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Office of Review and Compliance
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Confidential

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| <p>Parent on behalf of the Student¹,</p> <p>Petitioner,</p> <p>v.</p> <p>District of Columbia Public Schools (“DCPS”)</p> <p>Respondent.</p> | <p>HEARING OFFICER’S DETERMINATION</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p> |
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OSSE
STUDENT HEARINGS OFFICE

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

the location of services which, it asserted, is in the discretion of the local educational agency (“LEA”) and thus stay-put did not apply.²

At the February 9, 2012, resolution meeting the parties did not resolve the issue alleged in the complaint. The parties agreed that the 30-day resolution period would continue for the full thirty days. Thus, the 45-day timeline ends and the HOD is due on April 7, 2012.

A pre-hearing conference was conducted on February 17, 2012, at which the issue to be adjudicated was discussed and determined. DCPS counsel did not immediately file a formal response to the complaint and asserted during the pre-hearing conference on February 17, 2012, that the November 28, 2011, PWN met the requirements of 34 C.F.R. 508(e) and thus a formal response was unnecessary.

Petitioner’s counsel asserted the PWN was insufficient and on February 21, 2012, filed a motion to compel a response and/or for a more definite statement by DCPS in response to the complaint.

On February 23, 2012, the Hearing Officer issued a pre-hearing order and issued a second pre-hearing order on February 27, 2012, revising the issues to be adjudicated. On February 29, 2012, the Hearing Officer issued an order denying Petitioner’s motion to compel a response but requiring DCPS to inform Petitioner and the Hearing Officer of its position relative to the revised issues to be adjudicated.

On March 5, 2012, DCPS counsel filed a response to the due process complaint asserting that a PWN was not required because there was no change in placement simply a change of location of services to _____ and asserting the student had not been denied a FAPE because _____ could meet the student’s educational needs.

ISSUES: ³

1. Whether DCPS denied the student a Free and Appropriate Public Education (“FAPE”) by failing to issue an appropriate PWN and failing to properly justify the student’s change in placement/location of services.⁴

² The case was apparently subsequently reassigned to another DCPS counsel who on February 8, 2012, filed a copy of the PWN purportedly issued to the parent on November 28, 2011, that proposed to change the student’s school from School A to the

³ The alleged violations and/or issues listed in the complaint do not directly correspond to the issues outlined here. The Hearing Officer restated the issues in the pre-hearing order and at the outset of the hearing and the parties agreed that these were the issues to be adjudicated.

⁴ Petitioner’s counsel asserted the PWN was insufficient in justifying the change of placement/location of services because (1) the change in placement/location was made despite the input of the rest of the IEP team who were knowledgeable of the student, (2) DCPS provided no explanation for the change in placement/location of services, provided no description of the placement/location of service options considered and reasons for rejecting them (3) provided no description of other factors related to the change in placement/location of services and (4) DCPS unilaterally exercised its right to change the location of services.

2. Whether DCPS denied the student a FAPE by failing to provide the student with an appropriate placement/location of services that meets the student's unique educational needs.⁵

RELEVANT EVIDENCE CONSIDERED:

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-25 and DCPS Exhibit 1-6) 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.

FINDINGS OF FACT:⁶

1. The student is age _____ in _____ grade and has been determined eligible as a child with a disability under IDEA with a classification of SLD. The student attends School A, a private full time special education school located in the District of Columbia. The student's attendance at School A is funded by DCPS. The student has attended School A since the start of SY 2010-2011. (Parent's testimony, DCPS Exhibit 1-1)
2. School A is a non-profit non-public day school that serves students with disabilities, most with SLD classification. The school has been in existence approximately five years and is approved by the District of Columbia Office of the State Superintendent ("OSSE") to provide special education and related services. There are currently 32 students in the school's middle and high school programs. The student to teacher ratio in most classrooms is 5 to 1. All but four of the school's 32 students are funded by DCPS. The school can and is implementing the student's IEP. The student has attended School A since ninth grade starting in August 2010. Since the student began attending School A she has made steady academic and social progress. The student struggles with math but has made improvements. She is progressing in all subjects. The student is on track to complete course work for a high school diploma; however, socially and transitionally the student may need more than two more academic school years to complete all goals toward high school graduation. At School A the student has some opportunity for interaction with non-disabled students by participating in community services efforts at another private school located on the same campus as School A. (Ms. Logan-Staton's testimony, Petitioner's Exhibit 21-12)

⁵ Petitioner's counsel asserts _____ is inappropriate because it has a wider range of disabilities classifications, larger class sizes and is a more restrictive environment for the student because there is no interaction with non-disabled peers.

