

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

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

[Parent], on behalf of
[Student],¹

Date Issued: March 22, 2012

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on January 20, 2012. The Petitioner is represented by Nicholas Ostrem, Esq., and the Respondent is represented by Daniel McCall, Esq. A prior complaint was filed by the Petitioner and resulted in a Hearing Officer's Determination (HOD) in October 2009 that placed the Student at the _____ School, a non-public special education day school for children with disabilities.

Two responses to the present complaint were filed, one on January 30, 2012 and another, different response, on February 6, 2012. The second response indicated that the Petitioner declined the free appropriate public education (FAPE) the Respondent made available to the Student. (No evidence to support this assertion was ever provided at hearing and it is clear the

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

Petitioner merely disagreed with the Respondent's proposal to send the Student to a new school.) A prehearing conference was convened on February 6, 2012, and resulted in, among other things, a "stay-put" order requiring the Respondent to continue to maintain the Student's placement at the School pending the outcome of these proceedings. (The Petitioner had removed the Student from the school in January following knowledge that the Student's school would be changed to The resolution meeting was also held on February 6, 2012, and resulted in no agreements between the parties. The 45 day hearing timeline began on February 20, 2012.

There was also some confusion between the parties regarding the transportation of the Student to school under the School under the "stay-put" order. The misunderstanding was worked out between the parties and no action on the motion was required.

The due process hearing was convened and held on March 13, 2012, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. Petitioner requested the opportunity to file a written closing statement. The Petitioner filed her closing statement on March 16, 2012. The Respondent did not make a closing argument or file a written closing statement. The due date for this HOD is April 4, 2012. This HOD is issued on March 22, 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 whether _____ whether or not it is a change in educational placement, cannot provide the Student a FAPE?

The substantive requested relief is continued attendance at _____ School.

_____ School and _____ are not substantially and materially different and so the Student's placement was not changed. There is no basis to conclude _____ will not be able to implement the Student's individualized education program (IEP).

IV. EVIDENCE

Nine witnesses testified at the hearing, seven for the Petitioner and two for the Respondent.

The Petitioner's witnesses were:

- 1) Ida Jean Holman, Educational Advocate, James E. Brown & Associates (I.H.)
- 2) The Student's Mother, Petitioner (P)
- 3) _____ Director,
- 4) _____ Special Education Teacher,
- 5) _____ Social Studies Teacher,
- 6) _____ CEO, _____ School
- 7) _____ Head of School and Acting IEP Coordinator, _____ School

The Respondent's witnesses were:

- 1) _____ Program Director,
- 2) Nicole Rachel, LEA Program Monitor, District of Columbia Public Schools (N.R.)

Nine exhibits were admitted into evidence of 15 disclosures from the Petitioner. The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 6	February 10, 2011	Individualized Education Program (IEP)
P 7	January 6, 2012	IEP (See R 1)
P 8	January 6, 2012	Prior Written Notice (See R 10)
P 9	March 9, 2009	Educational Evaluation
P 10	January 26, 2011	WRAT4, Score Report
P 12	December 19, 2011	[OSSE List of] Approved Nonpublic Schools
P 13	Undated	Co-location Classrooms, What to Expect
P 14	September 16, 2011	Negotiated Contract for Goods and/or Services
P 15	Undated	Resume, Ida Jean Holman, Ph.D.

10 exhibits were admitted into evidence of the Respondent's 11 disclosures. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 1	January 6, 2012	IEP (See P 7)
R 2	January 6, 2012	Meeting Notes
R 3	November 21, 2011	Letter from Logan-Staton to Rachel (with attached)
R 4	February 6, 2012	Complaint from Rachel
R 5	(Multiple Dates)	Parent Contacts
	December 12, 2011	Parent/Guardian Letter of Invitation
	December 12, 2011	Student Letter of Invitation-IEP Meeting
	Undated	Certified Mail Receipt
	December 12, 2011	Parent/Guardian Letter of Invitation
	January 6, 2012	Parent/Guardian Letter of Invitation
R 6	October 8, 2010	D.C. Mun. Regs 5-A2813.1
	October 8, 2010	D.C. Mun. Regs 5-A2823
R 7	November 9, 2011	Statement of Services Agreement for Parentally-Placed Private School Children with Disabilities
	October 7, 2011	Frequently Asked Questions and Answers
R 8	Undated	Resume of Dale Young
	Undated	Resume of Temple Crutchfield
R 9	Undated	Photos
	September 9, 2011	Daily Lesson Plan
	September 22, 2011	Daily Lesson Plan
	Undated	Class Schedule
	September 17, 2011	[Student point chart]
	Undated	Data Assessments 2011-2012
	Undated	Co-location Classrooms
R 10	January 6, 2012	Prior Written Notice (See P 8)
	January 6, 2012	Prior Written Notice

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. To the extent the findings of fact do not reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are not credited. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. 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 year old learner with a disability.² The Student has been determined eligible for special education and related services under the definition of multiple disabilities (specific learning disabilities and speech and language impairment).³ The Student's needs are academic and functional in nature.⁴ It is not clear from the evidence how the Student's disabilities affect his progress and involvement in the general curriculum, but he is performing at the elementary school level academically.⁵ The Student's disabilities do not significantly impact his ability to transition from class to class or from school to school.⁶ The

² P 6, P 7/R 1.

³ P 6, P7/R 1.

⁴ P 6, P 7/R 1, P 9, P 10.

⁵ P 6, P 7/R 1, P 9, P 10. (That is to say, the evidence shows how the Student is performing academically and functionally, but it does not show or explain why he is performing that way. For example, is the Student performing academically on an elementary grade level due to a disability that has not been properly addressed, due to a lack of appropriate general education instruction, or a lack of effort and follow-up by the Student and family?)

⁶ P 6, P 7/R 1, P 9, P 10. (E.M. testified that Student has no problem when he arrives at her class, yet made the conclusory statement that transitions affected his performance. P testified that the Student really liked Monroe when he started, and now is having some issues but is also "doing great now." R.L. testified that it took a long time for the Student to get comfortable when he came to Monroe and that it was hard for him. T.P. also stated that it takes a long time for Student to adjust following a transition. T.P. also testified this was related to his disability, but did not explain how or upon what data that conclusion was based. I.H. testified that the Student's transition to Monroe took awhile and that he has done better since he has been there. Given the conflicts in all the testimony, and more

Student has emotional interactions with staff and peers, and problems with self-regulatory behavior.⁷

2. The Student has attended the _____ School _____ a non-public special education day school approved by the State Education Agency (SEA), since November 2009 and is currently in the _____ grade.⁸ The Student was publicly placed at _____ and his program is supervised by the Respondent.⁹ _____ is a small school for students with specific learning disabilities, multiple disabilities, other health impairments, and social/behavioral needs.¹⁰ The LEA Representative for the Respondent at _____ has had concerns about the level and delivery of instruction provided to Respondent's students at _____ modifications made, classroom function, as well as the safety and comfort of the building in which the school is housed.¹¹ The school is on the second floor of a building that is not one of Respondent's schools.¹² The school's regular school year is for 11 months and no services are provided by _____ during breaks in the school year.¹³
3. _____ consists, currently, of three self-contained classrooms at _____ Architecture, Construction and Engineering High School, one of Respondent's Public secondary schools.¹⁴ _____ is a non-public firm that has contracted with the Respondent to provide "co-location classrooms" in three of the Respondent's schools.¹⁵ A "co-location classroom" is defined by the Respondent and Spectrum as:

importantly the lack of corroboration in the IEP and evaluation data, this testimony is not given any weight, resulting in the finding herein.)

⁷ P 6, P 7/R 1.

⁸ Testimony (T) of P, T of R.L., P 12.

⁹ T of N.R., P 6, P 7/R 1.

¹⁰ T of R.L.

¹¹ T of R.L., T of N.R., R 4.

¹² T of R.L., T of N.R.

¹³ T of R.L.

¹⁴ P 13, T of D.Y., T of T.C.

¹⁵ P 14, T of D.Y.

A highly structured classroom that is located within a DCPS schools. [sic] Students would be [sic] enrolled in the co-location classroom are classified as a DCPS student who attends the school where the classroom is housed.¹⁶

The contract between the Respondent and _____ requires _____ to serve students with emotional disturbance (ED) and “build internal DCPS capacity to serve students with or at risk for ED.”¹⁷ Despite its contractual obligations, _____ is only partially focused on serving students with ED in the Respondent’s schools and also provides “intensive special education services in the areas of academics. . . .”¹⁸ Further, despite the contractual language that a student attending the co-location classrooms would be “classified as a DCPS student who attends the school where the classroom is housed,” the students in the classrooms have to be accepted by _____ is a “school within a school” and students in the _____ classrooms are not educated with non-disabled peers, although they may interact with non-disabled peers in hallways or if a student’s IEP does not require “full-time” specialized instruction and the student with a disability attends some regular classes with nondisabled peers in the non-_____ classrooms of the building.²⁰ Students at _____ also have the opportunity to participate in social and recreational activities with nondisabled peers.²¹ _____ hires its own certified teachers and staff and is self-administered.²² Academic content is delivered through use of a computer program called “A+” and learning is supported in the classroom by the special education teachers and other

¹⁶ P 14.

¹⁷ P 14.

¹⁸ T of D.Y., also T of T.C., P 14.

¹⁹ T of T.C., T of D.Y.

²⁰ T of D.Y., P 14. (T.C. testified that _____ is not a school but rather a program within a school. Given the level of experience and authority of D.Y. as compared to T.C., who is relatively new to _____ and given the totality of the _____ program described in the evidence, this IHO finds _____ is, in fact, a school within a school, despite the intent of the parties to the contrary as described in their contract. Furthermore, a “program” is not part of the continuum of alternative placements, but rather is an individualized set of goals and services as developed by the IEP team and documented in the IEP, pursuant to 34 C.F.R. § 300.320.)

²¹ R 9.

²² T of D.Y., P 14.

support staff.²³ The computer program adapts to the individual responses of the student and has been approved by the State Education Agency (SEA) to deliver academic content.²⁴ Classrooms are highly structured environments with no more than 12 students each.²⁵ Students earn Carnegie units toward graduation with a diploma.²⁶ The arrangement between the Respondent and began in August of 2011 and is still being developed.²⁷ does not provide services to students during breaks in the school year.²⁸

4. The Student's IEP was revised in February 2011.²⁹ It was subsequently and most recently reviewed in January 2012 and only minimal revisions were made.³⁰ The statement of the Student's present levels of academic achievement and functional performance were not different from the 2011 IEP to the 2012 IEP, but for the Student's performance in the area of speech and language.³¹ There are four annual math goals, none of which changed; four reading goals, two of which were revised to a lower standard (expectation of 5th grade performance to expectation of 4th grade performance), and two of which did not change; four writing goals that did not change; three speech and communication goals that did not change, despite the change in the Student's present level of functional performance in that area; three emotional/social/behavioral development goals that did not change; and four motor skills/physical development goals that did not change.³² The special education and related services, all outside of general education - consisting of: specialized instruction for 25 hours

²³ T of D.Y., T of T.C.

²⁴ T of D.Y., T of T.C., T of S.O.

²⁵ T of T.C.

²⁶ T of D.Y., P 14.

²⁷ T of D.Y.

²⁸ T of D.Y.

²⁹ P 6.

³⁰ P 7/R 1, R 2

³¹ P 6, P 7/R 1. (There was some language removed from the 2012 revision in many of the skill areas covered, but for those areas the present levels of performance are the same. As reflected in finding of fact #1, the statement does not communicate how the Student's disabilities affect his involvement and progress in the general education curriculum, as required by 34 C.F.R. § 300.320(a)(1). The IEP was not challenged, however.

³² P 6, P 7/R 1, R 2.

per week; speech and language services for one hour per week; occupational therapy services for one hour per week; and behavioral support services for 30 minutes per week – did not change.³³ Extended school year (ESY) services were included in the 2011 revision and were noted to be “not yet determined” in the 2012 revision.³⁴ The Student has made no academic and minimal functional progress in the last year at School.³⁵

5. At the IEP team meeting on January 6, 2012, which the Parent declined to attend, the Respondent advised the team that it was changing the Student’s location of service from due to the Student’s lack of progress, behavioral problems, and staff concerns about staff and the building.³⁶ The Petitioner stopped sending the Student to in January but did not send him to ³⁷ She began sending the Student to school again following the prehearing order in this case requiring the Student to remain at pending the outcome of this matter.³⁸

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

³³ P 6, P 7/R 1.

³⁴ P 6, P 7/R 1. (It is rather startling that the IEP team could not determine whether ESY services were necessary when the Student not only made no progress on any of his IEP goals in a year, but two goals had to be lessened, and academic performance is at the elementary level., indicating a need for a good amount of services. But then, it is not clear whether that performance is due to the Student’s disabilities.)

³⁵ P 6, P 7/R 1, R 2. (R.L. testified that the Student made progress. This was not in any meaningful way corroborated, and given the evidence of progress on IEP goals, cannot be credited.)

³⁶ R 2, R 10/P 8, T of N.R., T of P.

³⁷ T of P.

³⁸ T of P.

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).

Placement

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 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 46588.³⁹ 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

39

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. The Student's IEP was reviewed at the January 6, 2012, IEP team meeting, and no significant changes were proposed or made to the IEP. Thus, it was not revised in a way calling for a change in placement. (Of course, the lack of changes to the IEP clearly indicate a lack of educational progress, which was part of the Respondent's justification to remove the Student from Monroe and utilize the services of [redacted]. The Student will also be educated with non-disabled children to the same extent he is at [redacted] that is, not at all. The Petitioner argues that because the Student will be with non-disabled peers in the hallway during transition periods, the Student will be educated with non-disabled peers more than at [redacted].

While it is true the Student will be in the *presence of* non-disabled peers more, he will not be *educated with* them more than at [redacted]. Furthermore, nothing in the IEP or

evaluation data indicates the Student cannot be with non-disabled peers during transition times, a factor that if present could result in a different conclusion. No evidence was presented by either party regarding a change in the Student's opportunities to participate in non-academic and extracurricular activities. Thus, the Petitioner has not shown this factor demonstrates a change in educational placement and conceded in closing arguments that this factor was not at issue in this case. Finally, the proposed location of _____ is the same option on the continuum of alternative placements. The continuum includes: "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." 34 C.F.R. § 300.115(b)(1). On this continuum both _____ and _____

fall into the category of special schools. It is true that _____ is in a building not attached or part of a regular public high school, but this is not a distinction the law makes.

_____ while comprising classrooms in _____ Architecture, Construction and Engineering High School, is independently administered by a non-public firm and comprises classrooms that are exclusive to Spectrum and the students accepted by _____. Thus, it would not be accurate to describe _____ as "separate classrooms" as would be the case if the special education classes held in those classrooms were administered and delivered by DCPS staff and included students not accepted by _____. As a result, the proposed change to _____ from _____ School does not substantially or materially alter the Student's educational program and so is not a change in educational placement.

Provision of FAPE at Spectrum at Phelps

4. _____ may be able to provide the FAPE to the Student that he was not receiving at _____ School if the Student's IEP is appropriate. Petitioner argues that

cannot implement the Student's IEP and cannot meet his unique needs. The Student's unique needs are to be met through implementation of an appropriate IEP. *See* 34 C.F.R. §§ 300.17 and 300.320. Thus, the former question, whether _____ can implement the Student's IEP is legitimate for administrative review.

5. First, the Petitioner argues that extended school year (ESY) services cannot be implemented by _____ This may be so, but that does not mean the Student will not receive

them. ESY services are services provided beyond the normal school year of the public agency and that are determined necessary to provide a FAPE to a Student. 34 C.F.R. § 300.106. It is clear that the Student has not been receiving a FAPE for the past year at

_____ School, which is part of the Respondent's justification for changing the Student's school. Given his academic progress still being at the elementary level, despite being in the 11th grade, the Student will likely continue to require ESY services in order to be involved in and progress in the general education curriculum, the same curriculum as nondisabled children. *See* 34 C.F.R. § 300.320(a). In that event, those services will be provided as determined by the IEP team and it matters not whether DCPS contracts with another firm, or uses its own staff to provide the services. Thus, it cannot be said that the IEP, if it includes ESY services, cannot be implemented at _____ because there is no requirement that the ESY services be implemented at or by a particular school or firm.

6. Second, the Petitioner argues that the Student suffers harm from changes in placement. The IEPs and evaluations in the record do not support this. The testimony of _____ staff who, without much basis and matter-of-factly, stated the Student takes "a long time to adjust" and that he would benefit from remaining in his current placement was not convincing in light of the documentary evidence. The staff's conclusions may generally be assumed to be true for

many children. That does not make it a determinate factor about changing placement. If there were convincing evidence that the Student suffers demonstrable harm from transitions between placements, there would be legitimate support for the Petitioners position. As indicated, the IEP and evaluation data include no hint of a problem with transitions between classrooms, schools, etc. Furthermore, assuming it were true that the Student has significant struggles with changes in his classes or from school to school, in this case that difficulty would be outweighed by the fact that the Student has made no progress at over the past year and has even regressed academically, and so a change to a new school is what can minimally be done to address this failure.

7. Third, the Petitioner argues that there are no content-certified teachers at The school relies on a computer program, A+, to deliver academic content in a very individualized way. Special education teachers and support staff are available to assist the Student. The use of the A+ program has been approved by the SEA for its purpose. If the use of this program turns out to not be successful for the Student, another change will have to be made, but there is no reason to conclude now that this approach will not reasonably be expected to work. The evidence shows the Student has difficulty with staff, so this may result in improvement. Progress toward graduation with a diploma can be made.
8. Finally, the Petitioner argues that is a school for students with ED. It is clear that teaching students with ED is to be the focus of the school. The school is not exclusively working with functional problems of students, but also academic problems. The Student here has learning disabilities as well as social/emotional problems including emotional behavior interactions with adults and peers and problems with self-regulating behavior. These are issues the program must and can address, as well as his learning

disabilities. Furthermore, the Student's IEP has not been adjusted to "fit"

Rather, _____ has been selected as a location that can implement the IEP and the administrators of that program, as well as the Respondent, have indicated a willingness to divert from their contractual arrangement to meet the needs of the Student, particularly his specific learning disability. Thus, for the foregoing reasons, _____ can provide a FAPE to the Student. If monitoring of the Student's academic and functional progress shows he is not progressing on his IEP goals or in the general education curriculum, either a revised IEP or another new location will be in order. This conclusion in no way determines the appropriateness of the Student's IEP.

VII. DECISION

Because the assignment of the Student to _____ was not a change in placement, and because that school is reasonably expected to implement the Student's IEP, the Respondent prevails and no remedy is warranted.

VIII. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that the complaint is dismissed with prejudice. Because the Student's assignment to _____ was not a change in educational placement the Student is not entitled to remain at _____ School at public expense any longer.

IT IS SO ORDERED.

Date: March 22, 2012



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).