

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

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

2012 MAR 21 PM 4:24
OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a -year old male, who currently attends a full-time private special education school.

On December 27, 2011, Petitioner filed with the Student Hearing Office a Complaint against DCPS, alleging that DCPS had denied Student a free appropriate public education ("FAPE") by failing to provide Student with an appropriate placement/location of services and failing to follow proper procedure in determining Student's educational placement/location of services. As relief for these alleged denials of FAPE, Petitioner requested findings in its favor, and an Order requiring DCPS to fund placement and provide transportation for Student to attend his current private school.

Petitioner failed to properly serve its Complaint on DCPS, and DCPS filed a Motion to Dismiss. Petitioner properly served the Complaint on DCPS on January 6, 2012, and subsequently filed an Opposition to the Motion to Dismiss, or in the alternative, a Motion to Modify the Timelines. On January 12, 2012, the hearing officer issued an Order that denied DCPS's Motion to Dismiss and granted Petitioner's Motion to Modify the Timelines, thereby resetting the beginning of the 75-day timeline for this case to January 6, 2012.

On January 13, 2012, DCPS filed its Response, which denied the allegations of the Complaint and asserted that the proposed location of services was determined at a December 19, 2011 meeting after a review of relevant data, that Parent was at the meeting, involved in the discussion

and received an explanation from DCPS about the program's ability to fully implement Student's IEP. DCPS further asserted that it did not change Student's placement, which, according to DCPS, refers to the provision of special education and related services, and that location of services is an administrative decision left to the discretion of the local education agency ("LEA").

On January 13, 2012, Petitioner filed a Motion to Compel Compliance with Stay Put Provisions of IDEA. On February 1, DCPS filed its Response to the Motion. On February 12, 2012, the hearing officer issued an Order that granted Petitioner's Motion.

The parties concluded the Resolution Meeting process by participating in a resolution session on January 23, 2012. No agreement was reached, but the parties did not agree to shorten the 30-day resolution period. Therefore, the 45-day timeline began on February 6, 2012 and will end on March 21, 2012, which is the HOD deadline.

By their respective letters dated February 15, 2012, Petitioner disclosed forty documents (Petitioner's Exhibits 1 – 40) and DCPS disclosed eight documents (Respondent's Exhibits 1 – 8).

The hearing officer convened the due process hearing on February 23, 2012, as scheduled.¹ Petitioner's Exhibits 1 through 26, 28-29, and 37-40 were admitted without objection. Petitioner's Exhibit 27 was voluntarily withdrawn, and Petitioner's Exhibits 30-36 were excluded as irrelevant. Respondent's Exhibits 1-4 and 6-8 were admitted without objection. Respondent's Exhibit 5 was excluded as irrelevant. Thereafter, the hearing officer received opening statements, testimonial evidence, and closing statements prior to 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)

The issues to be determined are as follows:

1. Did DCPS fail to provide Student with an appropriate placement/location of services, in that DCPS's proposed placement/location of services (a) cannot provide a 100% out of general education separate special education day school and an 11-month program, (b) the program offered is for ED children but Student is LD, (c) and the program provides a majority of instruction via a computer and electives in the general education setting?
2. Did DCPS deny Student a FAPE by failing to follow proper procedure in determining Student's educational placement/location of services by unilaterally changing Student's

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

school from a full-time separate special education day school to a self-contained classroom primarily for ED students?

FINDINGS OF FACT²

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a year-old male, who currently attends grade at a full-time private special education school.³
2. Student was placed at his current private special education school in July 2010 pursuant to a July 20, 2010 Settlement Agreement with DCPS.⁴
3. Student's current private school serves Students with SLD, LD, MD, OHI, and ADHD. All the students on are on the diploma track and receive Carnegie units. Related services and career preparation courses are also provided, and transition programs are provided through community-based organizations. There are a total of 33 students at the school, all from the District of Columbia, and none of the students are non-disabled. In the high school, which encompasses grades 9 through 12, the students rotate through different teachers for academic classes and specials. The school offers an 11-month program from early September through July 31, so extended school year services are not offered at the school. The school charges annual tuition in the amount of which has been approved by the District of Columbia's Office of the State Superintendent of Education, and there is an additional hourly rate for related services.⁵
4. Student's current IEP, dated December 19, 2011, identifies Student's primary disability as multiple disabilities. The IEP requires Student to receive 26 hours per week of specialized instruction, 30 minutes per week of speech-language pathology services, and 60 minutes per week of behavioral support services. The LRE section of the IEP indicates with respect to specialized instruction that Student requires specialized instruction that includes various learning strategies, modification of the general education curriculum, and a small student-teacher ratio to foster his academic growth and meet the needs of his disability. Moreover, the Extended School Year ("ESY") section of the IEP indicates that Student does require ESY services.⁶
5. On December 19, 2011, DCPS held a multidisciplinary team ("MDT") meeting for Student to discuss his least restrictive environment ("LRE"). At the meeting, Student's

