

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

ODR
Office Of Dispute Resolution
September 23, 2014

STUDENT, ¹)	Date Issued: 9/22/14
through his Guardian,)	
Petitioner,)	Hearing Officer: Keith L. Seat, Esq.
)	
v.)	
)	
District of Columbia Public Schools)	
("DCPS"),)	
Respondent.)	
)	
)	
)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, guardian of Student, filed a due process complaint on 7/9/14, alleging that Student had been denied a free appropriate public education ("FAPE") in violation of the Individuals with Disabilities Education Improvement Act ("IDEA") because DCPS did not provide a location for Student for the 2014/15 school year that can implement his Individualized Education Program ("IEP"), which requires 31.5 hours per week out of general education. DCPS responded that Student was not denied a FAPE as the chosen location for Student can provide 27.5 hours per week out of general education, which is sufficient and may even be preferable for Student.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.") and 38 D.C. Code 2561.02.

¹ Personally identifiable information is provided in Appendix A.

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Procedural History

Following the filing of the due process complaint on 7/9/14, this Hearing Officer was assigned to the case on 7/10/14. DCPS filed a timely response to the complaint on 7/17/14 and made no challenge to jurisdiction.

Only Petitioner sought to waive the resolution meeting, which took place on 8/6/14. At that time, the parties neither settled the case nor agreed to end the resolution period early, so the standard 30-day resolution period concluded on 8/8/14. A final decision in this matter must be reached no later than 45 days following the end of the resolution period, which requires a Hearing Officer Determination (“HOD”) by 9/22/14. A prehearing conference was held on 8/28/14 and a Prehearing Order issued that same day.

Neither party objected to the testimony of witnesses by telephone. The parties made no admissions and agreed on no stipulations. Petitioner’s pending Motion for Notice of Appearance was withdrawn by Petitioner’s counsel.

Petitioner’s Disclosure statement, filed on 9/8/14, consisted of a witness list of 5 witnesses and documents P-1 through P-14. Petitioner’s Disclosure statement and documents were admitted into evidence without objection.

Respondent’s Disclosure statement, filed on 9/9/14 (without objection by opposing counsel), consisted of a witness list of 2 witnesses and no documents. Respondent’s disclosure statement was admitted into evidence without objection.

Petitioner’s counsel presented 3 witnesses in Petitioner’s case-in-chief (*see* Appendix A):

1. Petitioner (“Guardian”)
2. Program Director for Nonpublic School (“Program Director”)
3. LEA Representative for Public School 8B (“LEA Rep 8B”)

Respondent’s counsel presented 1 witness in its case (*see* Appendix A): LEA Representative for Public School 9 (“LEA Rep 9”)

Petitioner’s counsel also presented Petitioner as a rebuttal witness.

Hearing Officer Determination

The sole issue² to be determined in this Hearing Officer Determination is:

Issue – Whether DCPS denied Student a FAPE by failing to identify an appropriate location for the 2014/15 school year³ that can implement Student’s IEP, which requires full-time special education services out of general education.

Petitioner requested the following relief: DCPS shall fund placement at Nonpublic School to provide full-time special education services out of general education.⁴

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, the Findings of Fact⁵ are as follows:

1. Student is a resident of the District of Columbia. Petitioner is Student’s aunt and legal guardian (“Guardian”).⁶

2. Student has Multiple Disabilities, with a Specific Learning Disability as well as Other Health Impairment due to ADHD.⁷

3. Student is in _____ a self-contained classroom at Public School 9 for 2014/15, which he had attended for only two weeks at the time of the due process hearing. In his short time at Public School 9, Student was almost in a fight when he accidentally rubbed against another student in the hallway, and was warned by

² Petitioner withdrew a second issue at the due process hearing, which was: “Whether Respondent denied Student a FAPE by failing to provide ESY services to Student in 2014.”

³ All dates in the format “2014/15” refer to school years.

⁴ Petitioner withdrew a second request for relief, which was: “DCPS to fund compensatory education for any denials of FAPE due to failure to provide ESY services in 2014.”

⁵ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. 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, 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.

⁶ Guardian.

⁷ P-6-1.

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school staff that his Guardian might be called. Despite efforts by the school, special education students are made fun of by their general education peers.⁸

4. Student's IEP Team amended his IEP on 6/13/14 to increase his weekly hours of specialized instruction out of general education⁹ from 27.5 to 31.5.¹⁰ Public School 9, to which DCPS assigned Student for 2014/15, cannot implement Student's IEP and keep Student separated from general education students, who make up about three-fourths of the student body there.¹¹

5. Student's IEP Team was in consensus when increasing his hours from 27.5 to 31.5 at the end of 2013/14, and sought to return him to a smaller school like Public School 7, and avoid large schools like Public School 8A and Public School 8B.¹² Based on observations of various special education programs at Public School 9, LEA Rep 8B believes that Public School 9 is not appropriate for Student, as it is "an even bigger school" the Public School 8B and Student will have too much opportunity to wander.¹³ Public School 9 has a large building with many hallways and distractions moving from class to class; Student needs more structure to be successful.¹⁴ Student's IEP requires a 100% full-time self-contained program, which the IEP Team intended to be in a separate school apart from general education students.¹⁵

6. The increase in Student's IEP from 27.5 to 31.5 hours on 6/13/14 was determined to be his Least Restrictive Environment ("LRE") by the IEP Team.¹⁶ But the change did not go through the usual LRE Team process at DCPS, which involves observers and reports on Student in his existing environment. By the time Student's evaluations were completed in May 2014 and the IEP meeting took place in mid-June, school was out for the summer, so the usual observations and reporting by the DCPS LRE Team did not occur.¹⁷

7. In 2011/12 and 2012/13, Student attended 6th and 7th grades at Public School 7, which was a smaller setting; Student did much better there and was making progress in

⁸ Guardian; LEA Rep 9.

⁹ Unless otherwise indicated, all discussion of hours refers to hours per week of specialized instruction out of general education as set forth in an IEP.

¹⁰ P-8; P-9; P-10.

¹¹ LEA Rep 8B; Guardian.

¹² LEA Rep 8B; Guardian; P-9-2; P-10-3,4; P-13-2; P-8-10.

¹³ LEA Rep 8B; P-13-2.

¹⁴ LEA Rep 8B.

¹⁵ *Id.*

¹⁶ P-8-11.

¹⁷ LEA Rep 8B.

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mastering his IEP goals.¹⁸ While Student had 31.5 hours at Public School 7, on 5/20/13 his IEP was reduced to 19.5 hours as he headed into 8th grade.¹⁹

8. Eighth grade in 2013/14 was a very different matter for Student. Public School 7 closed, so Student attended Public School 8A for several months, but it was clear that Student's needs could not be met there.²⁰ Student then was shifted to Public School 8B, which has over 300 students, about three-fourths of whom are nondisabled.²¹ Student did not do well at Public School 8B either, even though his IEP was increased from 19.5 to 27.5 hours and Student was with general education students only for lunch and physical education.²² Other students made fun of Student. The building was large and Student was easily distracted by all the activity in the hallways. Guardian received calls about every week from the school about Student's behavior and learning abilities.²³ In 8th grade, Student received 8 days of out of school suspension and 10 in school suspensions, was often off-task in hallways, was disruptive, and was failing most of his classes.²⁴ "While the classes are small at Public School 8B, the school setting itself appears to be overwhelming" to Student.²⁵ In short, 2013/14 was a terrible experience for Student because of the size of the school, even though Student was in a self-contained program for 27.5 hours a week.²⁶

9. Student regressed in Reading, Math and Writing during 8th grade at Public School 8B and he is significantly deficient in each academic area.²⁷ In Math he was at a low third grade level, in Reading he scored only 16% on a Paced Interim Assessment, and he received only 1 point out of 4 in Written Expression.²⁸ Student has "a significant ability-achievement discrepancy."²⁹ Observations of Student for a Functional Behavior Assessment ("FBA") at the end of 8th grade reported that he was off-task over 90% of the time, out of his seat 77% of the time, and has verbal outbursts 73% of the time.³⁰

10. In contrast with large schools like Public School 8B and Public School 9, Nonpublic School is very small, with only 36 students, and provides therapeutic support all day long. Nonpublic School has a great deal of experience handling children with

¹⁸ Guardian; P-11-3,6.

¹⁹ P-1-8; P-3-1,9.

²⁰ Guardian.

²¹ LEA Rep 8B.

²² P-5-11; LEA Rep 8B; Guardian.

²³ Guardian.

²⁴ P-6-1,3.

²⁵ P-11-17.

²⁶ Guardian; LEA Rep 8B.

²⁷ P-9-1; P-10-1, P-11-14,15,16,17; P-12-2.

²⁸ P-8-3,4,6.

²⁹ P-11-19.

³⁰ P-6-4,5.

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special needs and behavioral problems, and emphasizes all students being in their proper place. Nonpublic School can give Student the attention and direction he needs both academically and behaviorally. Student would be tested to determine his weaknesses and then receive a great deal of individualized attention to strengthen those weaknesses.³¹

11. Nonpublic School can implement Student's IEP. Student has been accepted by Nonpublic School and is a good fit for its program. Nonpublic School is on the OSSE list of approved day schools.³²

Conclusions of Law

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

The overall purpose of the IDEA is to ensure 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 IEP is the 'centerpiece' of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (3d Cir. 2010), quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and is the primary vehicle for providing a FAPE. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. District of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Rowley*, 458 U.S. at 198. Congress, however, "did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

In addition, DCPS must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that

³¹ Program Director; Guardian.

³² Program Director.

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education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114.

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 child'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). In other words, an IDEA claim is viable only if those procedural violations affected the child's *substantive* rights.

“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 is on the party seeking relief. *Schaffer v. West*, 44 IDELR 150 (U.S. 2005).

Issue – *Whether DCPS denied Student a FAPE by failing to identify an appropriate location for the 2014/15 school year that can implement Student's IEP, which requires full-time special education services out of general education.*

There is no dispute in this case that Student's IEP Team modified his IEP at the end of 2013/14 to increase his hours from 27.5 to 31.5. Nor is there any dispute that DCPS selected a location for Student that cannot provide 31.5 hours out of general education, which requires a separate school or at least a fully separate program within a school. DCPS asserts that the difference is immaterial, asserting that it is probably better for Student to interact with nondisabled peers during those 4 non-academic hours, notwithstanding his IEP.

However, the IDEA is violated when a school district deviates materially from a student's IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007). A material deviation requires more than a minor discrepancy or a “*de minimis* failure to implement all elements of [the student's] IEP.” *Johnson v. District of Columbia*, 962 F. Supp. 2d 263, 268 (D.D.C. 2013) quoting *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 75 (D.D.C. 2007). Courts applying this standard look at the “goal and import” of what was not implemented in the student's IEP. *Johnson*, 962 F. Supp. 2d at 268, quoting *Wilson v. District of Columbia*, 770 F. Supp. 2d 270, 275 (D.D.C. 2011). *See also S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Turner v. District of Columbia*, 952 F. Supp. 2d 31, 40-41 (D.D.C.2013). Here, DCPS admits that it cannot implement Student's IEP at the location in which it placed him. DCPS undermined the goals of Student's IEP Team. For the reasons discussed below, this Hearing Officer finds that this omission was a material deviation from Student's IEP and that he was denied a FAPE.

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The IDEA and its regulations establish the process for developing and implementing an IEP, and carefully define the composition of the IEP Team to ensure that the particular needs of Student are considered and incorporated into his IEP by those who are knowledgeable about his needs as well as about the school system's resources. 34 C.F.R. 300.324, 300.323, 300.321; *Melodee H. ex rel. Kelii H. v. Dept. of Educ., State of Hawaii*, 2008 WL 2051757, 10 (D. Haw. 2008). DCPS cannot override the IEP developed by the Team that knows Student based on general notions from others who do not.

Guardian and LEA Rep 8B, who were both on Student's IEP Team, understood that Student does better in a smaller, focused program, like Public School 7, and does very poorly in a larger school with general education peers around to distract him, such as Public School 8A and Public School 8B. Public School 9, Student's current location, is even larger and mostly comprised of general education students. Student regressed while in larger schools in 2013/14, so to provide educational benefit to Student, on 6/13/14 his Team boosted his hours to 31.5 with the goal and expectation that Student would avoid the distraction of general education students and would attend a smaller separate school, which was his LRE.³³ Student's IEP Team, including Guardian, believed this was in the best interests of Student.³⁴

DCPS attempted to justify not fully implementing Student's IEP by emphasizing the socialization benefits to Student from having lunch with nondisabled peers. This argument has no merit. An LEA must implement the IEP developed by the team. The IDEA regulations, 34 C.F.R. 300.324(b), provide procedures for revising an IEP. A school may not change Student's IEP, formally or informally, without prior notice to Guardian and an opportunity for Guardian to discuss any proposed changes with the public agency. *See* Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46685 (August 14, 2006). Here DCPS did not seek to change Student's IEP, but simply failed to implement it.

DCPS's assertion that there is no material difference between 27.5 and 31.5 hours is also undermined by the very fact that the IDEA requires a continuum of services be provided, including "separate schools."³⁵ Further, in *Aikens v. District of Columbia*, 950

³³ All of the district's usual processes were not carried out, as DCPS normally would have obtained input from an LRE Team, which did not occur due to the timing at the end of 2013/14. However, the IDEA does require input from an LRE Team, but does require IEPs to be either implemented or properly modified.

³⁴ Indeed, an IEP Team is obliged to amend an IEP if its objectives are not met. 20 U.S.C. § 1414(d)(4); *Loren F. ex rel. Fisher v. Atlanta Independent School System*, 349 F.3d 1309, 1312 (11th Cir. 2003).

³⁵ "Continuum of alternative placements.

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F. Supp. 2d 186, 189, 192 (D.D.C. 2013), the district court upheld the hearing officer’s determination that there was no material or substantial difference between a separate school that has its own building and one housed within a larger school as long as it is “maintained separately” and the two schools “do not share the same space within the building and access between the two schools is controlled” by security guards. That is far different from Student’s situation at Public School 9, where the building is shared and he is constantly receiving the stimuli from being in the same space with 600 general education peers.

* * * * *

As a remedy for this violation of IDEA, Petitioner seeks DCPS funding for Student to attend Nonpublic School. DCPS did not offer any evidence that a DCPS school that could fulfill Student’s IEP. Since no public school is available to implement Student’s IEP, then DCPS “must pay the costs of sending the child to an appropriate private school.” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518-19 (D.C.Cir. 2005), quoting *Jenkins*, 935 F.2d at 305; *Branham v. District of Columbia*, 427 F.3d 7, 8-9 (D.C. Cir. 2005); *L.R.L. ex rel. Lomax v. District of Columbia*, 896 F. Supp. 2d 69 (D.D.C. 2012). A hearing officer may award appropriate equitable relief, including a prospective private placement, when there has been an actionable violation of IDEA, as here. See *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012), citing *Branham*, 427 F.3d at 11–12.

Nonprofit School is on OSSE’s list of approved nonpublic day schools. DCPS did not question Nonprofit School’s rates and offered no evidence that the cost of placement at Nonpublic School would be higher than at other local private schools serving students with similar disabilities. “Where a public school system has defaulted on its obligations under the IDEA, a private school placement is ‘proper under the Act’ if the education provided by said school is ‘reasonably calculated to enable the child to receive educational benefits.’” *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994), quoting *Rowley*, 458 U.S. at 176, 102 S. Ct. at 3034. See also, e.g., *N.G. v. District of Columbia*, 556 F. Supp. 2d 11, 37 (D.D.C. 2008). It is the conclusion of this Hearing Officer that Nonpublic School satisfies this standard as it is reasonably

“(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

“(b) The continuum required in paragraph (a) of this section must –

“(1) Include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, *special schools*, home instruction, and instruction in hospitals and institutions); . . .”

34 C.F.R. 300.115 (emphasis added).

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calculated to provide educational benefits to Student, and is an appropriate placement for Student.

ORDER

Petitioner has met her burden of proof in this case as set forth above. Accordingly, it is **hereby ordered** that DCPS shall within 10 business days place Student at Nonpublic School and fund Student's tuition, related services, and transportation for the 2014/15 school year.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
Hearing Officer

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).