

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

Student Hearing Office  
810 First Street NE, STE 2  
Washington, DC 20002

---

[Student/Parent]<sup>1</sup>,

Date Issued: March 23, 2012

Petitioner,

Hearing Officer: Jim Mortenson

v.

District of Columbia Public Schools (DCPS),

Respondent.

---

OSSE  
STUDENT HEARING OFFICE  
2012 MAR 26 AM 8:41

**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed by the Petitioner on January 24, 2012.

A response to the complaint was filed February 1, 2012. A resolution meeting was attempted on February 7, 2012. The Respondent did not bring any members of the IEP team to the meeting and refused to participate because the Student was not present (although his attorney and his guardian ad litem were present). The three agreed to reconvene later with the Student and the Respondent never rescheduled the resolution meeting. The Petitioner never requested the hearing timeline be adjusted. The Respondent moved for dismissal based on the lack of a resolution meeting and this motion was denied on the record because it was the Respondent who first refused to participate and then failed to reschedule the meeting.

---

<sup>1</sup> Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

A prehearing conference was convened on February 8, 2012, and resulted in, among other things, a “stay-put” order requiring the Respondent to continue to maintain the Student’s placement at the \_\_\_\_\_ Program pending the outcome of these proceedings. The 45 day hearing timeline began on February 24, 2012.

The due process hearing was convened and held on March 14, 2012, \_\_\_\_\_ at 810 First Street NE, Washington, D.C. The hearing was closed to the public. Of the two issues identified at prehearing, one was withdrawn as it had been resolved. The due date for this HOD is April 8, 2012. This HOD is issued on March 23, 2012.

**II. JURISDICTION**

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5, Chap. 30.

**III. ISSUES, RELIEF SOUGHT, and DETERMINATION**

The issue to be determined by the Independent Hearing Officer (IHO) is:

Whether the Respondent proposed to change the Student’s educational placement when it proposed to move him from \_\_\_\_\_ School to \_\_\_\_\_ and, if so, whether \_\_\_\_\_ is inappropriate?

The substantive requested relief is to remain at \_\_\_\_\_ Program.

\_\_\_\_\_ Program \_\_\_\_\_ and \_\_\_\_\_ are substantially and materially different and so the Student’s placement would be changed if he were assigned to \_\_\_\_\_ which is currently inappropriate.

#### IV. EVIDENCE

Four witnesses testified at the hearing, three for the Petitioner and one for the Respondent.

The Petitioner's witnesses were:

- 1) Jennifer Switlick, Program Monitor, DCPS (J.S.)
- 2) Petitioner (P)
- 3) Pierre Bergeron, Guardian Ad Litem (P.B.)

The Respondent's witness was Danielle Brown, Truancy Case Manager, DCPS (D.B.).

Three exhibits were admitted into evidence of three disclosures from the Petitioner. The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 1	May 5, 2011	Individualized Education Program (IEP) (See R 1)
P 2	December 19, 2011	Meeting Notes
P 3	February 6, 2012	Letter from Davis to Henderson

15 exhibits were admitted into evidence of the Respondent's 15 disclosures. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	May 5, 2011	IEP (See P 1)
R 2	December 19, 2011	Meeting Notes
R 3	December 20, 2011	Prior Written Notice
R 4	February 7, 2012	Resolution Period Disposition Form, RSM Notes
R 5	November 8, 2011	Letter of Invitation to a Meeting
R 6	November 30, 2011	[Consent Form]
R 7	May 11, 2009	Letter of Invitation/Notice of a Meeting
R 8	Undated	Service Tracker (Draft)
R 9	Undated	Backgrounder – Spectrum Co-location Classrooms
R 10	Undated	Resume of Temple Crutchfield
R 11	October 24, 2011	Letter from Brown to Petitioner
R 12	January 27, 2010	Letter from Travers to Conboy & Associates
R 13	May 12, 2009	Student Evaluation Plan
	December 15, 2009	Consent for Evaluation – Initial or Reevaluation
R 14	March 7, 2012	Documents for [Petitioner]
R 15	May 2011	LEA DATA SYSTEM ADMINISTRATOR TRAINING GUIDE



includes goals in the academic areas of reading, math, and writing, and functional goals in the areas of communication/speech and language and emotional, social, and behavioral development.<sup>9</sup> The only special education and related services documented in the IEP are 27.5 hours per week of specialized instruction outside of general education, one hour per week of behavioral support services outside of general education, and transportation.<sup>10</sup> The IEP lacks appropriate measurable postsecondary goals based upon age appropriate transition assessments.<sup>11</sup> No vocational education services are listed in the IEP despite the Student's placement at a "vocational program."<sup>12</sup>

4. Prior to the December 2011 IEP team meeting the Respondent determined to remove the Student from \_\_\_\_\_ and send him to \_\_\_\_\_.<sup>13</sup> It determined it could do this without prior written notice, including no explanation, because it had concerns about \_\_\_\_\_ and believed the change was only one of location and not of educational placement.<sup>14</sup> The reasons for the change, not communicated to the Petitioner or the IEP team, were generally that \_\_\_\_\_ did not have the ability to provide appropriate education and required related services to students in the program, including the Petitioner.<sup>15</sup> There were no records of services provided at \_\_\_\_\_ provided to the Respondent by \_\_\_\_\_ and there were concerns about the certification of teachers there.<sup>16</sup> There was no speech and language pathologist on staff (although it is unclear why this was a concern since the Respondent presumably could provide a speech and language pathologist for students who required one), very little direct instruction (although the Student

---

<sup>9</sup> P 1, R 1.

<sup>10</sup> P 1, R 1.

<sup>11</sup> P 1, R 1. (This failure was not raised in the complaint and so is not resolved through this proceeding.)

<sup>12</sup> P 1, R 1.

<sup>13</sup> T of J.S.

<sup>14</sup> T of J.S.

<sup>15</sup> T of J.S.

<sup>16</sup> T of J.S.

in this case was making academic progress according to his teachers at the IEP team meeting); and few interventions being provided (but it is not clear what was not being provided to the Student that would require his re-location to another school.)<sup>17</sup> The Respondent believed the change of schools was an administrative decision because there were no changes to the Student's IEP made at the December IEP team meeting, despite several serious flaws, including the lack of speech and language services and no measurable postsecondary goals.<sup>18</sup> The analysis the Respondent applied to determine that the change was not a change in placement was: both schools are "full-time" out of general education placements; had the necessary instructional staff; the Student's educational program was individualized to meet his needs; and there were related service providers who could implement the Student's IEP.<sup>19</sup> J.S. was aware that was a vocational school but was not aware of how much of the Petitioner's program was vocational in nature.<sup>20</sup> She also was not aware that carpentry was provided.<sup>21</sup>

5. The Student's Guardian Ad Litem did not agree with the Respondent's decision to change the Student's school.<sup>22</sup>
6. The Student is expecting to graduate (although it will not be with a diploma) in June 2012.<sup>23</sup> The Student is studying reading, math and English at school as well as carpentry, auto detailing, and auto mechanics.<sup>24</sup> The Student missed several days of class in the fall of the

---

<sup>17</sup> T of J.S.

<sup>18</sup> T of J.S., T of P.B., P 1/R 1, P 2, R 2.

<sup>19</sup> T of J.S. (The only related service on the Student's IEP was behavioral support services, even though the Student had a speech and language goal. It is unclear why the Respondent did not ensure the IEP accurately reflected the services the Student required.)

<sup>20</sup> T of J.S.

<sup>21</sup> T of J.S.

<sup>22</sup> T of P.B., P 2, R 2.

<sup>23</sup> T of P., P 1, R 1.

<sup>24</sup> T of P, T of P.B., R 2.

current school year, triggering notice from the Respondent.<sup>25</sup> The Student's attendance then improved.<sup>26</sup>

7. is a non-public school housed in a public school thus resulting in "co-location" classrooms.<sup>27</sup> Students who attend a co-location classroom have the opportunity to participate in social, academic, and recreational activities with non-disabled peers.<sup>28</sup>

offers rigorous academics, engaging technology, and strong behavioral support systems, but no vocational education.<sup>29</sup>

## **VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "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." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. There are vagaries of what is meant by "placement." When moving a child from one building to another where the schools are "substantially and materially similar" there is no change of

---

<sup>25</sup> T of D.B., R 11.

<sup>26</sup> T of D.B., T of P, T of P.B.

<sup>27</sup> R 9.

<sup>28</sup> R 9.

<sup>29</sup> R 9.

placement. 71 Fed. Reg. 46588-89 (August 14, 2006). The schools need not be identical.

According to OSEP:

Historically, we have referred to “placement” as points along the continuum of placement options available for a child with a disability, and “location” as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, 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.

Id. at 46588. This analysis differs slightly from the analysis OSEP used in 1994. OSEP stated in 1994 that the placement team (the IEP team in both Tennessee and the District of Columbia) must, in addition to selecting the “specific option from the continuum of alternative placements in which the child’s IEP can be implemented. . . .select a location, i.e. school or facility that the child would attend if not disabled, if appropriate, or another school or facility as close as possible to the child’s home, that is consistent with the student’s IEP and the option on the continuum selected to implement the student’s IEP.” Letter to Fisher, 21 IDELR 992, p. 4 of PDF, (OSEP 1994). Selecting the specific location in terms of a school or facility is no longer viewed by OSEP as purview of the placement team because it is now OSEP’s view “that placement refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school.” 71 Fed. Reg. 46687 (August 14, 2006). Thus, this IHO concludes the consideration of a specific school is not considered to be an IEP team decision, absent some exigent circumstance. OSEP’s analysis in determining whether a change in location is a change in placement, as articulated in Letter to Fisher remains persuasive. OSEP outlines four components to examine in determining whether “a proposed change would substantially or materially alter the child’s educational program”: 1) Whether the IEP was revised; 2) Whether the child will

be able to be educated with non-disabled children to the same extent as present; 3) Whether the child will have the same opportunities to participate in non-academic and extracurricular services; and 4) Whether the new placement option is the same option on the continuum of alternative placements. Letter to Fisher at p. 4 of PDF.

3. Special education includes vocation education which “means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.” 34 C.F.R. § 300.39(b)(5).

4. Changing the Student’s location of service from \_\_\_\_\_ Program to \_\_\_\_\_ would substantially and materially alter his education program. The Student’s IEP provides for “full-time” special education services, listed at specialized instruction and behavioral support services. \_\_\_\_\_ education, while not specifically listed in the IEP, is a large part of the Student’s education program. The Student’s special education at \_\_\_\_\_ includes vocational education in the areas of carpentry, detailing, and automotive repair and \_\_\_\_\_ does not provide vocational education. (The fact that vocational education is not specifically stated in the IEP is a reflection of poor IEP drafting given that the Student was publicly placed in a “vocational” school.<sup>30</sup> The errors in the IEP were not challenged in the complaint but should be corrected to avoid compliance problems or additional litigation.) Furthermore, the Student would be able to be educated with non-disabled children to a greater extent than at present, also suggesting a change in placement. Since vocational education is generally non-academic, the Student’s opportunity to participate in those services will be different at \_\_\_\_\_

---

<sup>30</sup> The IEP includes other obvious errors as well, supporting this conclusion, such as the lack of speech and language services despite a speech and language goal and the lack of measurable postsecondary goals.

since they are not available there. Finally, and are separate schools and so are the same on the continuum of alternative educational placements. Thus, the change would substantially and materially alter the Student's educational program, despite the failure of the Respondent to appropriately draft an IEP and despite that the two schools are the same on the continuum of alternative placements. This change was administratively and not by the IEP team as required by DCMR § 5-E3001.1.

5. Because changing the Student's placement to would substantially and materially alter the Student's educational program, is not appropriate for the Student. *See* 34 C.F.R. § 300.116. This conclusion does not prevent a change in location that would not substantially and materially alter the Student's educational program if such a change is necessary because there are problems with the provider, It is noted that the Student's IEP must be based on the Student's needs, not the administrative convenience of the Respondent such as the need to reassign the Student to another school that would substantially and materially change his educational program. *See* 34 C.F.R. § 300.324.

#### **VII. DECISION**

The Petitioner prevails because the assignment of the Student to was a change in placement that is not permitted to be made administratively and is inappropriate.

#### **VIII. ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that the Student will not be removed from a school with a vocational education component unless and

until the IEP team determines to change the Student's IEP to remove vocational education. Such change cannot be made for the convenience of the Respondent. This does not prevent a necessary administrative change to another school that does not substantially and materially alter the Student's education program, consistent with this HOD.

**IT IS SO ORDERED.**

Date: March 23, 2012

A handwritten signature in black ink, appearing to read 'Jim Mortenson', written over a horizontal line.

Jim Mortenson, Independent Hearing Officer

**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 USC §1415(i).