⁶ 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.

3. In November 2011 School A conducted an educational assessment of the student. The student was operating in broad reading at the 2.8 grade level and in broad math at the 3.4 grade level and at the 3.4 grade level in written language. The student's most recent speech and language evaluation was conducted in April 2007. The student has been diagnosed with severe receptive and expressive language impairment and a severe articulation disorder. (Petitioner's Exhibits 17-2, 17-3, 15-6)
4. The student has improved in both her speech and language skills and her academic performance since attending School A and her grades have improved. During ninth grade at School A (SY 2010-2011) the student improved her grades from a C average in first quarter to a B average in the final quarter. The student has excellent attendance and always wants to attend school. The student enjoys School A and is involved in a number of extra-curriculum activities. She has friends at school and has become more sociable since attending School A. (Parent's testimony, Petitioner's Exhibits 11-7, 18-1)
5. The student's current IEP developed at School A on November 28, 2011, prescribes the following services: 25.5 hours per week of specialized instruction outside the general education setting. The IEP also prescribes the following related services: 30 minutes per week of behavioral support services and 90 minutes per week of speech-language pathology. (Petitioner's Exhibit 10-10)
6. At the November 28, 2011, IEP meeting the DCPS representatives assigned to School A participated in the meeting and proposed a change in the student's location of services from School A to another full time special education school located in the District of Columbia. The parent, who participated by telephone, the student and the School A members participating in the IEP team meeting disagreed with the change. (Parent's testimony)
7. On November 28, 2011, DCPS issued a prior written notice PWN placing the student at As the basis for changing the student's school the DCPS progress monitor stated to the parent that School A was not providing the student all the appropriate services she was due to receive. The parent disagreed with the change and believes that student is making progress and her self-esteem has elevated since attending School A. The parent is fearful that if the student is removed from School A she will lose her momentum of academic progression. The parent did not visit to assess its appropriateness for the student. (Parent's testimony, Petitioner's Exhibit 13)
8. The PWN DCPS issued at the November 28, 2011, meeting stated the following: The description of the proposed action(s): "The IEP met to review the student's IEP and propose any changes what would be necessary the IEP was developed and DCPS did not recommend the School A as location of services. DCPS recommends as location of services." The explanation of reason for proposal or refusal of action: [The student] is currently receiving services as a student with SLD. She is receiving 25.5 hours per week of specialized instruction, 90 minutes we of special and language and 30 minutes/week of behavioral counseling outside of the general education setting." The description of each evaluation procedure, assessment record, or report used as a basis for the proposed or refused action: The IEP team reviewed [the student's] program reports

student is apprehensive that at a different school she would not receive the same level of attention she currently receives at School A. The student believes her speech and language skills have improved since attending School A. The student feels that schoolwork is challenging and she receives sufficient support to progress academically. (Student's testimony)

