

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

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

OSSF
STUDENT HEARING OFFICE
2012 MAR -6 PM 12:33

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is an .year old female, who currently attends a full-time private special education school.

On December 22, 2011, Petitioner filed a Complaint against DCPS, alleging that DCPS had provided an inappropriate placement, site location, setting and school for Student by proposing to move her from her current private school to a program at a DCPS senior high school. As relief for this alleged denial of FAPE, Petitioner requested a finding in its favor, and an Order requiring DCPS to fund placement and provide transportation for Student to attend her current private school or some other non-public or public school, award appropriate compensatory education, and provide any other appropriate relief.

On January 12, 2012, DCPS filed its Response, which denied the allegations of the Complaint and asserted that DCPS did not change Student's placement, which, according to DCPS, refers to the provision of special education and related services. DCPS further asserted that it issued a written notice to a program where Student will remain in an outside of general education setting 100% of the time, the location of services is able to implement Student's IEP, and Petitioner's assertions about the nature of the newly assigned program are factually incorrect. DCPS also asserted that location of services is at the discretion of the local education agency ("LEA").

The parties concluded the Resolution Meeting process by participating in a resolution session on January 10, 2012. No agreement was reached, but the parties did not agree to shorten the 30-day

resolution period. Therefore, the 45-day timeline began on January 22, 2012 and will end on March 6, 2012, which is the HOD deadline.

By their respective letters dated January 31, 2012, Petitioner disclosed thirty-four documents (Petitioner's Exhibits 1 – 34) and DCPS disclosed eight documents (Respondent's Exhibits 1 – 8).

The hearing officer convened the due process hearing on February 7, 2012, as scheduled.¹ All documents disclosed by both parties were admitted without objection. Thereafter, Petitioner withdrew its previously filed Motion to Compel Compliance with Stay Put Provisions, as well as its request for compensatory education. The hearing officer then received opening statements, testimonial evidence, and closing statements prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS provide Student with an inappropriate placement/site location/setting and school, in that DCPS proposed placing Student at a program in a DCPS high school beginning January 23, 2012, but the program cannot provide full-time out of general education services for learning disabled ("LD") students, it is primarily populated by emotionally disturbed ("ED") student with aggressive behavior, and it provides much of its instructions through computers and electives in the general education setting?

FINDINGS OF FACT²

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 an _____ year-old female, who currently attends _____ grade at a full-time private special education school.³

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

² To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved..

³ See Complaint; testimony of Student.

2. Student began attending her current private school in December 2010, pursuant to a settlement agreement with DCPS. The private school caters to SLD students, providing direct instruction and small class sizes.⁴
3. Prior to attending the private school, Student attended a charter school, where she repeated 9th grade for three consecutive years. The charter school was “very difficult” for Student because she could not keep up with the other students in her class, who were approximately 20 in number, and she and her mother would stay up all night trying to complete her homework. Student received mostly grades of “F” at the charter school even though she went to school every day and stayed after school every day to get help. The private school has been much better for Student because the teachers break down the work so that she can understand it and there are only 3 to 5 students in each class. Student raises her hand to participate in class at the private school, and she can mostly do her homework on her own, although Parent still has to read the directions on some of the assignments.⁵
4. At her current private school, Student and her classmates switch classes, so they are with different teachers and different students throughout the day. Student takes 6 classes per day. Carnegie units are provided through the enrolled classes.⁶
5. Student is on the diploma track at her current private school. She has been doing well at the school. She is shy, but she has adjusted well and made friends, she works hard, she does her work, she takes advantage of resources, and she asks for help if she needs it.⁷
6. Academically, Student’s weaknesses are in math and reading. Student struggles with basic math computations, word problems, and multi-step problems. In reading, Student struggles with reading comprehension and does better when material is read to her, and she also struggles with word recognition and reading fluency. Student was functioning at a 5th-6th grade level when she first began attending her current private school; she is functioning at a 7th-8th grade level now.⁸
7. Student’s current IEP is dated December 5, 2011. The IEP identifies Student’s primary disability as Specific Learning Disability (“SLD”), and it requires Student to receive 26 hours per week of specialized instruction, 30 minutes per week of behavioral support services, and 1 hour per week of speech-language pathology services. The LRE section of the IEP states that Student “continues to require a full-time placement out of the general education [sic] to receive specialized instruction in the areas of reading, math and written expression.”⁹

⁴ Testimony of advocate; testimony of Student; testimony of private school Founding Director; testimony of SEC; *see* Petitioner’s Exhibit 30.

⁵ Testimony of Student; testimony of Parent.

⁶ Testimony of Student; testimony of SEC.

⁷ Testimony of private school Founding Director.

⁸ Testimony of SEC.

⁹ Respondent’s Exhibit 2; Petitioner’s Exhibit 2.

