

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Office of Dispute Resolution  
October 30, 2015

---

STUDENT, <sup>1</sup>	)	
through the PARENT,	)	Hearing Officer: NaKeisha Sylver Blount
<i>Petitioner,</i>	)	
	)	Case No: 2015-0274
v.	)	
	)	<b>Date Issued:</b> October 30, 2015
District of Columbia Public Schools,	)	
<i>Respondent.</i>	)	

---

**Hearing Officer Determination**

**SUBJECT MATTER JURISDICTION**

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and D.C. Code 38-2561.02(a).

**PROCEDURAL BACKGROUND**

This is a due process complaint (“DPC”) proceeding pursuant to the Individuals with Disabilities Education Act (“IDEA”), as amended, 20 U.S.C. §§1400 *et seq.*

The DPC was filed on August 18, 2015 by Petitioner (Student’s mother), a resident of the District of Columbia, against Respondent, District of Columbia Public Schools (“DCPS”). On August 26, 2015, Respondent filed its timely Response, denying that Respondent denied Student a free appropriate public education (“FAPE”). On August 19, 2015, Petitioner filed a motion for stay-put protection, and Respondent filed a written opposition on August 24, 2015. The stay-put motion was granted on September 2, 2015.

The parties convened a Resolution Session Meeting (“RSM”) in this matter on August 31, 2015. The parties did not reach an agreement during the RSM; however, they agreed to keep the resolution process open for the entire 30-day resolution period. Accordingly, the parties agree that the 45-day timeline for the Hearing Officer’s Determination (“HOD”) in this matter began to run on September 18, 2015, and 45 day period concludes on November 1, 2015.

---

<sup>1</sup> Personal identification information is provided in Appendix A.

Hearing Officer Determination

The undersigned Impartial Hearing Officer (“IHO” or “Hearing Officer”) held a Pre-hearing Conference (“PHC”) on September 3, 2015, during which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by September 23, 2015 and that the DPH would be held on September 30, 2015. The PHC was summarized in the Pre-Hearing Conference Summary and Order (the “PHO”) issued on September 4, 2015 and amended on September 10, 2015 by agreement of the parties.

The DPH was held on September 30, 2015 at the Office of Dispute Resolution, 810 First Street, NE, Room 2004. Petitioner elected for the hearing to be closed. Petitioner was represented by Roberta Gambale, Esq. and DCPS was represented by Tanya Chor, Esq.

Petitioner’s and Respondent’s disclosures were timely filed. At the DPH, Petitioner’s exhibits P-1 through P-27 were admitted without objection. Respondent’s exhibits R-1 through R-9 were admitted without objection.

Petitioner called the following witnesses at the DPH:

- (a) Parent
- (b) Special Education Coordinator, Residential School (“Special Education Coordinator”)
- (c) Behavioral Analyst, Residential School (“Behavioral Analyst”)

Respondent rested on the evidence, and did not call witnesses at the DPH.

Petitioner and Respondent gave oral closing arguments.

### **ISSUES**

As discussed at the PHC and reflected in the PHO, the following issues were presented for determination at the DPH.

- (a) Whether DCPS is denying Student a FAPE by seeking to inappropriately change Student’s placement from a residential placement, which is his least restrictive environment (“LRE”) for the 2015-2016 school year
- (b) Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student on or about May 1, 2015, by failing to indicate on the IEP that the LRE and placement for Student is a residential placement

### **RELIEF REQUESTED**

Petitioner requested the following relief:

- (a) a finding in Petitioner’s favor as to the issues alleged;
- (b) an Order that DCPS maintain Student’s placement at the residential treatment center, in conformity with his determined LRE.

### FINDINGS OF FACT

1. Student is a [AGE] year old student in the [GRADE] grade. His permanent residence is with his mother (“Parent”/“Petitioner”) in Washington, D.C; however, he currently attends Residential School, which is in a different jurisdiction.<sup>2</sup>
2. Student is eligible for special education and related services under the disability classification “Emotional Disturbance.”<sup>3</sup>
3. Student’s disability manifests through unsafe behaviors such as destruction of property,<sup>4</sup> fighting/aggressiveness and other unsafe behaviors on the school bus and in school, not being able to stay on school grounds, and criminal charges.<sup>5</sup>
4. As a result of his disability, Student has been placed in four different nonpublic day schools and has had significant problems consistent with his disability in each one.<sup>6</sup>
5. On December 9, 2014, Parent and DCPS reached a stipulation that Student’s least restrictive environment as of that date involved placement at a psychiatric residential treatment facility.<sup>7</sup>
6. On January 30 2015, Student was placed at Residential School, funded by his health insurance.<sup>8</sup> Though Student was placed at Residential School due to medical necessity, the placement also met Student’s educational needs.
7. Student’s current IEP is from May 1, 2015, and defines Student’s least restrictive environment (“LRE”) as 27.5 hours of specialized instruction outside the general education setting; 60 minutes of behavioral support outside the general education setting; 15 minutes of occupational therapy outside the general education setting and 60 minutes of speech-language pathology outside the general education setting.<sup>9</sup>
8. Parent did not receive a fully finalized copy of Student’s May 1, 2015 IEP until around August 14, 2015,<sup>10</sup> though Petitioner received a draft on or around May 20, 2015.<sup>11</sup>
9. In early August 2015, Student’s health insurance indicated that it was discontinuing Student’s funding at Residential School. Once Student’s health insurance indicated that it would no longer fund Student at Residential School, Student’s IEP team

---

<sup>2</sup> Testimony of Parent.

<sup>3</sup> Testimony of Parent; P-3-1.

<sup>4</sup> P-15.

<sup>5</sup> Testimony of Parent; P-15; P-16.

<sup>6</sup> Testimony of Parent.

<sup>7</sup> P-14.

<sup>8</sup> Testimony of Parent; R-4.

<sup>9</sup> P-12-12; R-5-12.

<sup>10</sup> P-8-1.

<sup>11</sup> P-8-2.

undertook a discussion on August 14, 2015 about whether Residential School was Student's least restrictive environment ("LRE") in order for him to receive a FAPE.<sup>12</sup>

10. During the August 14, 2015 meeting Residential School, Parent and Parent's representative indicated that they did not believe Student was ready for discharge from Residential School.<sup>13</sup>

11. On August 28, 2015, Student's IEP team, including DCPS, concluded that Residential School is Student's LRE at this time. Parent requested that DCPS put in writing via a Prior Written Notice ("PWN") its intent to keep Student at Residential School, indicating that she did not want to see him exited prematurely.<sup>14</sup> DCPS agreed to convene regular meetings to review Student's progress on his IEP goals, and to base the timing of his discharge on that progress.<sup>15</sup>

12. On September 3, 2015, DCPS issued a PWN stating that "[b]ased on the IEP team's decision and information provided by the team members it has been determined that at this time [Student] continues to require the placement that he is currently receiving. The team has determined that his current placement is consistent with his IEP goals and needs, which [Student] has not mastered and presently needs treatment and instruction that can be provided by his current placement, as a means to meet those goals and objectives."<sup>16</sup>

13. On September 3, 2015, Petitioner expressed concern to DCPS that the wording of the PWN was vague and did not expressly specify that Student's placement is residential, and Petitioner requested that the IEP or the PWN be reworded.<sup>17</sup>

14. Student's providers at Residential School are not currently recommending discharge for him because they believe he first needs to meet his treatment goals, such as maintaining safe behavior for 90 days in a row.<sup>18</sup> As of August 19, 2015, Student's discharge date was projected to be approximately nine to twelve months from January 2015 (Student's entrance into Residential School).<sup>19</sup>

#### **Motion to Dismiss**

On September 21, 2015, Respondent filed a motion to dismiss the DPC. Respondent argued that there was no live dispute between the two parties, because DCPS had not removed Student from Residential School, because DCPS had indicated Student's LRE in all necessary documents, and because Petitioner had not alleged an actual violation of the IDEA. Respondent

---

<sup>12</sup> R-3; R-4.

<sup>13</sup> R-3; R-4.

<sup>14</sup> P-5; R-6-3.

<sup>15</sup> R-6-2.

<sup>16</sup> P-3.

<sup>17</sup> P-1.

<sup>18</sup> Testimony of Special Education Coordinator.

<sup>19</sup> P-7-6.

argued that no meaningful relief could be granted to Petitioner; therefore, the case must be dismissed as moot.

Petitioner orally opposed the motion on the record during the DPH, arguing that Student's IEP does not specify his LRE, that the reason DCPS had not moved Student from Residential School was because of the September 2, 2015 stay-put order, and that the PWN DCPS issued does not specify Student's current placement as residential. According to Petitioner, once the stay put is no longer in effect, Student becomes vulnerable to being moved by DCPS, particularly since DCPS declined Petitioner's request to stipulate during the PHC and on the record during the DPH that Student will remain at Residential School for a given period of time; therefore, Petitioner asserts that the issues alleged in the DPC are capable of repetition and avoiding review and are not moot.

In considering a motion to dismiss, courts (and by analogy, hearing officers) must construe the allegations and facts in the complaint in the light most favorable to the Petitioner and must grant the Petitioner the benefit of all inferences that can be derived from the facts alleged. *See Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C.Cir.2004). The court should dismiss a claim only if the Respondent can demonstrate “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley*, 355 U.S. at 45–46. Here, the parties disagree about the extent to which the language in Student's May 2015 IEP, the August 2015 meeting notes and the September 2015 PWN must and/or do clearly establish Student's placement as residential. Therefore, construing the facts in the light most favorable to the Petitioner does not lend to a conclusion that the case is moot. Respondent's motion to dismiss the DPC as moot is **DENIED**.

#### CONCLUSIONS OF LAW

“Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the impartial hearing officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also*, *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 17 n.3 (D.D.C. 2008).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the student's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

**(a) Whether DCPS is denying Student a FAPE by seeking to inappropriately change Student's placement from a residential placement, which is his least restrictive environment ("LRE") for the 2015-2016 school year.**

The Hearing Officer finds no evidence that, as of the time of the filing of the DPC or as of the time of the DPH, DCPS was attempting to change Student's IEP or educational setting from Residential School. It is perhaps understandable that Petitioner felt apprehensive about the August 14, 2015 IEP team meeting discussion regarding whether Student continued to require a residential setting for his educational needs, given that Student's health insurance was discontinuing its funding. However, the Hearing Officer finds no denial of the IDEA in the team undertaking such a discussion. Moreover, the team ultimately concluded that Student requires more time at Residential School. While a stay-put order was in place at the time, the Hearing Officer does not find sufficient basis in the record for concluding anything other than that the team reached its decision about Student's continued need to remain at Residential School of its own accord.<sup>20</sup> Moreover, Student right to a FAPE has not been impeded, Parent's opportunity to participate in the decision-making process regarding the provision of FAPE to Student has not been impeded, and Student has not been deprived of educational benefit. Any future decision DCPS may make to move Student is not ripe in this action. Petitioner has not met the burden of proving that DCPS is denying Student a FAPE by seeking to inappropriately change Student's placement from a residential placement.

**(b) Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student on or about May 1, 2015, by failing to indicate on the IEP that the LRE and placement for Student is a residential placement.**

In order for a student's IEP/educational program to be appropriate: (1) the LEA must have complied with IDEA's administrative procedures and (2) the IEP must reasonably calculated to provide some educational benefit to Student. *See N.T. v. District of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012), quoting *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir.2003); *J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010). The appropriateness of an IEP must be assessed as of the time the IEP was developed. *S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008), quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008) ("Because the question . . . is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, . . . the measure and adequacy of an IEP can only be determined as of the time it is offered to the student. . . . Neither the [IDEA] nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.") Petitioners do not assert that DCPS failed to comply with the administrative procedures attendant to developing Student's IEP. Rather, Petitioners claim that the IEP is not reasonably calculated to provide Student with educational benefit in that it fails to adequately describe Student's least restrictive environment ("LRE").

---

<sup>20</sup> In any event, the team's motive for making its decision would not in and of itself have been actionable under the IDEA, provided the decision itself did not deny Student a FAPE.

As of the time Student's IEP team met in May 2015, Student had been placed in four different nonpublic day schools and had significant problems consistent with his disability in each one. As of December 2014, Petitioner and DCPS agreed via a stipulation that a psychiatric residential treatment facility was Student's LRE as of that time. While Student's health insurance funded Student at Residential School until August 2015, in August 2015 Student's IEP team determined that Student continued to require placement at Residential School for educational purposes. From this information, the Hearing Officer concludes that a residential school was Student's LRE in May 2015.

However, the LRE section of Student's May 2015 is worded so generally that even a self-contained classroom in a regular school could technically implement it.<sup>21</sup> Because the IEP does not indicate that Student requires a greater level of restrictiveness, it is not reasonably calculated to provide educational benefit to Student, which is a procedural violation of the IDEA. Yet, the determination of whether there has been a denial of FAPE must be based on substantive grounds. In this instance, Student has not been moved from Residential School, nor has the Hearing Officer concluded that DCPS attempted to move Student from Residential School as of the time of the DPH. Parent has played an active role in the decision-making process concerning Student's placement/educational setting. As Student's right to a FAPE has not been impeded, Parent has not been deprived of an opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, and Student has not suffered a deprivation of educational benefit, there has been no substantive violation of the IDEA. Thus, Petitioner has not met her burden of proving that DCPS denied Student a FAPE by failing to develop an appropriate IEP for Student on or about May 1, 2015, by failing to indicate on the IEP that the LRE and placement for Student is a residential placement.

#### **Motion for Directed Finding**

At the close of Petitioner's case in chief, Respondent orally moved for a directed finding as to each issue, arguing that Petitioner had failed to meet her burden. Petitioner orally opposed the motion, and the Hearing Officer took the oral motion and response under advisement.

A corollary to the directed finding Respondent seeks is found in Fed. R. Civ. P. 50 – “Judgment as a Matter of Law” – which is proper when “the court finds that reasonable jury would not have a legally sufficient evidentiary basis to find for the nonmoving party.” *Kapche v Holder*, 677 F.3d 454 (D.D.C. 2012). citing *Breeden v. Novartis Pharms. Corp.*, 646 F.3d 43, 53, 396 U.S. App. D.C. 170 (D.C. Cir. 2011) (quoting Fed. R. Civ. P. 50 (a)(1)). As a detailed discussion on the merits of each issue is included above, the motion for directed finding is **DENIED AS MOOT**.

#### **ORDER**

As no denial of FAPE was found on the issues alleged, Petitioner's requested relief must be **DENIED**. The complaint is **DISMISSED** with prejudice.

---

<sup>21</sup> Pursuant to 34 C.F.R. §300.116(c), “unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.” Based on the record, a regular school would not have been able to meet Student's needs as of May 2015.

2015-0274  
Hearing Officer Determination

**IT IS SO ORDERED.**

Date: October 30, 2015

*/s/ NaKeisha Sylver Blount*  
Impartial Hearing Officer

Copies to:

Petitioner (by U.S. mail)

Petitioner's Attorney: Roberta Gambale, Esq. (electronically)

DCPS' Attorney: Tanya Chor, Esq. (electronically)

Chief Hearing Officer Virginia Dietrich, Esq. (electronically)

OSSE-SPED (electronically)

ODR (electronically)

**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).