13. is the student's algebra teacher at School A. The student is doing well and making progress in this subject and has been successful on recent quizzes. When the student first started the class in September 2011 she had difficulty with one step equations but is now able complete multiple step equations. She has difficulty with language and difficulty expressing herself verbally. Instructions must be broken down for her in simple terms. The school's speech pathologist will often assist in the algebra classroom. The student has difficulty grasping concepts and retaining information once it has been taught. Because of her difficulty in retention the student requires direct assistance. (testimony)
14. is the student's English teacher at School A. In that class the teacher has observed that the student has a below average reading level at approximately second grade. The student has earned grade "C" in the first two advisories of the SY 2011-2012 and is on track to earn a "B" for the third advisory. The student is making progress and benefits from the low student to teacher ratio in the classroom of approximately 5 to 1. (testimony)
15. School A's head of school and special education coordinator is Porter has observed the student in her classes and participated in the student's November 28, 2011, IEP meeting. Ms. Porter has been at School A since the student began attending and observed that when she first arrived the student was very shy and hesitant, but has of late blossomed and interacts easily with other students and school staff. The student appears to feel safe and supported in the school and considers the school her extended family. The student is positive, determined and in many ways a model student. She has perfect attendance and is currently on the school's honor roll. The student has expressed a desire to attend college and is scheduled to participate in an upcoming out of town college tour. The student benefits from the reassurance she receives from her teachers and staff regarding her academics but displays some difficulty with retention. School A is an 11th month program and will end the current school year on July 30, 2012. (Ms. Porter's testimony, Petitioner's Exhibit 11-1)
16. DCPS has recently attempted to remove all DCPS funded students at School A except three. DCPS has not provided the school administrator a reason for its attempted removal of the DCPS funded students. There has been no indication to the school that OSSE has any concerns regarding School A's approval to deliver all required services. (Ms. Logan-Staton's testimony, Petitioner's Exhibit 21-12, DCPS Exhibit 5)
17. The parent's educational advocate, Dr. Ida Jean Holman recently visited and took a tour. She observed that school is a beautiful facility and has an excellent program from elementary through high school. The class sizes are increased by grade. In high school the student to teacher ratio is 10 to 1. There is occasionally an aide also in the

classroom. The teachers in the high school are content certified based on information provided to Dr. Holman by a _____ staff member during her visit. Dr. Holman is not certain that the school's students have any contact with non-disabled peers. The school has approximately 230 students primarily with SLD classification and average to above average cognitive abilities. The school year is approximately 10 months with an ESY program. Speech and Language services are delivered and integrated into the classroom instruction at _____. However, the students at _____ generally operate far more independently than the student is at School A. (Dr. Holman's testimony)

18. Dr. Holman worked with the student prior to her attending School A. The student toured several schools when she moved from her previous school before attending School A and the transition was planned well in advance. Dr. Holman believes that a change in the school in the middle of the year would probably cause some regression and she should stay at School A because she has rapport with staff and students and they can provide one to one attention. The student may be in need of ESY services if she is not in an 11th month program as she is at School A because of her retention difficulties. (Dr. Holman's testimony)⁷

19. The DCPS progress monitor assigned to _____ who has been on that assignment for past month is Ms. Jennifer Switlick. Ms. Switlick participates in IEP meetings for DCPS students attending _____. Based upon her interaction and information provided to her by the school staff Ms. Switlick believes all teachers at _____ are certified either in special education or their subject content area or both. Those teachers in the school's high school division who are not certified in special education collaborate with special education teachers to develop and deliver specialized instruction and provide differentiated instruction and accommodations needed to effectively meet student's educational needs. (Ms. Switlick's testimony)

20. Ms. Nicole Rachel is the DCPS progress monitor assigned to School A and who initiated the change in school for the student acknowledges that the student benefits from a full time out of general education setting and acknowledges the student is apparently making progress at School A but doing so slowly. Ms. Rachel issued the PWN on November 28, 2011, IEP meeting to document what occurred at the IEP meeting and issued a subsequent PWN to note the change in the student location from School A to _____. Ms. Rachel made the decision to change the student's location to _____ primarily due to the lack of teacher certifications in both special education and content area for the teachers at School A. Ms. Rachel requested that she be provided teacher certifications by School A. School A provided certification for some of the teachers. At least one of the student's teachers at School A is not certified in special education. Ms. Rachel upon conducting several observations of instruction in the student's classrooms was concerned that best practices were not being used by the teachers and teaching objectives were not being clearly delineated and measured. Ms. Rachel chose _____ as a school for the student because the speech language services are integrated in the classroom and because _____ has high test scores and she believes the student would thrive there despite _____

⁷ The witness was designated as an expert in the area of development and determination of programming and placement for students with disabilities.

perhaps being shy at first and having what she hoped would be a short adjustment period. (Ms. Rachel's testimony, Petitioner's Exhibit 13, 14, DCPS Exhibit 5)

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.⁸ *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

ISSUE 1: Whether DCPS denied the student FAPE by failing to issue an appropriate PWN and failing to properly justify the student's change in placement/location of services.

Conclusion: The PWN issued by DCPS meets the requirements of 34 C.F.R. § 300.503. Petitioner did not sustain the burden of proof by a preponderance of the evidence.

Petitioner's counsel asserts the PWN was insufficient in justifying the change of placement/location of services because (1) the change in placement/location was made despite the input of the rest of the IEP team who were knowledgeable about the student, (2) DCPS provided no explanation for the change in placement/location of services, provided no description of the placement/location of service options considered and reasons for rejecting

⁸ 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.

them (3) provided no description of other factors related to the change in placement/location of services and (4) DCPS unilaterally exercised its right to change the location of services.⁹ However, the requirements of the PWN as set forth by IDEA do not include all requirements Petitioner asserts.

34 C.F.R. § 300.503 states in pertinent part:

- (a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency--
 - (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
 - (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.
- (b) Content of notice. The notice required under paragraph (a) of this section must include--
 - (1) A description of the action proposed or refused by the agency;
 - (2) An explanation of why the agency proposes or refuses to take the action;
 - (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
 - (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
 - (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
 - (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
 - (7) A description of other factors that are relevant to the agency's proposal or refusal.

DCPS issued two PWNs for the student, one at the November 28, 2012, meeting and another the day after. The? Ms. Rachel offered a reasonable explanation as to the difference between the two notices: the first encapsulated the result of the IEP meeting and second gave notice of the student change in school from School A to . Because the core action that is being challenged is the change in school the Hearing Officer will focus only on the second PWN.

The notice contains most if not all of the seven types of information required by 34 C.F.R. 300.503(b). It contains (1) a description of the proposed action to be taken: the student's relocation from School A to (2) The notice states (2) the explanation of the reason for the relocation was to address the student's academic weaknesses and deficits and to enhance her strengths. (3) The notice lists the evaluation(s) and data used as a basis for the action. (4)

⁹ Although this assertion was raised in the complaint and was noted in the assertion regarding the PWN, discussion of this issue is more appropriately addressed in the second issue regarding the appropriateness of the location of services.

The notice contains a statement regarding parent's protections and procedural safeguards and (5) provides sources for assistance in understanding the notice and (6) a statement as to other options considered and finally, (7) a statement that no other factors were considered in the proposed action.

At the hearing Ms. Rachel testified the primary reason she initiated the student's relocation to _____ was the lack of certification by teachers at School A and her concerns that the student's needs were not being adequately met at the school because of the lack of best teaching practices she observed during her visits to the school and observations of the student's classroom(s). This information is not specifically detailed in the PWN. However, the language used indicates that the relocation is to address the student's academic weaknesses and deficits. Even if the notice does not fully detail all reasons DCPS considered in taking the action the lack of detail does not make the notice deficient such that any inadequacy 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. Consequently, the Hearing Officer concludes Petitioner did not sustain the burden of proof on this issue.

ISSUE 2: Whether DCPS denied the student FAPE by failing to provide the student with an appropriate placement/location of services that meets the student's unique educational needs.

Conclusion: The student's IEP services and LRE remained unchanged and DCPS' change in school from School A to _____ is appropriate. Petitioner did not sustain the burden of proof that _____ is inappropriate.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement 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 is made in conformity with the Least Restrictive Environment provisions of the IDEA; and the public agency must ensure that the child's placement is determined at least annually, is based on the child's IEP, and is as close as possible to the child's home. See 34 C.F.R. § 300.116.

To the extent possible, children with disabilities, including children in public or private institutions or other care facilities, must be 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 and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. See 34 C.F.R. §300.114.

