District of Columbia
Office of the State Superintendent of Education
Office of Dispute Resolution
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Parent, through Student,[1]	)	
Petitioner,	)	**Room: 112**
	)	**Hearings: June 7 and 8, 2018**
v.	)	**Hearing Officer: Michael Lazan**
	)	**Case No.: 2018-0090**
DCPS,	)	**Issue Date: June 12, 2018**
Respondent.	)	

HEARING OFFICER DETERMINATION

I. Introduction

This is a case brought by the Petitioner, who is the guardian of the student (the "Student"). A Due Process Complaint ("Complaint") was received by District of Columbia Public Schools ("DCPS" or "Respondent") pursuant to the Individuals with Disabilities Education Act ("IDEA") on March 29, 2018. A response was filed by Respondent on April 23, 2018. The resolution period ended on April 28, 2018.

II. Subject Matter Jurisdiction

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA" or "IDEA"), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

III. Procedural History

[1] Personally identifiable information is attached as Appendix A and must be removed prior to public distribution.

On March 29, 2018, Petitioner asked this Hearing Officer to consolidate this case with another case brought by Petitioner on behalf of the Student's sibling, but this request was denied by the Office of Dispute Resolution. On May 14, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., and Attorney B, Esq., counsel for Petitioner, appeared. Attorney C, counsel for Respondent, appeared. A prehearing conference order was issued on May 21, 2018, summarizing the rules to be applied in this hearing and identifying the issues in the case. A motion to compel the production of records dated May 22, 2018, was withdrawn after records were produced. There were two hearing dates: June 7 and June 8, 2018. These were closed proceedings. Petitioner was represented by Attorney A, Esq., and Attorney B, Esq. Respondent was represented by Attorney C, Esq. Petitioner moved into evidence Exhibits 1-20. Objections to Exhibits 1-5 and 18 were overruled. Exhibits 1-20 were admitted. Respondent moved into evidence Exhibits 1-31. There were no objections. Exhibits 1-31 were admitted. Petitioner presented Witness A, which met with a relevance objection from DCPS. This objection was sustained. Petitioner also presented Witness B, an attorney, and Witness C, an intake director. Respondent presented Witness D, a special education director, who is an expert in school psychology. At the close of the hearing on June 8, both sides presented closing arguments. Petitioner supplemented his closing argument with a written statement, which was provided to the hearing officer on June 10, 2018.

IV. Credibility.

The witnesses for both sides were credible, though the only witness with any expertise in the education of students with disabilities was Respondent's Witness D.

V. Issues

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the issues to be determined are as follows:

1. In or about March, 2018, did DCPS fail to provide the Student with an Individualized Education Program ("IEP"), including the "LRE portion," that provides an education in the least restrictive environment? If so, did DCPS act in contravention of 34 CFR 300.114? If so, did DCPS deny the Student a Free and Appropriate Public Education ("FAPE")?

Petitioner contends that the Student should be placed in "push-in" classes (with general education students, special education students, and two teachers, a general education teacher and a special education teacher).

2. Did DCPS fail to include Petitioner in the Student's IEP meetings and/or the placement decision to move the Student to a "BES" classroom in a new school in or about March, 2018? If so, did DCPS violate 34 CFR Sect. 300.501(c) and related provisions? If so, did DCPS deny the Student a FAPE?

VI. Findings of Fact

1. The Student is an X-year-old who is eligible for services as a Student with Emotional Disturbance. The Student has a diagnosis of unspecified mood affective disorder, adjustment disorder, and Attention Deficit Hyperactivity Disorder. The Student functions in the average range in broad reading and the low average range in broad math, according to the Woodcock-Johnson Tests of Achievement. (R-27-4; R-28-3-4)

2. Because of behavioral concerns, the Student was referred for special education services in or about 2016, but was not found to be eligible in December, 2016, because of the Student's academic performance, which was considered to be appropriate.

The Student was again referred for special education services in August, 2017, but was again not found to be eligible because the Student was not deemed to be two or more years below grade level. The Student was then provided with a "Section 504" plan which provided the Student with classroom and testing accommodations. The Section 504 Plan also provided for behavior support services. (R-27-1-3; Testimony of Witness D)

3. The Student started the 2017-2018 school year at School A, in a general education classroom. (Testimony of Witness B; Testimony of Witness D)

4. During the 2017-2018 school year, the Student's behaviors have increased significantly. The Student has engaged in property destruction, erasure of teacher work, verbal aggression, "cursing in the hallways," "barking like a dog" in the library, and making physical threats to staff, including a threat to use gun violence on a staff member. In particular, in Spanish class, the Student walked up to the Spanish teacher, made a "fake gun" and said, "I can see you with two or three gunshots in your head." The Student also frequently got into fights with his/her sibling at the school. The Student also expressed suicidal thoughts, typically refused to accept responsibility for his/her actions, frequently left class, and often did not return homework. (R-22; R-15; R-20; R-22; R-27-1-4; Testimony of Witness D)

5. As a result of the Student's extreme behaviors, there was another referral to special education in fall, 2017. (Testimony of Witness D)

6. After evaluations were conducted, including a Functional Behavior Assessment, Witness D sought to have an eligibility meeting before the 2017-2018 winter break. An eligibility meeting was originally scheduled for December 20, 2017, but Petitioner, who wanted to bring a team of individuals to the meeting, indicated that his

team was unavailable. Witness D then set up an eligibility meeting on January 3, 2018. This date was confirmed by Petitioner, through counsel. One day before the IEP meeting, Petitioner, through counsel, indicated that he could not meet on January 3, 2018. Respondent then proposed an eligibility meeting on January 10, 2018, but Petitioner did not reply. Concerned about the timelines, Respondent felt that it could not wait anymore, and the eligibility meeting went forward on January 10, 2018. During this meeting, the Student was determined to be eligible for services. Witness D then sent Respondent an email explaining that the Student was determined to be eligible for services. (R-1-1-3; R-2; R-3; R-4; R-5; R-6; R-8-18; Testimony of Witness D)

7. Respondent then tried to set up an IEP meeting for the Student. Respondent, through Witness D, proposed a first meeting date of January 25, 2018, and sent a draft IEP to Petitioner prior to the meeting. Respondent arranged for staff to attend, rearranging the schedules of several individuals. Petitioner, through counsel, cancelled one day prior to the meeting because "many members" of Petitioner's team could not attend. Petitioner, through counsel, also indicated that he did not receive consent from a "superior authority" and that Respondent's attorney prevented "them" from responding to inquiries about dates. Petitioner then asked for three alternative dates. (R-5-1; R-7; R-8-24; Testimony of Witness D)

8. Respondent then sent Petitioner emails to attempt to reschedule the IEP meeting. Respondent, through Witness D, proposed January 30, 2018, for the meeting, but did not hear back from Petitioner regarding that date. Eventually, Petitioner's counsel wrote that Petitioner was "working on" selecting a date, but could not confirm a date at that time. Finally, Respondent, through Witness B, unilaterally scheduled the IEP

meeting for February 9, 2018. Notice was sent to Petitioner through email, regular mail, and a phone call. (R-8-18-20; Testimony of Witness D)

9. Petitioner did not confirm the February 9, 2018, meeting date. Still, DCPS felt it had to move forward without Petitioner because the time to formulate an IEP was running out. (Testimony of Witness B; Testimony of Witness D)

10. The IEP meeting went forward on February 9, 2018. At this meeting, the Student was determined to require twenty hours of specialized instruction outside of general education at a separate school, with the following additional behavior support services: 120 minutes per month inside of general education, 120 minutes per month outside of general education, and sixty minutes per month on a consultative basis. The IEP contained goals in math, reading, and emotional, social, and behavioral development. A Behavior Intervention Plan was also created at the meeting. (R-8-15; R-28; R-29)

11. DCPS then sent the IEP to Petitioner, who did not object to the IEP and did not ask the IEP team to reconsider the terms of the IEP. Prior to determining a new school for the Student, School A sought to provide the Student with twenty hours per week of specialized instruction outside general education. (Testimony of Witness D)

12. On February 11, 2018, Respondent sent a "Prior Written Notice-Notice of Change of Placement" letter to Petitioner, indicating the terms of the Student's new IEP. (P-10-1)

13. Respondent did not hear from Petitioner in regard to the IEP (except for informal conversations between Petitioner and staff at School A). Then, on March 5, 2018, Respondent sent Petitioner an email designating School B as the Student's new school. (P-11-1; Testimony of Witness D)

14. On March 9, 2018, DCPS again proposed implementing the IEP in the "BES" program at School B. Petitioner then sought stay-put relief from a federal court, but Respondent voluntarily granted the request for stay-put relief and attempted to provide twenty hours of "pull-out" instruction at School A. (R-8-23; Testimony of Witness B)

15. Respondent then tried to set up transition meetings for the Student's move to School B, but Petitioner, through counsel, did not respond to these requests for such meetings. DCPS sent a Letter of Invitation to Petitioner on March 9, 2018, requesting a meeting on March 16, 2018. The meeting was to be held at School B with a general education teacher, a special education teacher, an evaluator, and a local education agency ("LEA") representative. Petitioner, through counsel, told Respondent he would not appear at this meeting. Instead, Petitioner, through counsel, sent Respondent an email asking to delay the meeting. (P-12-1-2; P-13; P-14-2; Testimony of Witness D)

16. On March 19, 2018, Petitioner's counsel visited School A, unannounced, and indicated that Petitioner did not want to send the Student to any school other than School A. (R-8-2-3)

17. The Student continued at School A throughout the 2017-2018 school year, and the school tried to provide the Student with the twenty hours of pull-out instruction stipulated by the Student's IEP. The Student, however, resisted going to the pull-out instruction at School A. (R-8-10; Testimony of Witness D)

18. On March 21, 2018, Respondent sent a "Prior Written Notice-Notice of Change of Placement" letter to Petitioner, indicating that the Student's new program would be the BES program at School B. (R-24-1)

19. On May 31, 2018, Respondent sent a "Prior Written Notice-Notice of Change of Placement" letter to Petitioner, indicating that the Student's new program for the 2018-2019 school year would be the BES program at School C. (R-23-1)

20. School A does not have the resources to provide twenty hours of specialized instruction to the Student outside of general education. However, the school has "moved hours around" so it can offer the Student close to the twenty hours stipulated by the Student's IEP. The Student's "pull-out" classroom does not contain any special education paraprofessionals. The school does have one behavior technician, who spends a great deal of time with the Student. The Student also sees an art therapist at or through the school. (Testimony of Witness D)

21. The BES placement is for Students with behavioral needs. The placement includes a special education teacher who focuses on students' emotional disturbance and a behavior technician in the classroom. Paraprofessionals are also assigned to the classroom. (Testimony of Witness D)

VII. Conclusions of Law

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

The burden of proof in District of Columbia special education cases was changed by the local legislature through the District of Columbia Special Education Student Rights Act of 2014. That burden is expressed in statute as the following:

> Where there is a dispute about the appropriateness of the child's individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the

> existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

D.C. Code Sect. 38-2571.03(6)(A)(i).

1. In or about March, 2018, did DCPS fail to provide the Student with an IEP, including the "LRE portion," that provides an education in the least restrictive environment? If so, did DCPS act in contravention of 34 CFR 300.114? If so, did DCPS deny the Student a FAPE?

In enacting the IDEA, "Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 373 (1985). Accordingly, in formulating an appropriate IEP, an IEP team must "be mindful of IDEA's strong preference for 'mainstreaming,' or educating children with disabilities '[t]o the maximum extent appropriate' alongside their non-disabled peers." Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 (2d Cir. 2007) (quoting 20 U.S.C. § 1412(a)(5)); Lachman v. Ill. State Board of Educ., 852 F.2d at 295 ("[IDEA's] requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference").

Still, courts must be "mindful that the presumption in favor of mainstreaming must be weighed against the importance of providing an appropriate education to handicapped students." P. v. Newington Bd. Of Educ., 546 F.3d 111 119-122 (2d. Cir. 2008). It thus has held that "where the nature or severity of the handicap is such that education in regular classes cannot be achieved satisfactorily, mainstreaming is inappropriate." Briggs v. Bd. of Educ. of Conn., 882 F.2d 688, 692 (2d Cir. 1989). The IDEA's preference for mainstreaming "rises to the level of a rebuttable presumption."

Warton v. New Fairfield Bd. Of Educ., 217 F. Supp. 2d at 273 (quoting Sacramento City Unified Sch. Dist. v. Holland, 786 F. Supp. 874, 877 (E.D. Cal. 1992)).

In Oberti v. Board of Educ., 995 F.2d 1204 (3d Cir. 1993), the Third Circuit Court of Appeals set forth a construct for school districts in connection to their duties to provide an education to students with disabilities in the Least Restrictive Environment. In Oberti, the Third Circuit looked to: (1) whether the school district has made reasonable efforts to accommodate the child in a regular education classroom; (2) whether there are educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) whether there are possible negative effects of the inclusion of the child on the education of the other students in the class. Id., at 1217-1218. The Oberti court continued to explain that, if after considering these factors, the court determines that the district was justified in removing the child from the regular classroom and providing education in a segregated, special education class, the court must consider whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate.

Petitioner did not call an expert in education, or even a witness with a background in education, to testify as to whether DCPS made reasonable efforts to accommodate the Student in a regular education classroom. Nor was a witness called to explain the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class. Nor do any of the documents in the record establish that the Student should be in a general education classroom.

To the contrary, in his opening statement, Petitioner conceded that there were no issues with the IEP, which is exactly what Witness B said during his testimony. While Petitioner did argue in his closing statement that the Student should have been kept in general education through a 1:1 aide, there is nothing in the record to explain how a 1:1 aide could manage the Student, given the extreme behaviors the Student has exhibited. Witness D, the only witness who had any experience in the school system, indicated that the Student's behaviors were so extreme that the more restrictive placement is necessary for the Student to progress in the forthcoming school year. Petitioner did not satisfy the requirement to present a *prima facie* case on this claim, which must therefore be dismissed.

2. Did DCPS fail to include Petitioner in IEP meetings and/or the placement decision to move the Student to a "BES" classroom in a new school in or about March, 2018? If so, did DCPS violate 34 CFR Sect. 300.501(c) and related provisions? If so, did DCPS deny the Student a FAPE?

The sole claim here, as made clear by Petitioner in his closing argument, is that the Student's placement was changed without parental participation. 34 C.F.R. Sect. 300.501(b)-(c).

A change in "location" is not always a change in "placement." However, a change in location may give rise to a change in placement if the change in location substantially alters the student's educational program. 71 Fed. Reg. 46,588 (2006); Letter to Fisher, 21 IDELR 992 (OSEP 1994). The determination as to whether a change in placement has occurred must be made on a case-by-case basis. The following factors are relevant in this analysis: whether the educational program set out in the child's IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have the same opportunities to participate in

nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements. Letter to Fisher. Substantive changes in placement should be preceded by an IEP meeting, whereas an IEP meeting is not necessary for mere location changes. Letter to Lott, 213 IDELR 274 (OSERS 1989); Letter to Fisher, 21 IDELR 992 (OSEP 1994); 34 CFR Sect. 300.501(b)(1)(i); 34 CFR Sect. 300.501(c)(1).

Petitioner contended that the proposed transfer of the Student to the BES program at School B, and then School C, constitutes a change in placement. Petitioner pointed to a provision in a DCPS guide entitled "Special Education Programs and Resources for Families" and indicated that a "full-time" placement like the BES program is further along the continuum than the program recommended in the Student's IEP, which is a "Learning Lab" program of "pull-out" instruction. However, the guide says that a "Learning Lab" program provides *fewer* than twenty hours of specialized instruction outside general education. The Student's IEP provided for twenty hours of specialized instruction outside the classroom, which suggests that it is an IEP for a BES program.

Petitioner also pointed to a document from DCPS indicating that there was a change of placement when the Student was placed at School B, which can be read to be an admission by DCPS on this issue. However, caselaw suggests that the change from School A to School B should not be deemed a change in placement, since Petitioner did not call any witnesses to specifically identify the "fundamental" change to the Student's placement. In fact, Petitioner presented no witnesses with any knowledge of these schools, and did not even call himself as a witness. Petitioner only called a lawyer and an intake director as witnesses, neither of whom has any experience working for schools or

knowledge of the programs involved. The District of Columbia Circuit Court of Appeals has explained that if a parent cannot identify a "fundamental change in, or elimination of" a basic element of the education program, there has been no change in educational placement. Lunceford v. Dist. of Columbia Bd. of Educ., 745 F.2d 1577, 1582 (D.C.Cir.1984). In such circumstances, courts focus on whether the new school could implement a student's IEP. D.K. v. District of Columbia, 983 F. Supp. 2d 138 (D.D.C. 2013)(even where the student transferred from a general education private school to a special education private school, there was no fundamental change in, or elimination of, any basic element of the student's educational program as set forth in the student's IEP, and the private school that was assigned could implement that IEP).

Accordingly, Petitioner's contention that he did not receive a placement meeting is not accurate. The change of placement meeting here was the IEP meeting of February 9, 2018, which made significant changes to the Student's educational program. The resulting IEP specifically indicated that the Student would be removed from general education for twenty hours a week and educated at a *separate school.* The BES program at School B offers twenty hours of specialized instruction per week in a separate school. Petitioner should have gone to the IEP meeting to ask questions about the change in the Student's placement, learn about the nature of the proposed new placement, and advocate for the Student. Instead, Petitioner chose not to respond to the requests of Witness D, failed to go to the IEP meeting, and ended up misinterpreting the IEP. Petitioner was then invited to a transition meeting prior to the Student attending School B. This transition meeting was to include members of the IEP team, including a general education teacher, a special education teacher, an evaluator, and an LEA representative. Petitioner

chose not to go to this meeting either, suggesting that the placement at School B was a *fait accompli*, but Petitioner could have gone to this meeting to find out more information about the school and advocate his position in regard to the Student's placement.

It is noted that Petitioner has shown no interest in attending any meeting which involves discussion of the BES program. Procedural violations of the IDEA should not be the basis of a finding of FAPE denial unless there is a substantive showing as well. Lesesne ex rel. B.F. v. D.C., 447 F.3d 828, 834 (D.C. Cir. 2006); see also Kruvant v. District of Columbia, 99 Fed.App'x. 232, 233 (D.C. Cir. 2004); cf. Jalloh v. D.C., 968 F. Supp. 2d 203, 212 (D.D.C. 2013)(where a student's grandmother was not at an IEP meeting, issues with the IEP meeting were considered to be a procedural violation that did not deny Student a FAPE). Under the circumstances, Petitioner received an opportunity to participate in meetings with respect to the Student's educational placement and provision of a FAPE. 34 C.F.R. Sect. 300.501(b)-(c).[2] This claim must therefore be dismissed.

VIII. Order

As a result of the foregoing, this matter is dismissed with prejudice.

Dated: June 12, 2018

Michael Lazan
Impartial Hearing Officer

cc: Office of Dispute Resolution
Attorney A, Esq.
Attorney B, Esq.
Attorney C, Esq.

[2] There is no claim the school district failed to give Petitioner sufficient notice of the IEP meeting, or did not compile sufficient records in regard to its attempts to invite Petitioner to the IEP meeting. 34 CFR Sect. 300.322(d). In fact, the school district submitted emails, forms, and other records that make it clear that it did its due diligence to try to get Petitioner to the IEP meeting.

OSSE Division of Specialized Education
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IX. Notice of Appeal Rights

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: June 12, 2018

Michael Lazan
Impartial Hearing Officer