

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

Petitioner,
v.
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
Respondent.

Hearing Officer: Kimm Massey, Esq.
Case No:
Room No.: 2006

OSSE
Student Hearing Office
September 19, 2013

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a twelve year old who has been assigned to attend a different DCPS middle school than attended last year. On July 5, 2013, Petitioner filed a Complaint against Respondent District of Columbia public Schools, alleging that DCPS denied Student a free appropriate public education (“FAPE”) by failing to determine the appropriateness of the new program for Student when it changed program, questioning whether the change in program constituted a change in placement, and alleging that DCPS denied Student a FAPE by unilaterally changing Student’s placement without considering the harmful effects on Student. As relief for these alleged denials of FAPE, Petitioner requested a Notice assigning Student to an appropriate full-time therapeutic school program.

On July 12, 2013, DCPS filed a Response to the Complaint, asserting therein the following: (i) DCPS has made no changes to Student’s placement, as the IEP remains unchanged, which is undisputed. DCPS, as the LEA with discretion to determine location of services, proposed the new DCPS middle school to implement the IEP because Student’s previous school has now closed; and (ii) The complaint is premature. Beginning in Fall 2013, the new DCPS school will have a Behavioral and Educational Support Program, which includes a self-contained, structured classroom for a small number of students with behavioral issues that interfere with learning. The new DCPS school will be able to implement the IEP and is appropriate, and the BES Program can provide complete separation from non-disabled peers if required by the IEP.

The parties participated in a Resolution Meeting on July 17, 2013. There was no agreement but the parties agreed not shorten the 30-day resolution period. Therefore, the 45-day timeline began on August 5, 2013 and will end on September 18, 2013, which is the HOD deadline.

On July 26, 2013, the hearing officer conducted a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer issued a Prehearing Order on July 30, 2013.

By their respective letters on August 28, 2013, Petitioner disclosed six documents (Petitioner’s Exhibits 1-6) and DCPS disclosed two documents (Respondent’s Exhibits 1-2).

The hearing officer convened the due process hearing on September 5, 2013, as scheduled.¹ All documents disclosed by the parties were admitted into the record without objection. The hearing officer received opening statements and testimonial evidence from Petitioner. At the close of Petitioner's case, DCPS moved for judgment as a matter of law. After allowing the parties an opportunity to present arguments for and against judgment as a matter of law, and upon a consideration of the evidence presented to that point, the hearing officer denied DCPS's motion. Thereafter, the hearing officer received DCPS's testimonial evidence and closing statements from both parties before 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 IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

1. Did DCPS fail to determine the appropriateness of the new program for Student upon changing program from previous DCPS middle school, a separate program within a school, to the current DCPS middle school in what is allegedly a self-contained classroom?
2. Did DCPS's decision to change Student's school to the current DCPS middle school constitute a change in placement, as opposed to a change in location?
3. Did DCPS unilaterally change Student's placement without considering the harmful effects on Student?

FINDINGS OF FACT²

1. Student is a twelve year old _____ whose educational placement has been changed from the DCPS middle school _____ attended for SY 2012/13 to a different DCPS middle school for SY 2013/14.³
2. Student has a history of behavioral and mental health issues. _____ has been diagnosed with Oppositional Defiant Disorder; Mood Disorder, NOS; Attention Deficit Hyperactivity Disorder, NOS; Reading Disorder; Disorder of Written Expression; and Mathematics Disorder.⁴
3. Student's primary disability classification under IDEA is Emotional Disturbance ("ED"). _____ current IEP, which is dated November 15, 2012, requires _____ to receive 26.5 hours per week of specialized instruction and 60 minutes per week of behavioral support

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 Testimony of SEC of former DCPS school.

⁴ Petitioner's Exhibit 2.

services, with all instruction and services to be provided outside general education. The IEP indicates that Student does not require the support of a dedicated aide.⁵

4. Student's least restrictive environment ("LRE") is a full-time outside of general education environment due to significant behavior difficulties. Student has a history of being placed outside of the general education setting on a full-time basis, and IEP team has determined that specialized instruction should take place outside the general education setting so that academic deficits can be met and behavior concerns can be addressed.⁶
5. Student requires a therapeutic educational setting. A therapeutic program is a separate program with a very small student to staff ratio, a school-wide behavior intervention plan ("BIP") program as well as an individualized BIP for each student, a high level of structure school-wide, crisis intervention available at all times, and a therapeutic staff available all the time who are trained to deal with crises as they arise.⁷
6. For SY 2012/13, Student attended the full-time ED program at a DCPS middle school. The program was located on a separate floor of the school, and had an academy coordinator, behavior technicians, social/emotional professionals, aides, six classrooms, calming colors in the classrooms, art and music, in-school suspension ("ISS") and de-escalation rooms, and a room where students were rewarded for good behavior. The ED program was a separate program within the school. Although the students in the ED program went into the school in the mornings at the same time as the general education population, in all other respects the ED students were separate. Hence, they ate lunch and received physical education and other specials separate and apart from the general education population. In short, the ED program provided its students with a small therapeutic setting outside of general education with a total ED population of 50 to 60 students.⁸
7. The school Student was attending during SY 2012/13 closed at the end of that school year. By letter dated June 7, 2013, which was sent home with Student on the last day of school, DCPS informed Parent that Student would be attending another DCPS middle for SY 2013/14 but IEP was not being changed.⁹
8. For SY 2013/14, Student has been placed in the Behavioral and Educational Support ("BES") program at current DCPS middle school. This program is located in a separate wing on the fourth floor of the building. It includes Student's self-contained ED class, another self-contained ED class, a class for intellectually disabled ("ID") students, an in-school suspension room, and a sensory/de-escalation room. The program has two social workers – one full-time and one part-time -- who conduct group and individual therapy, depending on what the student's IEP requires. There is also a psychologist who alternates coming in two days one week and three days the next. The program will offer aides as well, but the aides have not been hired yet.¹⁰

⁵ Petitioner's Exhibit 1.

⁶ Petitioner's Exhibit 1 at 7-8.

⁷ Testimony of licensed psychologist; *see* Petitioner's Exhibit 2 at 12.

⁸ Testimony of former SEC.

⁹ Testimony of father; Petitioner's Exhibit 4, Respondent's Exhibit 1.

¹⁰ Testimony of special education teacher.

9. The BES program is being provided at Student's current DCPS middle school during SY 2013/14 for the first time. However, the BES program serves over 500 students in over 50 classrooms across 19 DCPS schools.¹¹
10. There is a total of _____ students in the BES program at Student's current DCPS middle school. The BES program segregates its students from the rest of the population at the school. Hence, although the students in the program initially ate lunch with their nondisabled peers, as of the date of the due process hearing in this case, a separate lunchroom had been set up on the fourth floor for the students in the BES program.¹²
11. There are _____ students, including two _____ and four _____ and two adults, consisting of a teacher and a behavior tech, in Student's current class. Both the teacher and behavior tech took a safety training course for detaining students in crisis until they can get to the de-escalation room; however, Student's teacher prefers to handle the crisis so they do not have to use the de-escalation room. There is one _____ student in the class, with whom Student does not get along. The conflict has been ongoing since the first day of SY 2013/14, and on the day before the due process hearing in this case, the conflict escalated into physical aggression. The school usually handles the ongoing conflict by separating separates the two _____ by keeping one in Student's class and sending the other to the other self-contained ED class, or having a counselor come up for individual counseling, or having one of the _____ sit with the dean or assistant principal of the school if the conflict erupts in the morning. The de-escalation room has not been used to address the conflict, as it is a last resort only. However, as of the date of the due process hearing in this case, Student had been suspended due to the physical altercation with the other female student, who had also been suspended.¹³
12. Student needs a lot of behavioral/therapeutic support, as well as coaching and redirection. When Student does not receive the therapeutic support _____ needs, _____ becomes defensive and acts out more.¹⁴
13. Student has been accepted for admission to a nonpublic, therapeutic, special education school that primarily serves ED students.¹⁵

CONCLUSIONS OF LAW

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

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner's claims, which will be considered together because they overlap significantly and are highly interrelated.

¹¹ See Respondent's Exhibit 2 at 6.

¹² Testimony of special education teacher.

¹³ Testimony of special education teacher; testimony of community support specialist.

¹⁴ Testimony of community support specialist.

¹⁵ Testimony of private school's admissions coordinator.

**Alleged Failure to Determine the Appropriateness of
the Current Program, Alleged Change in Placement,
and Alleged Unilateral Change in Placement Without
Considering the Harmful Effects on Student**

Under IDE A, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate secondary school and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17.

The courts have determined that the term "educational 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); *see also*, *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) ("*White*") (citations omitted) ("[e]ducational placement," as used in the IDEA, means educational program-not the particular institution where the program is implemented); *Laster v. District of Columbia*, 439 F. Supp. 2d 60 (D.D.C. 2005) (internal quotations and citations omitted) (although IDEA does not define the term then-current educational placement, the meaning falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP).

Hence, a mere change in schools is not a change in educational placement. *See Veazy v. Ascension Parish School Board, et al.* 105 LRP 1050 (5th Cir. 2005) (district's decision to change school site at which hearing impaired child's IEP was implemented was not a change in his educational placement); *Knight v. District of Columbia*, 877 F.2d 1025 (D.C. Cir. 1989) (change from private school placement to a public school placement, when that is the only significant difference between the programs, is not a change in educational placement). Indeed, it is only where the change in schools includes a fundamental change in, or elimination of, a basic element of the education program that the change in schools qualifies as a change educational placement. *Lunceford v. District of Columbia*, 745 F.2d 1577, 1582 (D.C. Cir. 1984).

Moreover, if the change in schools does not constitute a change in educational placement, then the school system is not required to ensure parental involvement in the decision to change schools. *See James v. District of Columbia*, Memorandum Opinion at 7, Civil Case No. 12-376(RJL) (D.D.C. June 13, 2013) (reassignment of disabled child from one school to another did not require parental involvement where the change in schools did not constitute change in placement); *Aikens v. District of Columbia*, Civil Action No. 12-553(RMC) (D.D.C. June 21, 2013) (school district must ensure parental involvement in decision to change disabled student's school only if change constitutes change in child's educational placement).

In the instant case, Petitioner argues that DCPS's decision to change Student's school from former DCPS school to the current DCPS school was a change in placement because Student was moved from a separate program in the previous school to a classroom in the current school. Petitioner further argues that because the change in schools constituted a change in placement, Parent should have been involved in the decision. Moreover, Petitioner argues that the current school assignment is inappropriate because it does not offer the therapeutic setting and total separation from nondisabled peers that Student requires, which the previous program was able to provide. As relief for these alleged denials of FAPE, Petitioner is requesting placement at the requested private school, which Petitioner asserts offers the full-time out of general education program that constitutes Student's LRE.

DCPS acknowledges that Student's former school closed and DCPS unilaterally issued a letter instructing Parent to enroll Student at the current DCPS middle school for SY 2013/14. However, DCPS argues that parental involvement in the decision to change Student's school was not required because it was a mere change in location of services and not a change in placement. DCPS further argues that Student's current BES classroom is similar to Student's previous ED classroom, that the BES program can implement Student's IEP and provide the same level of behavioral support Student previously received, as required by the IEP, and that the current classroom is located on its own floor and does not provide any interaction with nondisabled peers, even for lunch and specials. Hence, DCPS seeks the dismissal of Petitioner's Complaint on the ground that there has been no denial of FAPE.

A comparison of Student's previous ED program with current BES program reveals that the ED program was located on a separate floor of a DCPS middle school, while the BES program is located in a separate wing on the fourth floor of Student's current DCPS middle school. Moreover, the ED program had an academy coordinator, behavior technicians, social/emotional professionals, aides, six classrooms, in-school suspension and de-escalation rooms, and a room for rewarding good behavior, whereas the BES program offers two social workers, behavioral technicians, a part-time psychologist, three self-contained classrooms, and in-school suspension and sensory/de-escalation rooms. In addition, students in the ED program were separate from the general education population at the school, even during lunch, physical education and other specials, while students in the BES program are also separated from the rest of the population at the school, including during lunch. Finally, the ED program had a total population ranging from 50 to 60 students, while the BES program currently has a total population of sixteen students.

Based on this comparison of Student's previous ED program with current BES program, the hearing officer concludes that the two programs are substantially and materially similar in that they both offer(ed) a small, self-contained program for ED students that is located in a larger DCPS middle school but totally segregates the ED students from their nondisabled peers and provides the ED students with behavioral and social/emotional support, as well as in-school suspension and de-escalation rooms. As a result the hearing officer further concludes that DCPS's decision to reassign Student to the BES program at current DCPS middle school after the school that previously housed the ED program closed did not constitute a change in educational placement, and DCPS was not required to ensure parental participation in the decision. *See James v. District of Columbia, supra* (change in location of services was not change in educational placement where the two programs were substantially and materially similar, so parental involvement was not required in connection with the reassignment).

In reaching this decision, the hearing officer acknowledges that the ED program had an academy coordinator and a room for rewarding good behavior, whereas the BES program does not offer these two elements. However, the hearing officer concludes that the absence of these two elements does not constitute the elimination of a basic element of Student's educational program that prevents the two programs from being substantially and materially similar, because the essential components of the two programs are substantially similar and the evidence demonstrates that the BES program can provide Student with the full-time out of general services that IEP requires. The hearing officer further acknowledges that the BES program has not yet hired the aides that it is supposed to offer. However, as Student's IEP indicates that does not require the support of a dedicated aide, and the evidence in this case reveals that Student's classroom contains both a teacher and a behavioral technician, the hearing officer finds that the current lack of aides in the BES program is of no significance with respect to Student.

Finally, the hearing officer notes that the evidence in this case demonstrates that Student has been experiencing an ongoing conflict with a classmate that is causing to exhibit undesirable behaviors, but instead of consistently providing Student with support from the behavioral support staff in the BES program and using the in-school suspension and de-escalation rooms to address the situation, the staff members at Student's current DCPS middle school have been attempting to contain the conflict by separating the two sometimes having a counselor come up for individual counseling, at other times having one of the sit with the dean or assistant principal of the school, using the de-escalation room as a last resort, and ultimately subjecting both to an out-of-school suspension. This failure to fully utilize the behavioral support services and facilities available at the BES program may be attributable to the fact that the program is new at Student's current middle school and had only been in operation for two weeks at the time of the due process hearing in this case. With that in mind, although the hearing officer has not found that there has been a denial of FAPE in this case, the hearing officer strongly encourages DCPS to ensure that Student receives behavioral support from the trained behavior support staff assigned to the BES program, and that said behavior support staff uses the behavioral support facilities at the BES program as needed, when Student experiences behavioral and/or social/emotional crises in the school environment.

ORDER

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

1. All claims and requests for relief in Petitioner's July 5, 2013 Complaint are hereby **DENIED** and **DISMISSED WITH PREJUDICE**.

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: 9/18/2013

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer