

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 on March 11, 2013, at the District of Columbia Office of the State Superintendent of Education (“OSSE”) Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is age [REDACTED] and resides with his parents in the District of Columbia. He has been determined to be a child with a disability including hearing impairment and mood disorder. The student currently in 9th grade and attends a private general education school located in Alexandria, Virginia (“School A”). The student has attended School A since the second half of the 2009-2010 school year (“SY”).

The student’s parents filed a due process complaint early in 2011 which resulted in a due process hearing in March 2011 and a Hearing Officer’s Determination (“HOD”) that ordered DCPS to reimburse the parents for the student’s tuition at School A and fund him there for SY 2010-2011. Petitioners allege the student has made academic progress at School A and during SY 2011-2012 was functioning on 8th grade level and earning above average grades.

On May 3, 2012, DCPS convened an individualized educational program (“IEP”) meeting for the student and proposed an IEP with 24.5 hours per week of specialized instruction inside general education and 1 hour per day outside general education and proposed to remove the student from School A and place him at his neighborhood DCPS high school for SY 2012-2013. DCPS on May 3, 2012, issued a prior notice to his effect.

In August 2012, the student’s parent filed a due process complaint challenging the change in the student’s IEP and placement. A hearing was held in October 2012 that resulted in a HOD issued on October 27, 2012, by Hearing Officer Selbka² that concluded the DCPS had denied the student a FAPE by proposing an IEP that did not consider factors in transitioning the student from School A to the proposed placement at his neighborhood school, (“School B”).

Hearing Officer Selbka concluded School A was an inappropriate school for the student because, inter alia, it did not provide services in accordance with the student’s IEP, and the Hearing Officer ordered DCPS, inter alia, to convene a meeting to (1) determine and adopt in the IEP accommodations and other services the student needs to transition to his new “location of placement,” and in doing so consider five factors in planning the student’s transition to a new location of services and in developing an IEP and (2) to determine a least restrictive environment (“LRE”) and location of services for the student.

² Case # 2012-0551

The meeting Hearing Officer Selbka order was convened on December 10, 2012. At that meeting DCPS proposed to place the student at School B and asserted that it considered all the factors that Hearing Officer Sebeka ordered be considered and revised the student's IEP accordingly.

The IEP developed on December 10, 2012, proposes that the student receive 16.5 hours of specialized instruction per week in general education and 10 hours per week of specialized instruction outside general education and 1 hour of behavioral support services outside general education. The IEP contains goals in math, reading, written expression and emotional/social/behavioral development and includes a list of classroom aides and services and a list of classroom and testing accommodations. The LRE section of the in the IEP states that the student will be out of general education 11 hours per week.

On January 7, 2013, Petitioners filed the current complaint alleging DPCS violated the HOD by not taking into account in any significant way the factors the HOD directed be considered and by not considering the harm to the student in changing schools mid-year. Petitioners allege the proposed IEP³ and placement of the student at School B are inappropriate. Petitioners are seeking continued placement of the student for the remainder of SY 20102-2013 as well as stay-put protections at School A during the pendency of this proceeding.

DCPS filed a response to the complaint on January 10, 2013. Along with the response DCPS counsel included a copy of Hearing Officer's Selbka's October 27, 2012, HOD, a copy of the prior notice, and a copy of the student's December 10, 2012, IEP. DCPS denied any alleged denial of a FAPE and specifically, asserted that December 10, 2012, IEP and proposed location of services is appropriate and that the DCPS complied with the HOD and considered all factors that the HOD ordered be considered in making a decision about the student's IEP and placement and location of services. In addition, DCPS pointed out that the IEP team added behavioral supports to the student's IEP to assist with the student's transition to the new educational setting.

DCPS also asserted that in the October 27, 2012, HOD Hearing Officer Selbka determined that School A is an inappropriate program, placement and location of services for the student, thus asserted the issue of School A's appropriateness as a location of services cannot be adjudicated.

The resolution meeting was held January 23, 2013, and was unsuccessful in resolving the issues. The parties expressed no desire to proceed directly to hearing but agreed to allow the full 30-day resolution period expire before the 45-day timeline began. Thus, the 45-day period began on February 6, 2013, and ends (and the HOD is due) on March 23, 2012.

A pre-hearing conference ("PHC") in this matter was held on Wednesday, January 30, 2013.⁴ The conference was conducted by telephone. On February 8, 2013, the Hearing Officer issued a

³ During the PHC Petitioners' counsel stated that the size of the School B's building and the large general education classes at School B to which the student may be assigned.

⁴ The pre-hearing conference ("PHC") was convened on the first date that both counsel were available following the resolution meeting.

pre-hearing order (“PHO”) stating the issue to be adjudicated and setting hearing dates. In the PHO This Hearing Officer directed DCPS inform the Hearing Officer and Petitioner’s counsel by February 12, 2013, whether there was an agreement between the parties for the student to remain at School A during the pendency of this case. If DCPS did not agree Petitioner was to file a motion with the Hearing Officer regarding stay-put protections by February 14, 2013.

Petitioners’ counsel acknowledged during the PHC that School A has not complied with any of the factors that Hearing Officer Selbka stated in the HOD would be necessary for DCPS to consider School A as a possible placement for the student at the December 10, 2012, IEP meeting. Thus, DCPS asserts the issue of School A’s appropriateness cannot be re-litigated in the current hearing.⁵

DCPS also asserted that Petitioners’ counsel stated an intention to appeal the October 27, 2012, HOD before the appeal period ended January 27, 2013. However, during the PHC Petitioners’ counsel stated that there was no intention by Petitioners to appeal the HOD and no appeal had been filed.

Following the PHC Petitioner’s counsel, on February 14, 2013, filed a motion to invoke “stay-put” protections to maintain the student at School A during the pendency of this proceeding. Respondent’s counsel on February 19, 2013, filed an opposition to the motion for “stay-put” protections and on March 20, 2013, Petitioner’s counsel filed and response to Respondent’s opposition. The Hearing Officer reserved ruling on the motion for stay-put protections until the hearing and has rendered a decision on the motion in this final HOD.

MOTION FOR STAY PUT PROTECTIONS:

34 C.F.R. § 300.518(a) provides:

Except as provided in Sec. 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under Sec. 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

There has been no agreement between Petitioner and DCPS that the student will be moved to School B.

The commentary to the IDEA regulations states:

“The current educational placement during the pendency of any administrative or judicial proceeding described in § 300.518 and section 615(j) of the Act, refers to the setting in which the IEP is currently being implemented. The child’s current placement is generally

⁵ This Hearing Officer concluded that this issue can be adjudicated as expressed in issue # 4 below.

not considered to be location-specific.” (See Federal Register /Vol. 71, No. 156 /Monday, August 14, 2006 /Rules and Regulations page 46709)

However, in *Pardini v. Allegheny Intermediate Unit* (August 29, 2005) 44 IDELR 30 the U.S. Court of Appeals, Third Circuit stated:

“IDEA is clear, unambiguous and supported by the Supreme Court's *Honig v. Doe* decision, which states "plainly that during the pendency of any proceedings under the Act, unless the state or local educational agency and the parents agree . . . the child shall remain in the then current educational placement." The Court thus concluded that the stay-put provision "means what it says." The Court citing its previous decision in *Drinker (Drinker v Colonial School Dist, 78 F.3d 859 (1996))* stated:

“In *Drinker*, the 3d Circuit stressed the importance of maintaining the status quo when identifying "the then current educational placement" for purposes of the stay-put rule.” 78 F.3d at 864.

The Court in that case also stated:

“[I]mplicit in the maintenance of the status quo is the requirement that a school district continue to finance an educational placement made by the agency and consented to by the parent before the due process [procedure is invoked]. To cut off public funds would amount to a unilateral change in placement, prohibited by the Act.”... Because the [current educational placement] connotes preservation of the status quo, it refers to the operative placement actually functioning at the time the dispute first arises. If an IEP has been implemented, then that program's placement will be the one subject to the stay put provision. And where the dispute arises before any IEP has been implemented, the current educational placement will be the operative placement under which the child is actually receiving instruction at the time the dispute arises. *Drinker*, at 867 (quoting *Thomas v Cincinnati Bd. of Educ.*, 918 F.2d 618, 625-26 (6th Cir. 1990))”

In *Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22 (2004) a group of students had been attending a non-public school pursuant to funding from DCPS. DCPS subsequently sought to move these students out of the non-public school by convening IEP meetings and changing the placement to another location. DCPS argued to the Court that the non-public school that the students had been attending was not the current educational placement for stay-put purposes. The Court, rejected this argument, stating that the understanding of placement included the actual physical school building that the student had been attending as well as the type of services received and that “IDEA’s procedural safeguards, specifically the stay put protection would be rendered worthless if the Court adopted DCPS’ theory.”

Generally, the child's current placement may not be considered to be location-specific. However, in the instant case Petitioner is challenging DCPS' compliance with a HOD that specifically stated that until DCPS complies with the HOD the student's location of services shall remain School B.⁶

The Hearing Officer concludes that in this instance stay-put protections relate specifically to School B and DCPS shall be responsible for maintaining and funding the student at School B up to and including date of the issuance of this HOD and the Order below and no longer.

THE ISSUES ADJUDICATED: ⁷

1. Whether DCPS failed to adequately consider the factors⁸ that the October 27, 2012, HOD directed be considered in planning the student's transition to a new location of services and in developing the student's IEP and determining his LRE and location of services at the December 10, 2012, IEP meeting, and if so, did DCPS' failure to do so deny the student a free and appropriate public education ("FAPE").
2. Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP and propose an appropriate location of services at the December 10, 2012, meeting by failing to adequately address the student's the transition needs that arise from changing his location of services during the middle of the school year.
3. Whether School B is an appropriate location of services for the student.
4. If Petitioners meet the burden of proof on any of the three issues above, is it appropriate (or proper) for the student to remain at School A for the remainder of SY 2012-2013?

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-45 and DCPS Exhibit 1-5⁹) that were admitted into the record and are listed in Appendix A. Witnesses are listed in Appendix B.

⁶ Respondent's Exhibit 5-14)

⁷ The alleged violations and/or issues listed in the complaint may not directly correspond to the issues outlined here. However, the issues stated here were stated in the PHO and reviewed at the outset of the hearing and no party objected to issues to be adjudicated as stated.

⁸ In making this determination, the IEP Team shall consider the following factors: (1) how transition to a new location will affect Student's learning; (2) the effect of a new physical location on Student; (3) the effect of Student's anxiety and other disabilities on his educational performance in light of a transfer; (4) whether the composition of the student body or the physical layout of a new location will affect the provision of FAPE to this Student; and (5) any other aspects of Student's disability and how a transfer will affect Student presented by Parents or their experts and advocates at the IEP meeting.

⁹ On March 4, 2013, DCPS counsel objected to the admission of certain documents including email correspondence contained the Petitioner's disclosed documents (Petitioner's Exhibits: 11, 15, 18, 22, 23, 24, 26, 31, 32, 22, 34, 36). The Hearing Officer admitted the documents over DCPS' objection and took the objection to the

FINDINGS OF FACT:¹⁰

1. The student is age [REDACTED] and resides with his parents in the District of Columbia. He has been determined to be a child with a disability including hearing impairment and mood disorder. The student currently in 9th grade and attends School A, a private general education school located in Alexandria, Virginia. The student has attended School A since the second half of the 2009-2010 school year (“SY”). (Respondent’s Exhibit 5-3)
2. The student’s parents filed a due process complaint early in 2011 which resulted in a due process hearing in March 2011 and a Hearing Officer’s Determination (“HOD”) that order DCPS to reimburse the parents for the student’s tuition at School A and fund him there for SY 2010-2011. (Respondent’s Exhibits 2-1, 5-4)
3. On May 3, 2012, DCPS convened an IEP meeting for the student and proposed an IEP with 24.5 hours per week of specialized instruction inside general education and 1 hour per day outside general education and proposed to remove the student from School A and place him at is neighborhood DCPS high school for SY 2012-2013. DCPS on May 3, 2012, issued a prior notice to his effect. (Respondent’s Exhibit 5-5)
4. In August 2012, the student’s parent filed a due process complaint challenging the change in the student’s IEP and placement. A hearing was held in October 2012 that resulted in a HOD issued on October 27, 2012, by Hearing Officer Selbka¹¹ that concluded the DCPS had denied the student a FAPE by proposing an IEP that did not consider factors in transitioning the student from School A to the proposed placement at his neighborhood school, School B. (Respondent’s Exhibit 5-2, 5-6, 5-12, 5-13, 5-14)
5. Hearing Officer Selbka concluded School A was an inappropriate school for the student because, inter alia, it did not provide services in accordance with the student’s IEP, and the Hearing Officer ordered DCPS, inter alia, to convene a meeting to (1) determine and adopt in the IEP accommodations and other services the student needs to transition to his new “location of placement,” and in doing so consider five factors in planning the student’s transition to a new location of services and in developing an IEP and (2) to determine a LRE and location of services for the student. (Respondent’s Exhibit 5-5, 5-11)

email correspondence under advisement and has in this decision admitted all of Petitioner’s disclosed documents. However, none the email correspondence was used as a basis for any finding of fact and was not considered to prove truth of any assertion contained therein.

¹⁰ 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 only cite one party’s exhibit.

¹¹ Case # 2012-0551

6. The October 27, 2012, HOD included the following conclusions and order directing DCPS to hold the IEP meeting that was held December 10, 2012:

- a. “ The undersigned finds that the District failed to reasonably design an IEP and placement for Student in May, 2012. Specifically, the District failed to consider the unique needs of the Student in transferring from Current LOS [School A] to another location of services. The undersigned does not find that Parents proved Current LOS has a specific methodology which only Current LOS can implement. Rather, the District’s IEP is not reasonably calculated to provide Student FAPE in that the District failed to take into account Student’s unique needs and how such needs might manifest when Student transfers from Current LOS to Student’s new location of services. As such, the District’s proposed IEP is not reasonably calculated to provide Student with an educational benefit and not designed to provide Student FAPE.
- b. The undersigned finds that, in order to design an IEP in May, 2012, reasonably calculated to provide Student with FAPE, the IEP Team must consider: (1) how transition to a new location will affect Student’s learning; (2) the effect of a new physical location on Student; (3) the effect of Student’s anxiety and other disabilities on his educational performance in light of a transfer; (4) whether the composition of the student body or the physical layout of a new location will affect the provision of FAPE to this Student; and (5) any other aspects of Student’s disability and how a transfer will affect Student presented by Parents or their experts and advocates.
- c. The undersigned finds that the District chose a location of services capable of implementing the IEP proposed by the District in May 2012, and that said location of services would not be a change of placement. However, this issue is largely moot because the undersigned found the design of the proposed IEP defective as set forth above.
- d. The undersigned finds that Current LOS [School A] is not an appropriate location of placement for Student as it does not use certified special education teachers for its classes; does not generally follow state standards in the ways set forth above; and does not provide services in accordance with the Student’s IEP. As such, Current LOS cannot provide Student with FAPE and must be considered inappropriate.
- e. As such, the District is entitled (and, indeed required) to transfer Student from Current LOS [School A] to an appropriate location of services for placement. However, in order to provide Student with a new location, the District (through its representatives on the IEP Team and through a properly revised IEP) has to address any implications to Student’s learning and the implementation of Student’s IEP which arise from the change of location.
- f. As the District did not take into account Student’s unique needs in transitioning from Current LOS to a new location of services, the District must first do so prior to transferring Student. This will, in all likelihood, require a revised IEP (and may require a revised LRE determination and location of services depending on how the IEP Team ultimately chooses to addresses Student’s issues with transitions to different environments).
- g. The Parents have met their burden that the District’s May 3, 2012, IEP was not reasonably calculated to provide Student with FAPE. The Parents have failed to meet their burden on the other issues

Order

- h. The IEP Team’s actions in not considering the effects of Student’s disability in transitioning to a new location when designing Student’s new IEP constitute a denial of FAPE.

- i. The District shall not effectuate a transfer to [School B] at this time. Student shall remain at [School A] until the District can: (1) convene an IEP meeting; (2) revise Student's IEP; and (3) determine Student's new location of services. The District shall fund Student's attendance at [School A] until the District can effectuate a transfer in accordance with this order..."
7. The meeting Hearing Officer Selbka ordered was convened on December 10, 2012. The student's parent and his counsel attended. The DCPS representatives participating included a DCPS transition case manager, a DCPS compliance case manager, the DCPS progress monitor, Ms. Candi CdeBaca, and a special education teacher and social worker from School B who participated by telephone. Members of the School A staff could not be reached and the parent's counsel stated that their participation was not necessary. (Ms. CdeBaca's testimony, Respondent's Exhibit 2-2)
8. At that December 10, 2012, IEP meeting DCPS considered the factors that Hearing Officer Sebeka ordered be considered and proposed to place the student at School B. The agenda of the meeting included a review of the HOD, development of the student's IEP and review of the location of services transition action plan. (Respondent's Exhibit 2-2)
9. The notes from the December 10, 2012, IEP meeting clearly outline the provision of the October 27, 2012, HOD and list the five factors that Hearing Officer directed be considered as well as the statement that the team "adopt all accommodations and/or additional services necessary to ameliorate any deficits to Student's learning caused by the transfer to a new location..." (Respondent's Exhibit 2-1)
10. The notes from the December 10, 2012, IEP meeting state:
 - a. Accommodation and Interventions: Repetition of directions, simplification of directions, reading of test questions, copies from paper rather than board, calculators, small group testing, breaks between tests, use of graphic organizers. Ms. Nicholls states that he uses a computer for written assignments as much as possible. (Respondent's Exhibit 2-1)
 - b. The student is being educated with regular education peers in a general education setting with accommodations according to teacher reports and DCPS observations. The student's IEP is not being implemented at School A and School A does not employ special education certified instructors. Student data also indicates that with accommodations, student can achieve at high levels in the general education setting. Student has not behavior issues or attendance issues reported. (Respondent's Exhibit 2-1)
 - c. The parent's attorney asked that the student be re-evaluated. We need to have a transition plan Personality, anxiety, and executive functioning skills to revise the IEP, Mr. Eig thinks that with DCPS not evaluating student prior to moving him inserts an appeal issue. Mr. Eig is waving the participation of School A as he feels they cannot provide the team the information we need about transitioning the student. As for right now his 2nd quarter grades are: Algebra 1, A; Writing 9, C+; World History 1, C+, English 9 (Literary Genres), C; Environment Science, C+.

Current Location of services does not completed benchmarking assessments and thus cannot provide data outside of grades and observed performance. (Respondent's Exhibit 2-2)

- d. DCPS completed a psycho-education evaluation in May 2010. The evaluation is within the three-year period and is thus current until May 2. Team at [School B] proposes adding 1 hour per week of behavioral services to assist with his transitioning into a setting like [School B]. Student is doing well academically and his biggest area of concern would be the actual transition, which behavior services could. (Respondent's Exhibit 2-2)
- e. Resource classes have approximately 10 students. In the general education classes could have much higher numbers (20-25) of students but they are co-taught special education and general ed. So it would be import to put him in resource classes for academics. [School B] proposes a dedicated aide. Mr. Eig refuses that support because he does not want to draw attention to himself. Mr. Eig asks what would the timing of the move mean for the student's grades. [School B] states that the schedule at School B is the same thing so his grades would just all rollover. He will still get credit for all of the work he has done this semester. (Respondent's Exhibit 2-2)
- f. Transition Plan:
 - Add behavioral services to the IEP Add goals about transitioning
 - Make a Tentative/Transitional IEP increasing the IEP hours of specialized instruction to 15.5 hours
 - Link the student to Transition Case Manager who has offered to work with the family to visit the school, enroll, etc. Mr. Eig states he might not be interest in visiting but hey can talk about that later.
 - DCPS would convene a 30-day review meeting to discuss student's
 - DCPS would not be able to evaluate the student prior to the 30 day review but team could likely compete by tend of January or early February. Student could certainly have evaluation completed as soon as he stared School B.
 - Mr. Eig states he will provide the list of accommodations and they will be incorporated into the IEP.
 - Transportation would not be warranted, as the school is three blocks away from student's home.

Conclusion: Mr. Eig states there will likely be an appeal. He requests that documents be emailed to him when DCPS can incorporate his current grades and accommodations after they are sent to the team. (Respondent's Exhibit 2-3)

- 11. The IEP developed on December 10, 2012, proposes that the student receive 16.5 hours of specialized instruction per week in general education and 10 hours per week of specialized instruction outside general education and 1 hour of behavioral support services outside general education. The IEP contains goals in math, reading, and written expression and emotional/social/behavioral development and includes a list of classroom

aides and services and a list of classroom and testing accommodations. The LRE section of the in the IEP states that the student will be out of general education 11 hours per week. (Respondent's Exhibit 3-9, 3-10)

12. In the IEP developed December 10, 2012, each of the goals areas states: "the student's deficits with working memory and motor coordination and written expression and executive function and his significant problems with anxiety especially as a result of attending school." The Needs section states that student need "preferential seating, additional time on quizzes and tests, sensory accommodations, quiet work environment, repetition of instructions, allow use of headsets to minimize distractions, frequent breaks during testing, use of calculator, use of word processing program for written work always, minimize copying form board or book, use simplified work sheet, large clear font, plenty of workspace, use graphic organizers to organize thoughts prior to writing, use active reading strategies visual and auditory supports for all instruction, encourage positive peer interaction allow access to counselor as needed, limited auditory distractions." (Respondent's Exhibit 3-2, 3-3, 3-4, 3-6, 3-7)
13. The IEP goals have the following impact statement: "Student has mild mixed hearing impairment in left ear and mild sensori-neural hearing impairment in right ear. He has worn a hearing aid in his left ear during class since 1st grade. Student requires environmental accommodations because of his hearing problems Student hearing loss has caused him to feel anxious around his peers. Moreover, as [student] becomes overly emotional his ability to process academic information becomes more pronounced. However with accommodations student's progress n the general education setting has not been hindered." (Respondent's Exhibit 3-2, 3-4, 3-6,
14. The December 10, 2012, IEP added the following under Emotional, Social, and Behavioral Develop Goals: (Respondent's Exhibit 3-7, 3-8)
 - a. "[the student's] current behavior according to observations by teachers and staff at School A is slightly immature and awkward but reveals overall positive peer and adult interaction skills. [the student] is reportedly 'slow to warm up in new situations and can be quiet, shy and passive.'" He has a mild temperament, moderate speaking voice, and he has many friends. His main social weakness is that in comparison to other 6th graders, he seems to get excited and act childlike and playful over 'Little things.'" He rarely seems frustrated according to his teaches. He struggles with being a self-advocate. Student does not exhibit behavioral issues but will likely benefit from behavioral support during his transition to a new location of services. Behavioral services were waived at the current location due to site's inability to provide the services." (Respondent's Exhibit 3-7, 3-8)
 - b. "Teacher reports and parents reports suggest that due to student's history of anxiety, he will struggle with transitions. Student's anxiety may cause him to shut down or have difficulty completing academic tasks and will I need to work on goals that will support his use of positive coping strategies and building appropriate relationships with adults and peers."(Respondent's Exhibit 3-7, 3-8)

- c. "Student made significant progress in the general education setting after building positive relationships with peers and adults at current site. Student will need support to engage in his new location and utilize new resources that will be available to him." (Respondent's Exhibit 3-7, 3-8)
- d. The annual goals for the student in this area are: (Respondent's Exhibit 3-7, 3-8)

Goal 1: Student will learn coping strategies for adapting to transitions.

- i. Baseline: Student currently struggles with shutting down during transitions.
- ii. Anticipated date of achievement is 12/7/13
- iii. Evaluation procedure and schedule: Log: weekly Observation: daily

Goal 2: The student will learn to verbally and in a journal process his feelings and anxiety

- iv. Currently there is no baseline in this area
- v. Anticipated Date of achievement: 12/7/2013
- vi. Evaluation procedure and schedule: Log: weekly Observation: weekly.

15. The student's academic goals in the IEP were developed by a special education teacher at School B based on the student's grades, and conversations the teacher had with teachers at School A. The teacher also used the common core standards and the student's achievement scores to develop the baselines and needs. The student's strengths and testing listed in the IEP came from what School B provided. ([REDACTED] testimony)
16. During the IEP meeting the student's parent and representatives were given the opportunity to make suggestions for revision to the IEP goals and the transition plan but they provided none. School B can provide the level of support to implement the student's IEP and the DCPS members of the team did not believe School B was too large for the student. There are less than 500 students there now. General education classes would not exceed 17 students and special education classes would not exceed 10 students. The student's IEP would be reviewed after he attends School B for thirty days. ([REDACTED] testimony)
17. School B is one of the smaller DCPS high schools because the school only has ninth and tenth graders. Class size was considered by the December 10, 2012, IEP team. Some courses at School B are co-taught with a special education teacher and a general education teacher. The IEP team considered that if the student was doing well at School A and was with all general education students the consideration of small class size would be an important factor and this could be met at School B. The goals in the transition plan developed by the team on December 10, 2012, were broad enough so that they could be

adjusted once the student arrived at School B and then the could be revised. ([REDACTED] testimony)

18. Co-taught classes reduce the student teacher ratio by one-half. (Stipulation)
19. The student never visited School B and there was a DCPS transition coordinator tasked with connecting with the student and connecting with the teachers in both schools but the student's parents refused to work with the transition case manager. The student was invited on multiple occasions to visit School B but never came. ([REDACTED] testimony)
20. DCPS attempted to relocate the student from School A because it determined that School A was not implementing the student's IEP. The relocation was attempted at the end of SY 2011-2012 and in mid-year 2012-2013. It would have been appropriate to have him move at the semester break; however, whenever he moves the School B staff will ensure the transition is a smooth as possible. ([REDACTED] testimony)
21. The student's parent's engaged an educational consultant who reviewed the October 27, 2012, HOD and the December 10, 2012, IEP. [REDACTED] supports the student's placement at School A because it provides class size and an environment that is unique and that works for the student in a structure he believes the student needs to do well in school. ([REDACTED] testimony)¹²
22. [REDACTED] believes that how School A does business they are providing specialized instruction and the student is benefitting from being there. The student sees a therapist weekly and takes medication weekly to manage his anxiety. At School A the student can't hide and has to be engaged with the staff and his peers. [REDACTED] does not support transiting the student in the middle of the school year and would not do that for any student especially a child. ([REDACTED] testimony)
23. In [REDACTED] opinion if the student is moved to School B he may retreat within himself and the gains that he has made in the past few years will be lost. The size of the school building at School B would be problem for him – just navigating the halls. [REDACTED] is concerned the student would have difficulty. However, [REDACTED] was not really familiar with School B and had nothing bad to say about it. His comments were generally regarding any comprehensive high school. ([REDACTED] testimony)
24. [REDACTED] believes the student can benefit from behavioral support services outside general education. However, [REDACTED] expressed an opinion that the student needs full time special education related services and the class size rather than the material and format of the instruction seems to be the key factor for this student in whether he can be in full time or part time special education setting. The size of building, number of students in the building, sensory issues in the building and the group of students the student will be with during his classes is the most important factors in a ideal placement for the student. ([REDACTED] testimony)

¹² The witness was designated an expert in educational programming and placement.

25. In designing a transition plan for the student to change schools it would be important to engage the student's comfort level, allowing him to make connections with the staff in the building who are going to be key players in his life. He might tour the building and be handed a schedule over a time so that he will become familiar with the school. Representatives from his current school ideally would meet with the new school staff and this could be handled in advance of the student's relocation. In [REDACTED] opinion components of the transition plan developed on December 10, 2012, would be included but the plan it is not as comprehensive as he would like to help the student make the transition. For instance there is no school visit and no communication between the staff of the two schools. ([REDACTED] testimony)
26. [REDACTED] in arriving at his opinion did not speak to the teachers at School B or the School B school psychologist and anyone else at School B about the student and [REDACTED] could not recall the last time he visited School B. He made his comments about the school based upon his general impression of most comprehensive high school, which in his opinion generally have 18 students in each class which he believes is too many for this student. ([REDACTED] testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §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 free appropriate public education ("FAPE").

Pursuant to IDEA §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.

34 C.F.R. § 300.17 provides:

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

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. ¹³ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the

¹³ 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.

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.

ISSUE 1: Whether DCPS failed to adequately consider the factors that the October 27, 2012, HOD directed be considered in planning the student's transition to a new location of services and in developing the student's IEP and determining his LRE and location of services at the December 10, 2012, IEP meeting, and if so, did DCPS' failure to do so deny the student a free and appropriate public education ("FAPE").

Conclusion: The December 10, 2012, IEP team considered and incorporated the considerations outlined in the HOD in developing the student's IEP, developing the transition plan for his relocation from School A and in making the LRE and location of services decision. Petitioner failed to sustain the burden of proof by a preponderance of the evidence that DCPS failed to comply with the HOD.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also *Scott v. District of Columbia*, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

20 U.S.C. 1414(a)(i) defines IEP as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed as a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

The IDEA ensures 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." 20 U.S.C. §1400(d)(1)(A). The IDEA guarantees children with disabilities the right to a FAPE. *Id.* In seeking an appropriate education for students with disabilities, the child's parents, teachers, school officials, and other professionals collaborate to develop an IEP to meet the child's unique needs. See 20 U.S.C. §1414(d)(1)(B). "The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir.2005) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*,

458U.S. 176, 203 (1982)). Local school officials utilize the IEP to assess the student's needs and assign a commensurate environment. See 20 U.S.C. § 1414(d)(1)(A).

Removing a child with disabilities "from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34C.F.R. § 300.550; 34 C.F.R. §300.114 see also 20 U.S.C. § (a)(5)(A) (a disabled child is to participate in the same activities as non-disabled children to the "maximum extent appropriate"); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) ("The IDEA requires school districts to place disabled children in the least restrictive environment possible.")

The evidence¹⁴ clearly demonstrates that at the December 10, 2012, meeting the IEP team carefully reviewed the October 27, 2012, HOD and its directives and considered the effects that a location change would have on the student and incorporated accommodations for the student's anxiety and other issues related to his disability and included a transition plan, social and emotional goals and made certain the IEP noted the student needs in this regard. Although Dr. Levine testified that the transition plan could have been improved the elements that he noted such as the student visiting School B or communication between School A and School B staff were elements DCPS attempted but was unable to get cooperation from the student's parents and School A. The evidence demonstrates that DCPS fully complied with the HOD in conducting the December 10, 2012, meeting and developing the student's IEP and transition plan. Petitioner failed to sustain the burden of proof on this issue.

Consequently, the Hearing Officer concludes that the evidence presented is insufficient to prove that the DCPS failed to comply with the October 27, 2012, HOD's directive that if consider the factors listed in the HOD regarding the student's particular needs regarding a transition form one location to another.

ISSUE 2: Whether DCPS denied the student a FAPE by failing to develop an appropriate IEP and propose an appropriate location of services at the December 10, 2012, meeting by failing to adequately address the student's the transition needs that arise from changing his location of services during the middle of the school year.

Conclusion: Although the middle of the school year is not an ideal time to move any student, the evidence does not demonstrate that the concerns for this student are any more acute than those of any student and exception to the general rule of not relocating a student in the middle of the school year is not controlling when, as is this case here, the student's current location cannot and will not provide him a FAPE.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement 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 is made in conformity with the Least Restrictive Environment provisions

¹⁴ FOF # 9, 10, 11, 12, 13, 14

of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

34 C.F.R. § 300.324(a) provides that In developing each child's IEP, the IEP team must consider— (i) the strengths of the child; (ii) the concerns of the parents for enhancing the education of their child; (iii) the results of the initial or most recent evaluation of the child; and (iv) The academic, developmental, and functional needs of the child.

The evidence demonstrates that the student's parents had the opportunity at the December 10, 2012, IEP meeting to fully participate in the development of the student's IEP - the goals, and accommodations and the services that would be provided to the student. And the evidence demonstrates that the student's parent had input into the student's locations of services and an opportunity to visit the proposed school but chose not to do so. Even Dr. Levine testified that his reluctance to relocate the student mid-year would be the same for any student not just this student.

As Hearing Officer Selbka noted in his October 27, 2012, HOD:

There are exceptions to the general rule that the district has administrative discretion to choose a location for provision of special education. Specifically, if: (1) a district changes a location for a student mid-year, (2) a district changes a location in the last year of high school; or (3) a student would be harmed by a change in location - then a parent/student can required the district to keep a student in a specific location. *Block v. District of Columbia* 748 F. Supp 891 (D.D.C. 1990) *Holmes v. District of Columbia*, 680 F. Supp 40 (D.D.C. 1988) *W.W. v. Smith*, 210 Fed Appx. 282 (4th Cir. 2006) in such cases a hearing offer has discretion to find the proposed location of services inappropriate base upon the harm of the transfer.

However, these exceptions only apply if the original location of services can appropriation implement the student placement and provide the student with FAPE. In *S.W.* the parent's argument challenging the change in location was premised on the original location being appropriate to implement the student's IEP. See 210 Fed. Appx. at 287. In *Block* the District Court affirmed the hearing officer's HOD based upon factual finding that the students initial location was appropriate to implement the student's IEP. *Block* 748 F. Supp at 897. In *Holmes*, the District Court specifically found that the student's initial location was appropriate to implement the student's IEP *Holmes*, 680 F. Supp. at 42

Therefore in order for the student to invoke the exceptions set forth above the original location has to be able to implement the student's IEP and provide the student a FAPE moving forward. To hold otherwise would require a school district to keep a student in an appropriate placement in violation of IDEA this cannot be the law. See *Forest Grove School District v. T.A.* the purpose of due process hearing review is to provide relief so that a student will receive FAPE.

Consequently, the Hearing Officer concludes that Petitioner failed to meet the burden to demonstrate that the student should not be relocated from his current school where he is not being provided a FAPE and his IEP is not being implemented simply because the middle of the school year is not the most opportune to relocate any student.

ISSUE 3: Whether School B is an appropriate location of services for the student.

Conclusion: Petitioner failed to present sufficient evidence to sustain the burden of proof that School B is an inappropriate location of service for the student.

Petitioner put forward the testimony of its expert witness to testify that the student should remain at School A and that the student would not fair well because of his anxiety, sensory issues, and other social and emotional concerns in a typical comprehensive high school. However, [REDACTED] testimony an opinion in that regard was lessened by his unfamiliarity with school DCPS has proposed. He testified that he is not familiar with the school, did not contact any of its staff and based his opinion on whether the student could be successful there on his belief that the building was large and had sensory issues, large class sizes and other generalize statements.

On the other hand [REDACTED] credibly testified that that School B could implement the student's IEP providing specialized instruction and related services and he would be in classes that would have no more than 10 students and even in the general education classes no more than 17 students and some of these classes would be co-taught further reducing the student-teacher ratio. [REDACTED] also noted that School B is one of the smallest DCPS high schools because it only has ninth and tenth graders. The evidence presented by [REDACTED] established that School B can address the student's needs, provide him the services in his IEP and offer him the behavior support services that will assist him in transitioning from one school to another. On the other hand, Petitioner failed to sufficiently establish that School B was inappropriate for this student.

Petitioners believe School A to be the most appropriate setting for their child. And while the parents have a right for their child to be educated in the school that they deem best, there is no obligation for a school district to fund the parents' school of choice if the school district has offered an appropriate placement that the parent has declined.

The standard set out by the United States Supreme Court in determining whether a child is receiving a FAPE, or the "basic floor of opportunity" is whether the child has access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley* 458 U.S. at 201. The IDEA, according to *Rowley* imposes "no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." *Id* at 198 A.I ex rel. *Iapalucci v. District of Columbia* 402 F. Supp. 2d 152, 167 (D.D.C. 2005)

In addition, a school district is not required to implement a program that will maximize the handicapped child's potential. *Rowley*, 458 U.S. at 198-99. Rather, a handicapped child has a right to "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. *Rowley* explained that implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. . . We therefore conclude that the 'basic floor of

opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.”
Rowley, 458 U.S. at 200-02.

DCPS has clearly now proposed a school for the student that can implement the student’s IEP. Accordingly, the Hearing Officer concludes that DCPS has no obligation to maintain the student’s placement at School A.

ISSUE 4: If Petitioners meet the burden of proof on any of the three issues above, is it appropriate (or proper) for the student to remain at School A for the remainder of SY 2012-2013?

CONCLUSION: Petitioner did not sustain the burden of proof on any of the above issues. School A cannot provide the student a FAPE, cannot implement the student IEP and as pointed out in the October 27, 2012, HOD, is an inappropriate placement for this student. Petitioner failed to sustain the burden of proof that the student should remain any longer at School A.

Ideally in transitioning the student from School A to School B if he were to come, School B staff would work with the School A staff and schedule a set of meetings to coordinate the transition over a reasonable period suitable for the student and have the student articulate his concerns and work with the parents and student to address concerns. However, the evidence in this case demonstrates that DCPS made efforts for a transition coordinator to work directly with the student and his parents but those efforts were rebuffed. DCPS has offered for the student to visit School B but the student’s parents have shown no interest in doing so. When DCPS attempted to engage the student's current school, School A, in the transition discussion the parent’s attorney indicated there was no need for them to participate. Based upon the Petitioner actions the Hearing Officer is inclined to believe that there is no interest by Petitioners in relocating the student from what has been determined to be an inappropriate placement that cannot implement his IEP.

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).

/s/ Coles B. Ruff

Coles B. Ruff, Esq.
Hearing Officer
Date: March 23, 2013