P-6-1.

⁴ Petitioner, Student, P-13-1, P-14-3, P-15-1.

⁵ Petitioner.

⁶ Petitioner, Student.

⁷ Petitioner, P-18.

⁸ Petitioner.

⁹ School A SEC.

¹⁰ P-18-20, P-18-21.

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(F) 6 hours per week of pull-out instruction to preview and review coursework in a group no larger than 3;

(G) Access to an educational case manager to review organization issues for one period a week; and

(H) The following special education interventions, on a regular and consistent basis: guided prompts, highlighting strategies, context clue worksheet, visual storybooks, structured writing assignments, a word bank, extra time for assignments and tests, prewriting strategies, graphic organizers, outlines, text to speech software or equipment, and multi-sensory instruction.¹¹

#6. No public or nonpublic school exists with a curriculum that would allow Student to receive all of his general education classes in a classroom with no more than 12 students.¹²

#7. On 10/30/13, DCPS proposed an amendment to Student's IEP that incorporated the specific IEP requirements of the HOD.¹³ Petitioner met with DCPS more than once to discuss implementation of the HOD, including a meeting on 11/15/13, at which time the IEP was amended and DCPS offered School B with the services of an instructional aide.¹⁴ The School B SEC participated in the 11/15/13 meeting by telephone and described the program available.¹⁵

#8. School B is a DCPS school and is Student's neighborhood school.¹⁶ It is a co-taught environment. School B is able to implement all of the IEP requirements of the HOD except for the requirement that Student receive his elective classes in Physical Education, ROTC, and Art classes in a classroom with no more than 12 students. School B can provide Student with his academic classes, other than electives, in a general education classroom with no more than 12 students. School B is also capable of providing Student with the required amount of specialized instruction outside of general education.¹⁷ (James Robinson). DCPS offered to place an instructional aide in the general education classroom with Student, so that the student/teacher ratio would be reduced to 12:1, to comply with the intent and spirit of the HOD that Student have more opportunity for assistance within the general education setting. DCPS also offered Student tutoring at School B to assist him with grasping the general education curriculum.¹⁸ An instructional aide and tutoring is also available to Student if Petitioner chooses to keep Student at his current school, public charter school School A.¹⁹

#9. Petitioner initially rejected School B as a school placement for Student, sight unseen. Petitioner later visited School B, and still rejected the public school placement. Rather, Petitioner seeks placement at nonpublic School C, the same nonpublic School C that was deemed inappropriate in the 10/30/13 HOD because it did not afford Student access to typically developing peers. Petitioner opts to keep Student at public charter school School A, a school that

¹¹ P-18-8, P-18-9.

¹² Compliance case manager.

¹³ P-21-1.

¹⁴ Petitioner, compliance case manager.

¹⁵ Compliance case manager.

¹⁶ Compliance case manager.

¹⁷ School B SEC

¹⁸ R-4, compliance case manager.

¹⁹ Petitioner, compliance case manager.

she knows cannot implement the IEP requirements of the HOD, rather than move him to School B.²⁰ School A is less able to implement Student's IEP than is School B.²¹

#10. Currently, School C cannot implement the IEP requirements of the HOD in that School C cannot provide Student with classes in the general education or inclusion setting. School C does not allow access to typically developing peers.²²

Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The sole issue to be determined is whether DCPS denied Student a FAPE by failing to implement Student's IEP as determined by a Hearing Officer Determination ("HOD") dated 10/30/13; specifically, since the IEP was amended on 11/15/13, Student's current location of services, School A, could not implement the IEP and DCPS had not provided a location of services that could implement the IEP.

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

²⁰ Petitioner, compliance case manager, R-1-2, R-6.

²¹ School A SEC, School B SEC.

²² School C Admissions Director.

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

Each public agency must ensure that (1) to the maximum extent appropriate, children with disabilities are to be educated with children who are nondisabled, and (2) 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 CFR 300.114.

The school district is not required to maximize or provide the best program; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit the child to benefit from the instruction. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982).

Petitioner failed to meet her burden of proof that DCPS failed to implement a Hearing Officer Determination ("HOD") by failing to provide Student with a location of services that could implement his IEP.

On 10/30/13, a HOD was issued that provided Student with very specific IEP elements. DCPS met with Petitioner several times in an effort to implement Student's IEP that was amended on 11/15/13 to comply with the HOD.

The problem with implementing the 11/15/13 IEP was that there was no school, either public or nonpublic, that could provide the required instruction to Student in all of his academic classes in a general education classroom of 12 students or less. The closest match to the IEP was School B, a public high school that was offered to Petitioner at the earliest opportunity, i.e., on 11/15/13. The only aspect of the IEP that School B could not implement exactly was the requirement that Student receive his elective classes of Physical Education, Art and ROTC in a class size of 12 students or less. School B could provide Student with his other academic classes in a general education classroom of 12 students or less. All other aspects of Student's IEP could be implemented at School B.

To compensate for the lack of a general education small class size in Student's elective courses and in an effort to comply with the spirit and intent of the HOD, DCPS offered an instructional aide to Student in all of his classes, not just in his electives, and tutoring as well. Student had performed well with a small student/teacher ratio that had consisted of a teacher and an instructional aide for 6-7 students while at School D. Petitioner rejected the offer. Instead, Petitioner wanted placement in nonpublic School C or she wanted DCPS to create a classroom especially for Student to satisfy the general education small class size requirement of the HOD.

The Hearing Officer determines that DCPS made earnest and timely efforts to comply with implementation of the 10/30/13 HOD, which was administratively impossible to comply with. School B is about a 95% match for implementation of Student's IEP. School B, Student's

neighborhood school, is a better match than any other public or nonpublic school placement. Creating a special classroom for Student would be financially and administratively absurd.

The Hearing Officer determines that Student's opportunity for a FAPE will not be compromised by receiving his elective classes in a large general education setting at School B with the assistance of an instructional aide and tutoring. In fact, Student desperately sought an educational setting with access to typically developing peers as early as Spring 2013 when he was still attending nonpublic School C. Student testified at the due process hearing. Student was articulate, well mannered and his demeanor suggested that he could easily fit in with typically developing peers. The instructional aide offered by DCPS can assist Student with mastery of his elective classes and if that is not enough, DCPS has offered tutoring. School B is an appropriate location of services where Student's 11/15/13 IEP can be implemented and this location of services complies with the specific requirements, spirit and intent of the HOD.

Petitioner wanted a nonpublic placement at the school of her choice, nonpublic School C, which was and still is an inappropriate educational school placement for Student. Student's IEP does not support placement at School C, which is a full-time special education school that does not allow access to typically developing peers. Petitioner enrolled Student at public charter school School A on her own initiative. It is Petitioner's prerogative to keep Student at School A, a school that she knows cannot implement Student's IEP and a school where Student is already struggling.

ORDER

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

This complaint is **DISMISSED WITH PREJUDICE**.

All requested relief is denied.

IT IS SO ORDERED.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

Date: February 23, 2014

/s/ Virginia A. Dietrich
Hearing Officer

2013-0680

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Copies to:

Petitioner: (U.S. mail)

Petitioner's Attorney: Miguel Hull, Esq. (electronically)

DCPS' Attorney: Justin Douds, Esq., Maya Washington, Esq. (electronically)

OSSE-SPED (electronically)

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