Petitioner's counsel objected to DCPS unilaterally changing the student's location of services. "The touchstone of 'educational placement' is not the location to which the student is assigned

but rather the environment in which educational services are provided. To the extent that a new setting replicates the educational program contemplated by the student's original assignment and is consistent with the principles of mainstreaming and affording access to a FAPE, the goal of protecting the student's educational placement served by the stay-put provision appears to be met. Likewise, where a change in location results in a dilution of the quality of a student's education or a departure from the student's least restrictive-compliance setting, a change in educational placement occurs." *AW v. Fairfax County School Board*, 41 IDELR 119 (2004).

Comments to the Federal Register, Vol. 71, No.156, p. 46588, clarify the difference between "placement" and "location." "Placement" is defined as points along the continuum of placement options available for a child with a disability, and "location" is defined as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. The Comments go on to state that "while public agencies have an obligation under the Act to notify parents regarding placement decisions, there is nothing in the Act that requires a detailed explanation in children's IEPs of why their educational needs or educational placements cannot be met in the location the parents request...such a provision would be overly burdensome for school administrators and diminish their flexibility to appropriately assign a child to a particular school or classroom, provided that the assignment is made consistent with the child's IEP and the decision of the group determining placement." "It is the Department's longstanding position that maintaining a child's placement in an educational program that is substantially and materially similar to the former placement is not a change of placement." "In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience.

There is no evidence in the record that the student's IEP or LRE was changed at the November 28, 2011, meeting. Petitioner's IEP prescribed full time out of general education specialized instruction, behavioral support and services and speech language services. The evidence demonstrates that at [redacted] the student can receive services in a full time out of general education setting, with small classes and individualized instruction and receive the prescribed related services. And although School A is an 11th month program and [redacted] is apparently a 10th month program there is evidence the student can be provided ESY services at [redacted] if it determined they are warranted to prevent regression. The Hearing Officer concludes that the decision to place the student at [redacted] was a location of services decision that was within the sole discretion of DCPS and not a change of placement decision. DCPS did not violate the IDEA and DCPS' actions did not deny the student a FAPE.

Petitioner's asserts [redacted] is inappropriate because it has a wider range of disabilities classifications, larger class sizes and is a more restrictive environment for the student because there is no interaction with non-disabled peers.

Although there was testimony that students at School A participate in community service in a nearby school that is not a full time special education school and thus the student has an

opportunity for interaction with non-disabled peers, the Hearing Officer is not convinced by this argument or that _____ is a less restrictive setting than School A because it has no such community service opportunity. There was scant evidence of interaction with non-disabled peers as to the frequency or type of interaction from which the Hearing Officer could reasonably consider that School A to be something other than a full time separate special education school as the evidence indicates _____ is as well.

The Hearing Officer is convinced by the testimony of the DCPS progress monitor currently assigned to _____ that the special education teachers are providing sufficient collaboration with content certified teachers at the school and the speech language services are integrated in the classroom. As noted in the testimony the student benefits from a full time out of general education setting and the student is apparently making progress at School A but doing so slowing.

Despite Dr. Holman's testimony that she has visited _____ and that the student to teacher ratio is higher than School A and despite the parent's concerns that the student might lose her current academic momentum if she were required to change schools, the Hearing Officer concludes based on evidence that _____ can implement the student's IEP and is an appropriate location of services for the student.

Petitioner asserts the student will be detrimentally affected if she is forced to change schools in the middle of the school year. The student has during the pendency of this proceeding remained at School A under stay-put protections. The Hearing Officer takes administrative notice that the advisory has recently ended and there remains at least one advisory left of the school year. However, School A is an 11th month program and the student would therefore have to remain at School A until the end of July 2012. Therefore, rather than delay such a transition for months more, the student's transition should best be made now. This will in the Hearing Officer's opinion be a logical juncture at which to transition the student to _____ and allow an opportunity for DPCS to make a determination of whether the student will be provided ESY services at _____. That decision should be made promptly upon the students start at _____.

Petitioner failed to meet her burden of proof that DCPS' change of the student's school from School A to _____ on November 28, 2011, was inappropriate or that _____ is unable to implement the student's IEP or that it is a lesser restrictive environment or cannot meet the unique needs of the student.

ORDER:

The complaint is DISMISSED with prejudice.

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: April 7, 2012