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 See Complaint; testimony of advocate.

⁴ Testimony of private school Founding Director; testimony of advocate; Petitioner's Exhibit 7.

⁵ Testimony of private school Founding Director.

⁶ Petitioner's Exhibit 14; Respondent's Exhibit 2.

teachers discussed his current levels of functioning, the team discussed Student's related services, the team reviewed Student's IEP and determined that there would no changes to the IEP hours and that Student continued to require a full-time out of general education setting. When the discussion turned to Student's LRE, the DCPS Progress Monitor said that she was not recommending Student's current private school and was instead recommending a self-contained program at a DCPS senior high school because DCPS believed the program could implement Student's IEP. There was no representative from the recommended program in attendance at the meeting in person or by phone, but the Progress Monitor stated that she did not know the details of the program so the staff from the program would have to explain the details. Nor was the DCPS Case Manager able to provide any details concerning the program. Everyone present at the meeting, besides the DCPS Progress Monitor and the DCPS Case Manager, disagreed with the decision to move Student to a new school. DCPS indicated that the move would be a change in location of services only.⁷

6. Parent and the other non-DCPS team members were unable to participate in a discussion about the DCPS-recommended program for Student because there was no one at the meeting who was knowledgeable about the program. As a result, the team did not determine that Student would be moved to the new program. DCPS made that determination without meaningful input from the other team members.
7. On December 19, 2011, DCPS issued a Prior Written Notice stating that the IEP team proposed to change Student's location of services to the recommended program because DCPS can fully implement Student's IEP and provide access to FAPE, and the program can also address Student's strengths and deficits.⁸
8. Parent was told that DCPS would contact her to visit the new school, but that never happened. As of the time of the due process hearing in this case, Parent knew nothing about the recommended program.⁹
9. Student has never visited the recommended program.¹⁰
10. Subsequent to the December 2011 MDT meeting, Petitioner's educational advocate attempted to visit the recommended program. However, by email dated February 8, 2012, the Program Director advised the advocate that the program policies prohibit advocate from observing, although Parent could contact the Director and set up an appointment to visit.¹¹
11. The recommended program for Student is run by a private company that oversees all of the daily administration for the program in the District of Columbia, which consists of 4 sites with a total of 8 classrooms. The program services children with IEPs and offers a

⁷ Testimony of private school Founding Director; testimony of advocate.

⁸ Respondent's Exhibit 4; Petitioner's Exhibit 15.

⁹ Testimony of Parent.

¹⁰ Testimony of Student.

¹¹ Testimony of advocate.

self-contained setting designed to help transition the students back into the regular school setting. The particular site DCPS selected for Student consists of 3 classrooms with a maximum capacity of 12 students each. There are currently 17 students attending the program on a regular basis, and all of those students have full-time IEPs. The students range from the 9th to 12 grade, and they are grouped by age, as well as by student and teacher personalities. The students have a variety of disabilities, but they are primarily ED, multiply disabled, OHI, and LD. The students stay in one classroom all day, unless their IEPs require otherwise. As of January 2012, the students receive electives in the self-contained classroom from the special education teacher who collaborates with the DCPS public school's general education teacher for the particular elective.¹²

12. The program site selected for Student has two special education teachers, both of whom are certified special education teachers in the District of Columbia but not content certified, and the program has recently hired another special education certified teacher. Students earn Carnegie units toward graduation by receiving exposure to the general education curriculum through A+ software installed on the computers in the classrooms. The amount of exposure provided to the A+ software varies depending upon the particular student, but it can amount to up to one-third to one-fourth of the school day. The A+ program is a self-paced program. However, there is an adult to assist the students on the computer and ensure active engagement is taking place, and the teachers can access the A+ program to see what work the students have done.¹³
13. The recommended program for Student is not at 11-month program; it follows DCPS's school calendar. If a student in the program needs ESY, the ESY will be provided by DCPS.¹⁴
14. The recommended program offers opportunities to integrate with non-disabled peers before and after school. The students in the program use the same door in the mornings at the same time the regular education students arrive at school, although the students in the program are dismissed 15 minutes before the general education students in the school at large. Moreover, the students in the program eat lunch at a different time than the regular education students.¹⁵
15. The recommended program provides 26.5 hours per week in school, including related services and lunch. The program was originally designed to serve primarily ED students, but it no longer focuses primarily on ED students and now services students with various disabilities.¹⁶
16. The recommended program can provide full-time out of general education services. Behavioral support services are provided by an employee of the program, while speech and language services are provided by DCPS. However, at the time of the due process

¹² Testimony of Program Director.

¹³ Testimony of Program Director.

¹⁴ Testimony of Program Director.

¹⁵ Testimony of Program Director.

¹⁶ Testimony of Program Director.

hearing in this case, the program administrators had scheduled 9 IEP meetings with the intent to reduce the IEP hours of 9 students, and the program had a prospective student coming in with less than a full-time IEP.¹⁷

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:

1. Alleged Failure to Provide an Appropriate Placement

Although IDEA does not define the term educational placement, the meaning falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP. See *Laster v. District of Columbia*, 439 F. Supp. 2d 60 (D.D.C. 2005). Hence, "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); *Knight v. District of Columbia*, 877 F.2d 1025 (D.C. Cir. 1989).

In determining the educational placement of a disabled child, the LEA must ensure, *inter alia*, that the decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and that the child's placement is determined at least annually. 34 C.F.R. § 300.116(a)(1) and (b)(1). Hence, a decision to change a disabled child's educational placement during the annual determination of the child's placement is not a decision that can be made solely by an LEA as an administrative function.

To determine whether a change in educational placement has actually taken place, one "must identify, at a minimum, a fundamental change in, or elimination of a basic element of the education program in order for the change to qualify as a change in educational placement." *Lunceford v. District of Columbia*, 743 F.2d 1577, 1582 (D.C. Cir. 1984). Under this standard, a change from a private school to a public school, when that is the only significant difference between the programs offered, does not constitute a change in educational placement. *Roher* at *3, citing *Knight, supra*. However, a change from a full-time special education program to a part-time regular education program does constitute a change in educational placement. *Roher* at *3, citing *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985).

Finally, even where, as here, an LEA determines to place a disabled student in a private placement for a period of time pursuant to a settlement agreement, if after that period of time has passed the LEA believes that it can provide the child with FAPE in its own programs, then the LEA is not required to continue funding the child in the private program. *Letter to Chamberlain*, 111 LRP 74144 (OSEP May 26, 2011).

In the instant case, on December 19, 2011, during the annual review of Student's IEP, DCPS unilaterally changed Student's school assignment from the private, full-time special education

¹⁷ Testimony of Program Director.

school he has been attending pursuant to the parties' July 2010 settlement agreement to a self-contained program in a DCPS senior high school. DCPS asserts that the change is a mere change in location of services, not a change in educational placement, and that such a change is within the discretion of the LEA. DCPS further asserts that the proposed location of services was determined at Student's December 19, 2011 meeting after a review of relevant data, and that Parent was at the meeting, involved in the discussion and received an explanation from DCPS about the program's ability to fully implement Student's IEP.

Petitioner disagrees with DCPS's position, arguing that DCPS's abrupt and unilateral decision to move Student from a full-time special education separate day school to a self-contained classroom in a DCPS high school constitutes a unilateral change in placement that denied Parent meaningful participation in the placement decision. Petitioner further argues that the recommended program cannot implement Student's IEP because it is designed for ED students and Student is not ED, it provides electives in a general education setting while Student requires a full-time out of general education setting, it provides a majority of the instruction through a computer program, and it cannot offer an 11-month program.