8. On December 5, 2011, DCPS convened an MDT meeting to conduct an annual review of Student's IEP. The team discussed Student's progress and needs, and then DCPS proposed a program at one its DCPS senior high schools as the recommended location of services for Student. Everyone besides the DCPS representative was concerned about the proposed change and did not feel it was appropriate, especially since the move to a new school would occur during the middle of the school year and Student does not adjust well to change. There was no representative from the proposed program at the meeting. The parties agreed that Parent would visit the recommended school program and then DCPS would reconvene the MDT meeting to discuss Student's assigned school.¹⁰
9. On December 5, 2011, DCPS issued a Prior Written Notice proposing to change Student's location of services to the program at its public high school "because the student would have her IEP implemented and DCPS can implement a FAPE that would address her specific strengths and deficits."¹¹
10. Student went to visit the public high school with her mother the week prior to the due process hearing in this case. Student and her parent did not see the classroom Student would be placed in; the counselor never offered to let them see the class. Instead, they talked to a man who stated he would be Student's counselor at the public high school. The counselor said that there would be less than 12 students in Student's class, they would stay in one room all day, except they would have lunch in the cafeteria when the non-disabled students were not at lunch. The counselor explained that the program consists of two classes, which are both mixed with LD and ED students. Student is concerned that she would not be able to concentrate in the class with the ED students because she is easily distracted. Parent is also concerned that the public school program will set Student back because she will become unfocused in the new class, which is too large at 12 students, and she will regress back to where she was before she began receiving help at the current private school.¹²
11. The self-contained program DCPS has proposed for Student is located in a DCPS senior high school and is run by a private company based in Tennessee, which is operating in the District of Columbia for the first time during SY 2011/12. The particular program at issue consists of two classes that have the capacity to accommodate up to 12 students each. The students are not grouped by age, disability or level of functioning. As a result, Student will be in a class with other students who are ED, LD, Intellectually Disabled ("ID," formerly called Mentally Retarded), Autistic, and Other Health Impaired ("OHI"), and who range in age from 14 years old to 20 years old. The two classes are located on a separate wing of a hallway. Each class has a teacher, a behavior intervention specialist, and an instructional aide.¹³

¹⁰ Respondent's Exhibit 3; Petitioner's Exhibits 5 and 25; testimony of advocate; testimony of private school Founding Director.

¹¹ Respondent's Exhibit 4.

¹² Testimony of Student; testimony of Parent.

¹³ Testimony of Program Director.

12. Students in the proposed self-contained program utilize the A+ program for computer-assisted instruction to provide them with exposure to the general curriculum so that they can earn Carnegie units toward graduation. This is necessary because the teachers in the classrooms are special education teachers who do not have the certification required to allow the students to earn Carnegie units. The 3 staff members in the classroom are available to assist students with the instruction on the computer, as needed. Moreover, the computer-based instruction is a station among other activities to which students rotate and does not constitute a major part of the instruction in the class.¹⁴
13. Student's reading and computer skills are not good.¹⁵
14. The students in the self-contained program receive all of their instruction in core subject areas in the classroom to which they are assigned. They receive electives in the classroom, as well, which involves the electives instructor providing lesson plans to the classroom teacher, who then presents the lessons to the students in the class. However, prior to approximately one week before the due process hearing in this case, the students in the program were provided with electives in classes with general education students.¹⁶

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:

Alleged Failure to Provide an Appropriate Placement

Although IDEA does not define the term educational placement, the meaning falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP. See *Laster v. District of Columbia*, 439 F. Supp. 2d 60 (D.D.C. 2005). Hence, "placement" refers to the overall educational program offered, not the mere location of the program." *Roher v. District of Columbia*, 1989 WL 330800, *3 (D.D.C. 1989); *Knight v. District of Columbia*, 877 F.2d 1025 (D.C. Cir. 1989).

In determining the educational placement of a disabled child, the LEA must ensure, *inter alia*, that the decision 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 that the child's placement is determined at least annually. 34 C.F.R. § 300.116(a)(1) and (b)(1). Hence, a decision to change a disabled child's educational placement during the annual determination of the child's placement is not a decision that can be made solely by an LEA as an administrative function.

To determine whether a change in educational placement has actually taken place, one "must identify, at a minimum, a fundamental change in, or elimination of a basic element of the

¹⁴ Testimony of Program Director; testimony of Progress Monitor.

¹⁵ Testimony of Parent.

¹⁶ Testimony of Program Director.

education program in order for the change to qualify as a change in educational placement.” *Lunceford v. District of Columbia*, 743 F.2d 1577, 1582 (D.C. Cir. 1984). Under this standard, a change from a private school to a public school, when that is the only significant difference between the programs offered, does not constitute a change in educational placement. Roher at *3, citing *Knight, supra*. However, a change from a full-time special education program to a part-time regular education program does constitute a change in educational placement. *Roher* at *3, citing *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985).

Finally, even where, as here, an LEA determines to place a disabled student in a private placement for a period of time pursuant to a settlement agreement, if after that period of time has passed the LEA believes that it can provide the child with FAPE in its own programs, then the LEA is not required to continue funding the child in the private program. *Letter to Chamberlain*, 111 LRP 74144 (OSEP May 26, 2011).

In the instant case, on December 5, 2011, during the annual review of Student’s IEP, DCPS unilaterally changed Student’s school assignment from the private, full-time special education school she has been attending pursuant to the parties’ December 2010 settlement agreement to a self-contained program in a DCPS senior high school. DCPS asserts that the change is a mere change in location of services, not a change in educational placement, and that such a change is within the discretion of the LEA.¹⁷

Petitioner disagrees with DCPS’s position, arguing that the unilateral change in schools represents a move along the continuum of restrictiveness from a stand-alone special education school to a self-contained classroom in a public school, which constitutes a change in placement. Petitioner argues that such a change in educational placement cannot be made summarily and unilaterally by the LEA, but instead must be made at an IEP team meeting with full participation by all team members after a reevaluation has taken place. Petitioner also argues that the change in schools is inappropriate because the proposed program cannot provide full-time out of general education services for LD students, it is primarily populated by ED students with aggressive behavior, it provides much of its instruction through computers, and it provides all electives in the general education setting.

As an initial matter, the hearing officer notes that the evidence in this case does not support Petitioner’s contention that the proposed program cannot provide full-time out of general education services for LD students, it is primarily populated by ED students with aggressive behavior, it provides much of its instruction through computers, and it provides all electives in the general education setting. *See Findings of Fact 11, 12, and 14, supra*.

On the other hand, however, the evidence does prove that the proposed move from Student’s current private special education school to a self-contained classroom in a DCPS senior high

¹⁷ At the due process hearing in this case, DCPS also asserted that Student’s current private school cannot implement Student’s IEP because some of the teachers are not certified, whereas the proposed public school program can implement the IEP. However, as this argument was never raised by DCPS until the due process hearing, with the result that Petitioner was never put on advance notice of the need to prove that the current private school can implement the IEP, the hearing officer declined to allow DCPS to present evidence in support of the argument and declines to rule on that argument now.

school constitutes a change in educational placement, because the move would represent a fundamental change in the nature of Student's educational program. *See Lunceford, supra.* Hence, DCPS is proposing to move Student from a stand-alone special education school where she changes classes throughout the day, has no more than 3 to 5 students in each class, receives Carnegie units through classes taught by teachers, and attends classes primarily populated by other children who have the same disability that she has. By contrast, in the program that DCPS has proposed, Student would remain in one self-contained classroom for all core subjects and all electives with up to 12 other students who have an array of disabilities that range from LD to ED, OHI, ID and Autism, and she would only be able to receive Carnegie units by way of computer-based instruction. Clearly, these differences, taken together, would constitute a fundamental change in the nature of Student's educational program.

Student's IEP requires only that she be placed in a full-time placement out of the general education setting, and not that she remain in a stand-alone full-time private special education school. *See Finding of Fact 7, supra.* Hence, to the extent that DCPS believes it can provide Student with FAPE in one of its own programs in a DCPS public school, it is not required to continue funding Student at her current private school. *See Letter to Chamberlain, supra.* However, a change of the nature proposed here, which would represent a fundamental change in the nature of Student's educational program, is not a mere change in location of services that can be made unilaterally by the LEA. To the contrary, what is at issue here is a change in Student's educational placement that was made at Student's annual IEP meeting and, pursuant to IDEA, could only have been made by a group of persons that includes Parent, or in this case the adult student, and other persons knowledgeable about Student, the meaning of her evaluation data, and the placement options under consideration. *See 34 C.F.R. § 300.116(a)(1).* Under these circumstances, the hearing officer concludes that DCPS failed to follow proper procedures in changing Student's educational placement in a manner that impeded Student's right to a FAPE and significantly impeded the adult student's right to participate in the decision-making process, thereby denying Student a FAPE. *See 34 C.F.R. § 300.513(a)(2)* (hearing officer may find denial of FAPE only if procedural inadequacies impeded child's right to FAPE, significantly impeded parent's opportunity to participate in decision-making process, or caused deprivation of educational benefit).

To remedy this denial of FAPE, and taking into account that Student continues to attend her current private school during the pendency of this action, the hearing officer will issue an Order that prohibits DCPS from following through with its proposal to change Student's educational placement by unilaterally moving Student from the private school she currently attends to the proposed self-contained classroom at a DCPS public high school without first complying with IDEA's procedures governing changes in educational placements.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. DCPS is prohibited from following through with its proposal to change Student's educational placement by unilaterally moving Student from the private school she

currently attends to the proposed self-contained classroom at a DCPS public high school without first complying with IDEA's procedures governing changes in educational placements.

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: 3/6/2012

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer