District of Columbia
Office of the State Superintendent of Education

Office of Review and Compliance
Student Hearing Office
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OSSE
STUDENT HEARING OFFICE
2012 DEC 26 AM 9: 38

Confidential

Parent on Behalf of Student[1], Petitioner, v. District of Columbia Public Schools ("DCPS") Respondent.	HEARING OFFICER'S DETERMINATION Hearing Officer: Coles B. Ruff, Esq.

[1] Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

JURISDICTION:

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E30. The Due Process Hearing was convened for one day on December 13, 2012, at the Office of the State Superintendent ("OSSE") Student Hearing Office 810 First Street, NE, Washington, D.C. 20003, in Hearing Room 2006.

BACKGROUND AND PROCEDURAL HISTORY:

The student is eligible for special education with a disability classification of emotional disability ("ED"). The student's most recent individualized educational program ("IEP") was developed on May 22, 2012, while the student was attending a DCPS elementary school, ("School A"). The student's disability classification was changed at the May 22, 2012, IEP meeting from developmental delay ("DD") to ED and the IEP team determined that School A was not an appropriate placement for the student.

The student's current IEP prescribes that all services are to be provided outside general education. DCPS maintains that the student can attend his neighborhood school ("School B"). The student began attending School B at the start of school year ("SY") 2012-2013. Petitioner alleges School B cannot implement the student's IEP and is not an educational placement that can, as his IEP prescribes, provide the student full-time special education services (specialized instruction outside general education throughout the school day with no services provided with non-disabled peers).

On October 9, 2012, Petitioner, through counsel, filed the current due process and seeks as relief: that the Hearing Officer order DCPS to place and fund the student in a full time special education program. Petitioner is seeking no compensatory education.

DCPS filed a response to the complaint on October 15, 2012, and asserted that the student's neighborhood school can implement the student's IEP. DCPS maintains that the student's IEP developed at the May 22, 2012, meeting is appropriate as well as his continued placement at School B. There is no dispute between the parties that the student's May 22, 2012, is an appropriate IEP.

A resolution meeting was never held. The parties did not waive the resolution meeting but agreed that the hearing should proceed after the 30-day resolution period expired. The 45-day timeline began on November 9, 2012, and ended (and the HOD is due) on December 23, 2012.

The Hearing Officer conducted a pre-hearing conference on ("PHC") in this matter on November 19, 2012.[2] The issues to be adjudicated and the relief sought were discussed and determined. At

[2] The pre-hearing conference was convened on the first date that both counsel were available.

the time of the pre-hearing conference Petitioner had not secured a specific school to propose and was instructed by the Hearing Officer to provide the name of the school to the Hearing Officer and DCPS counsel by December 4, 2012. DCPS was also given the same date by which to propose a placement other than School B if it chose to do so. On November 22, 2012, the Hearing Officer issued a pre-hearing order ("PHO") outlining, inter alia, the issues to be adjudicated.

Neither party provided a proposed school to the Hearing Officer by December 4, 2012. At the outset of the hearing the Hearing Officer determined that Petitioner had still not secured an appropriate placement to propose; therefore, the Hearing Officer instructed that if Petitioner met the burden of establishing that the student's current school was an inappropriate placement and/or location of services the only relief that would be granted is to direct that an appropriate placement be determined at a placement meeting.

ISSUE: [3]

The issue to be adjudicated is:

Whether the student's current school, School B, is an appropriate location of services that can implement the student's May 22, 2012, IEP[4], and if not, is DCPS' placement of the student at School B a denial of a free and appropriate public education ("FAPE") to the student.

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-5 and DCPS Exhibit 1-8) that were admitted into the record and are listed in Appendix A. Any documents not admitted into the record are so noted in Appendix A. Witnesses are listed in Appendix B.

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[3] The alleged violation(s) and/or issue(s) listed in the complaint or in the pre-hearing order do not directly correspond to the issue outlined here. Hearing Officer restated the issue at the outset of the hearing and the parties agreed that this is the issue to be adjudicated. At the start of the hearing the parties discussed the student's disability classification and it was determined that there was no dispute that the student's current classification is ED. Thus, the second issue listed in the PHO was withdrawn by Petitioner.

[4] The facts stated in the complaint indicated that the student's behavior was not being fully addressed at School B and because of the school's inability to effectively address his behavior he is not available to access his education. Thus, Petitioner asserted the IEP is not being implemented and School B is an inappropriate location of services. At the outset of the hearing the Hearing Officer reviewed the facts set forth in the complaint with the parties and the parties agreed to this interpretation of the issue to be adjudicated.

FINDINGS OF FACT: [5]

1. The student resides with his parent in the District of Columbia. The student is currently in first grade and has been determined eligible for special education with a disability classification of ED. The student's most recent IEP was developed on May 22, 2012, while the student was in kindergarten attending School A. (Parent's testimony, Petitioner's Exhibit 1-1)

2. At School A, during SY 2011-2012, the student had repeated behavioral difficulties and received a long-term suspension. On one occasion police were called to the school because of the student's behavior. The student was eventually admitted to the Psychiatric Institute of Washington ("PIW") because of his in-school behaviors. (Parent's testimony)

3. While attending School A DCPS had conducted and functional behavior assessment ("FBA") and developed a behavior intervention plan ("BIP"). (DCPS Exhibits 6, 7)

4. On April and May of 2012 DCPS conducted a comprehensive psychological evaluation when the student was age 6 years 4 months. The evaluation report was issued May 23, 2012. The DCPS school psychologist assessed the student's cognitive, academic and social/emotional functioning. The student's cognitive abilities were determined to be average. His academic abilities were measured as generally below average and his social/emotional functioning was determined to be problematic with symptoms of Attention Deficit Hyperactivity Disorder ("ADHD"). The psychologist concluded the student met the criteria for the ED classification. The psychologist recommended that the student receive full-time special education services designed for students who have academic ability, but require "high intensity behavior modification…" On the Young Children's Achievement Test ("YCAT") the student had the following scores:

   (Petitioner's Exhibit 4-1, 4-6, 4-10)

	Standard Score	Descriptive Category	Age Eq.	Percentile Rank
General Information	77	Poor	5-0	8
Reading	72	Poor	4-7	3
Mathematics	93	Average	5-11	32
Writing	97	Average	6-2	42
Spoken Language	66	Poor	4-2	1

[5] The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

5. The student's disability classification was changed at the May 22, 2012, IEP meeting from developmental delay ("DD") to ED and the IEP team determined that School A was not an appropriate placement for the student. The IEP team determined the student was in need of setting "with small teacher/student ratio, highly structured, designed for students who have chronic emotional deficits. An LRE review will be completed and submitted requesting placement for school 2012-2013." (Parent's testimony, Petitioner's Exhibits 2-1, 3-2)

6. The parent expected DCPS to notify her of the placement location for the student before the start of SY 2012-2013. Late in the summer when she inquired of DCPS where the student should attend school for SY 2012-2013 DCPS informed her that she should enroll him at his neighborhood DCPS elementary school, School B. (Parent's testimony)

7. The student's current IEP prescribes 25.5 hours per week of specialized instruction, 2 hours of behavioral support services and 1 hour of occupational therapy, and 1 hour of speech-language pathology. All services are to be provided outside general education. (Petitioner's Exhibit 1-12, 1-13)

8. The student began attending School B at the start of 2012-2013. Since the student began attending School B, DCPS has attempted to implement the student's IEP by providing him specialized instruction and the related services prescribed in his IEP. (DCPS Exhibits 2, 3, 4)

9. DCPS issued a progress for the student on November 13, 2012. The report indicates that that student has been making some degree of progress on his IEP goals since attending School B. (DCPS Exhibit 1)

10. The student's behaviors at School B have, nonetheless, continued to be problematic. The parent is called by the school several times per week to either take the student home because of his behavior or to assist in calming the student and addressing his behaviors. The parent accompanies the student every morning to school and sits with him during his homeroom period and then escorts him to his special education classroom. She often sits with the student for a while to ensure his behavior is in order before departing the classroom and the school building. Nonetheless, the student's behavior at School B has remained uncontrollable. (Parent's testimony)

11. The student is repeatedly sent from the classroom because of his behaviors and he has been suspended for his behaviors at least once since he began attending School B. The parent is of the opinion that School B is not an appropriate placement for the student because the staff is willing but unable to modify the student's behaviors and emotional outbursts, which are severely interfering with the his ability to be available for academic instruction. (Parent's testimony)

12. On November 28, 2012, the parent's educational advocate, Ms. Keesha Blythe, observed the student in his classroom at School B. Ms. Blythe observed that the student is in a resource special education classroom most of the day. In that classroom there are no

more than twelve students at anyone time; but only the student and one other student stay in that classroom all day. All other students rotate in and out of the classroom with varying numbers of students in the classroom at any one time. The change of students in the classroom was distracting the student during Ms. Blythe's observation and the student was not able to maintain independent work that he had been assigned while the teacher worked with other students.

The teacher had difficulty controlling the student's behavior. The student's teacher as well as the school principal shared with Ms. Blythe that they thought the student needed a more structured setting where students are not moving in an out of the classroom. The student was reported to have on occasion hit, fought and injured other students in the classroom. (Ms. Blythe's testimony)

13. A counselor with D.C. Department of Mental Health who is assigned to School B has recently begun to provide the student additional counseling services outside the counseling prescribed by the student's IEP. The parent agreed for the student to be provided this additional service to help address confidential issues that are impacting the student's emotional and behavior functioning. (Ms. Grundmayer's testimony)

14. The student has generally participated in his IEP behavioral support services. But much of the service has been delivered when the student has been in distress and the counselor's time has been spent calming the student down. The student often does not deescalate without his mother being called to the school. The student's rage and his mood swings are difficult to manage in the school and School B staff is concerned that the student's medication should be either consistently administered or changed. When the student is in his counseling session he has sometimes refused to leave the counselor's office when the counseling session is complete and refused to follow instruction that he return to class. The student's counselor could not definitively say that the student's needs were being met at School B because of the student's repeated outbursts and disruptive behaviors at school. (Ms. Williams' testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief. [6] *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

ISSUE: Whether the student's current school, School B, is an appropriate location of services that can implement the student's May 22, 2012, IEP, and if not, is DCPS' placement of the student at School B a denial of a FAPE to the student.

Conclusion: The evidence clearly demonstrates the student's disruptive behaviors are causing him to be unavailable for learning and the educational setting at School B is inappropriate for the student and his continued placement at School B is a denial of a FAPE.

The IDEA ensures that "all children with disabilities have available to them a free appropriate pubic education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. §1400(d)(1)(A). The IDEA guarantees children with disabilities the right to a FAPE. Id. In seeking an appropriate education for students with disabilities, the child's parents, teachers, school officials, and other professionals collaborate to develop an IEP to meet the child's unique needs. See 20 U.S.C. §1414(d)(1)(B). "The IEP must, at a minimum,' provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir.2005) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458U.S. 176, 203 (1982)). Local school officials utilize the IEP to assess the student's needs and assign a commensurate environment. See 20 U.S.C. § 1414(d)(1)(A)

The evidence in this case clearly demonstrates that when the student's IEP was developed on May 22, 2012, the parent was present and participated in the decision making that determined the student was in need of an out of general education placement where he would be in a classroom with a low student to teacher ratio and a highly structured environment to meet his individual needs.[7] The student's in-school behaviors at the time his IEP was developed had been extremely problematic and the change in placement was designed to address his ongoing behavioral difficulties. The IEP team anticipated that an LRE review team would select an appropriate placement for the student. Instead the parent was later instructed to enroll the student at his neighborhood school. [8]

There is no dispute between the parties that the student IEP is appropriate. Although at School B the student spends most of his school day in a special education resource room and has

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[6] The burden of proof shall be the responsibility of the party seeking relief. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.

[7] FOF #5

[8] FOF #6

apparently been provided the services prescribed by his IEP[9], his behavioral concerns that his change in placement was designed to address have persisted. However, the evidence clearly demonstrates by the parent's credible testimony[10] that she is called to the school several times per week to calm the student and/or remove him from school due to his behavior.[11] This is clear indication that the student's needs are not being met at School B and a change in location is necessary. The testimony of the witnesses DCPS presented did not counter, but to some degree supported, the parent's convincing testimony that the student's needs are not being met at School B.

The Hearing Officer, therefore, concludes based upon the evidence in this case that the student's placement at School B has resulted in harm the student and resulted in a denial to him of a FAPE. Accordingly, the Hearing Officer directs that DCPS determine an appropriate educational placement for the student within the time frame directed below.

ORDER:

The Hearing Officer, having concluded that the student's current school, School B, is an inappropriate placement and/or location of services for the student, hereby orders that DCPS, within twenty (20) school days of the issuance of this Order, convene a placement meeting for the student and determine an appropriate out of general education placement for the remainder of SY 2012-2013 that can implement the student's IEP and provide appropriate services to meet the student's needs consistent with educational placement described in the student's May 22, 2012, IEP meeting notes: "a setting with small teacher/student ratio, highly structured designed for students who have chronic emotional deficits."

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).

/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.
Hearing Officer
Date: December 23, 2012

[9] FOF #8,9,12
[10] The parent was forthright, clear and impassioned in her testimony.
[11] FOF #s 10, 14