As an initial matter, the hearing officer notes that the evidence in this case does not support Petitioner's substantive contentions about the recommended program. Hence, while there is evidence that the program initially was designed for ED students, credible testimony in this case proved that the program no longer focuses primarily on ED students and now services students with various disabilities. *See* Finding of Fact ("FOF") 15. The evidence further proves that the program offers a 100% full-time out of general education setting and no longer provides electives in a general education setting. *See* FOFs 11 and 16. Moreover, although the evidence proves that one-third to one-fourth of the instruction in the program is provided by way of computer, one-third to one-fourth of the instruction does not constitute a "majority" of the instruction, as alleged by Petitioner. *See* FOF 12. Finally, although the program is not an 11-month program, Student's IEP calls for ESY services, not an 11-month program, and the evidence proves that DCPS will provide ESY services for students in the program. *See* FOF 13. Hence, Petitioner has failed to meet its burden of proving that the recommended program is inappropriate for Student on the grounds alleged.

On the other hand, however, the evidence does prove Petitioner's contention that the recommended move from Student's current private special education school to a self-contained classroom in a larger general education DCPS senior high school constitutes a change in educational placement, because the move would represent a fundamental change in the nature of Student's educational program. *See Lunceford, supra*. Hence, DCPS is recommending moving Student from a stand-alone private special education day school, where he changes classes throughout the day and receives Carnegie units through classes taught by teachers, to a self-contained classroom in a larger general education high school, where Student would remain in the self-contained classroom all day long and would only be able to receive Carnegie units by way of computer-based instruction. Clearly, these differences would constitute a fundamental change in the nature of Student's educational program, and therefore, the recommended move would constitute a change in Student's educational placement.

2. Alleged Procedural Violation

As noted above, in determining the educational placement of a disabled child, the LEA must ensure, *inter alia*, that the decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and that the child's placement is determined at least annually. 34 C.F.R. § 300.116(a)(1) and (b)(1).

In the instant case, Petitioner asserts that DCPS unilaterally determined to change Student's placement, thereby denying Parent meaningful participation in the placement decision, while DCPS maintains that Parent was present at the meeting where the determination was made and was fully involved in the change of placement discussion. The evidence in this case demonstrates that Parent was unable to participate in a meaningful discussion about the recommended program because there was no one present at Student's December 2011 meeting who was knowledgeable about the program.¹⁸ See FOFs 5-6 and 8. Moreover, DCPS postured the recommended change in schools as a change in location of services only, which was within the LEA's discretion, as opposed to a change in placement. Hence, DCPS proceeded to issue a Prior Written Notice to the recommended program even though Parent and all other members of the MDT, besides the two DCPS representatives, disagreed with the recommended change.

The hearing officer has already determined above that the recommended change in schools would constitute a change in educational placement for Student because it would represent a fundamental change in the nature of Student's educational program. As a result, pursuant to IDEA, such a change could only have been made by a group of persons that includes Parent and other persons knowledgeable about Student, the meaning of his evaluation data, and the placement options under consideration. See 34 C.F.R. § 300.116(a)(1). Under these circumstances, the hearing officer concludes that DCPS failed to follow proper procedures by changing Student's educational placement in a manner that impeded Student's right to a FAPE and significantly impeded Parent's right to participate in the decision-making process, thereby denying Student a FAPE. See 34 C.F.R. § 300.513(a)(2) (hearing officer may find denial of FAPE only if procedural inadequacies impeded child's right to FAPE, significantly impeded parent's opportunity to participate in decision-making process, or caused deprivation of educational benefit).

To remedy this denial of FAPE, and taking into account that Student continues to attend his current private school during the pendency of this action, the hearing officer will issue an Order that prohibits DCPS from following through with its recommendation to change Student's educational placement by unilaterally moving Student from the private special education school he currently attends to the recommended self-contained classroom at a DCPS public high school without first complying with IDEA's procedures governing changes in educational placements.

¹⁸ Compare *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003), which DCPS supplied to the hearing officer at the due process hearing, where the court rejected Petitioner's assertion of lack of parental involvement on the issue of school selection because the evidence showed Parent was involved in an extensive discussion about the issue at the student's IEP meeting.

ORDER

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

1. DCPS is prohibited from following through with its recommendation to change Student's educational placement by unilaterally moving Student from the private special education school he currently attends to the recommended self-contained classroom at a DCPS public high school without first complying with IDEA's procedures governing changes in educational placements.

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: 3/21/2012

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer