DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Adult STUDENT,[1]	)	
	)	Date Issued: December 29, 2011
Petitioner,	)	
	)	Hearing Officer: Virginia A. Dietrich
v.	)	
	)	
District of Columbia Public Schools	)	
	)	
Respondent.	)	
	)	
	)	

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STUDENT HEARING OFFICE
2011 DEC 30 AM 9:00

HEARING OFFICER DETERMINATION

Background

-year old adult Student or Petitioner, filed a due process complaint notice on October 5, 2011 alleging that she had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"). At the time of the alleged violations, Student was a child with a disability classification of Emotional Disturbance who was receiving full-time special education services outside of general education at a private school that was funded by District of Columbia Public Schools ("DCPS"). At the end of the 2010-2011 school year, the private school closed, but not before the school and DCPS made efforts to meet with all students and relocate them to other schools.

Petitioner alleged that she did not receive any notice that a placement meeting to address her placement for the next year was taking place, that the placement meeting wrongfully took place without her, that the placement meeting did not include representatives from the private school that she was attending, and that at the placement meeting, DCPS selected a new placement/location of services that represented a lesser restrictive environment, thereby changing her educational placement. Petitioner sought placement and funding at the private school that she unilaterally enrolled in for the 2011-2012 school year without DCPS' consent.

DCPS asserted that it did not change Student's placement, that it made sufficient efforts to include Student in the meeting where DCPS decided that the location of services would be

[1] Personal identification information is provided in Appendix A.

changed to that the representatives from the private school refused to participate in the location of services meeting, and that could implement Student's IEP. DCPS denied that it had violated the IDEA and denied Student a FAPE.

Subject Matter Jurisdiction

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

Procedural History

The due process complaint was filed on 10/05/11. This Hearing Officer was assigned to the case on 10/06/11. A resolution meeting took place on 11/04/11 at which time parties agreed to end the 30-day resolution period and proceed to a due process hearing. The 30-day resolution period expired on 11/04/11, the 45-day timeline to issue a final decision began on 11/05/11, and the final decision was initially due on 12/19/11.

Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person. After Petitioner rested her case, DCPS' Attorney requested a continuance due to a medical emergency that arose during the luncheon recess. Petitioner consented to the continuance. By Order dated 12/15/11, the hearing was continued to 12/20/11 from 9:30 a.m. – 1:00 p.m. and the final decision due date was extended to 12/29/11.

The due process hearing resumed on 12/20/11 and by 12:30 p.m., all testimony had been concluded. There was ample time for both Petitioner and DCPS to present an oral closing argument within the 30 minutes left for the scheduled hearing. DCPS' Attorney requested the opportunity to present a written closing argument by close of business in order to cut the hearing short so that she could leave to attend to administrative work duties unrelated to the case. Petitioner's Attorney did not agree to the submission of written closing arguments and DCPS' request to submit a written closing argument was denied by the Hearing Officer. Petitioner presented her oral closing argument and thereafter DCPS had the opportunity to either present a an oral closing argument or waive it. DCPS' Attorney chose neither option, insisting on her right to submit a written closing argument by close of business. The Hearing Officer again indicated that the submission of a written closing argument would not be permitted. Later in the afternoon, DCPS filed a written closing argument to which Petitioner objected via E-mail correspondence. The Hearing Officer did not review DCPS' written closing argument as it was not authorized, and it was not considered as part of the administrative record upon which the final decision was based.

Petitioner presented five witnesses: Petitioner; Petitioner's mother ("Mother"); Petitioner's educational advocate; Educational Director at Academy; and clinical

psychologist at Academy. DCPS presented two witnesses: DCPS co-locations classroom coordinator; and DCPS case manager.

Petitioner's disclosures dated 12/06/11, containing a witness list and Exhibits P-1 through P-26, were admitted into evidence without objection. DCPS' disclosures dated 12/06/11, containing a witness list and Exhibits R-01 through R-18, were admitted into evidence without objection.

The three issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS denied Petitioner a FAPE by failing to provide Petitioner with an appropriate placement/location of services on 08/02/11; specifically, by placing Petitioner at the Academy in a classroom in a regular high school, when Petitioner's Individualized Education Program ("IEP") prescribed a 100% out of general education, separate special education day school with an 11 month curriculum.

Whether DCPS denied Student a FAPE by failing to provide Petitioner with notice of the Multidisciplinary Team ("MDT") meeting that occurred on 08/02/11 as was required by the IDEA and a Hearing Officer Determination ("HOD") dated 10/09/10, and where at that meeting the decision was made to change Petitioner's placement to a lesser restrictive environment.

Whether DCPS denied Petitioner a FAPE by failing to convene a full IEP Team on 08/02/11 that included Petitioner and Petitioner's teachers and related services providers from

For relief, Petitioner requested a finding that Petitioner was denied a FAPE on each of the issues presented; that DCPS issue a Prior Written Notice placing and funding Petitioner at Academy with transportation, retroactive to 09/06/11; and within 30 days, DCPS to convene a MDT meeting to review Petitioner's progress and revise Petitioner's IEP as necessary.

Findings of Fact

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, age and at all relevant times an adult Student under the IDEA, attended a DCPS funded private school, during the 2010-2011 school year.[2] Student stopped attending at the end of the 2010-2011 school year due to school closure.[3] Well in advance of the closure of Student and Mother were aware through verbal notification at a school meeting that was hosted by the principal and attended by Petitioner and/or Mother, that would close at the end of the year and all students would be relocated to other schools.[4]

[2] Petitioner, P-15.
[3] Petitioner, DCPS co-locations classroom coordinator.
[4] Petitioner, Mother.

#2. Student's initial IEP, dated 11/08/10, classified Student with an Emotional Disturbance and prescribed 26 hours/week of specialized instruction from a special education teacher and 1.5 hour/week of behavioral support services from a clinical therapist, with all services to be provided outside of the general education setting for 11 months of the school year.[5] Per the IEP, Student was projected to graduate from high school with a diploma, but the IEP did not include a projected graduation or exit date from high school.[6]

#3. During the 2010-2011 school year, Student lived with her mother at a private home located in the northeast quadrant of the District of Columbia. Although the family occupied the two top floors and the basement level was rented out, Petitioner and her mother did not live in apartment #5 and there was no apartment #5 located within the dwelling.[7]

#4. During all relevant times, Petitioner's home telephone number matched the telephone number listed on Student's IEP[8] and this telephone number was used by DCPS to make calls to Petitioner and/or Petitioner's Mother in early and late July 2011 about Student's relocation to The home telephone was operable and equipped with an answering service where messages could be left; and Student checked the telephone messages regularly.[10]

#5. Prior to the 08/02/11 meeting, Student's mother attended all meetings with DCPS, even after Student reached the age of majority, because Mother understood that it was her right to voice her opinion as Student's mother.[11] On 07/07/11, DCPS first made attempts to contact Student's mother at the home address and telephone number that appeared on Student's 11/08/10 IEP by calling the home telephone number and by sending a letter to Mother by U.S. mail and certified mail. The purpose of the attempts was to inform Petitioner and her mother of a meeting scheduled for 08/02/11 to talk about Student's IEP and to discuss changes in Student's placement/location of services.[12] The address listed on the IEP contained the correct street address; however, it erroneously indicated apartment #5 as part of the address.[13] Mother never received a letter from DCPS by U.S. mail[14] and the certified letter was returned to DCPS by the postal service marked "Unretrieved."[15] There was no evidence in the record that DCPS was successful in reaching Mother or Petitioner by telephone on 07/07/11.

#6. Petitioner's Attorney had been representing Student since 07/26/10,[16] and on 07/19/11, Academy sent E-mail correspondence to Petitioner's Attorney indicating

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[5] P-15-1, P-18.
[6] P-15-4.
[7] Petitioner, Mother.
[8] Petitioner, P-15.
[9] DCPS case manager.
[10] Petitioner, Mother.
[11] Mother.
[12] R-01, DCPS co-locations classroom coordinator.
[13] Petitioner, Mother, P-15.
[14] Petitioner.
[15] DCPS co-locations classroom coordinator.

[16] P-8.

that an IEP/ Least Restrictive Environment ("LRE") meeting for Petitioner, per DCPS, would be held on 08/02/11 at 11:30 a.m. at 1200 First Street, N.E., 9th Floor.[17]

#7. On 08/02/11, DCPS convened an IEP/LRE meeting to discuss Student's overall progress, parental concerns and location of services.[18] RCA personnel, who were available by telephone, refused to participate because Student was not available to participate.[19] At the 08/02/11 MDT meeting, there were no changes to Student's IEP; however, DCPS changed Student's location of services to Academy for the 2011-2012 school year and issued a Prior Written Notice to that effect.[20] During the week of Aug 2-Aug 5, 2011, Petitioner found out that DCPS wanted her to attend Academy.[21]

#8. Beginning on 07/29/11, DCPS made additional efforts to contact Petitioner and/or Mother to inform them of the closing of and Student's transition to Academy. DCPS made telephone calls on 08/15/11, 08/19/11, 08/23/11, 08/29/11 and 09/20/11; and left telephone messages with each call.[22] On 08/26/11 and 09/20/11, DCPS attempted home visits to the address listed in Student's IEP, but was unable to make contact either Petitioner or Mother.[23]

#9. At no time did Petitioner or Mother ever contact DCPS to find out what school Petitioner would be attending for the 2011-2012 school year.[24]

#10. is a 10-month program as are all of DCPS schools; however, DCPS can provide Student with one month of Extended School Year ("ESY") services in order to provide her with the 11 months of services required by her IEP. is a location of services that can implement Student's 11/08/10 IEP. can provide 26 hours/week of specialized instruction and 1.5 hours/week of behavioral support services, all in an out of general education setting. services children with an Emotional Disturbance disability classification and students can be provided with all services, including lunch, outside of the general education setting. At Student can receive class-wide instruction in small groups and individualized instruction. is co-located at a general education high school, but in a separate part of the building; therefore, students do not have to interact with nondisabled peers, but they are able to. At Student can earn Carnegie units towards her high school diploma through direct instruction from certified special education teachers in conjunction with a computer program. 30% of the instruction is computer-based and the staff provides support to students as needed throughout the academic subjects. The computer-based instruction is set up to meet each student's current level of functioning and the computer program is approved by the Office of Chief Academic Officer in Teaching and Learning.[25]

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[17] P-24.
[18] R-02.
[19] DCPS co-locations classroom coordinator, R-02.
[20] P-19-2, P-20.
[21] Petitioner.
[22] DCPS case manager.
[23] DCPS case manager.
[24] DCPS co-locations classroom coordinator, DCPS program manager.
[25] DCPS co-locations classroom coordinator for entire Finding of Fact.

#11. On 08/17/11, Petitioner gave written notice to DCPS of her intent to unilaterally enroll at Academy within 10 days at public expense, on the basis that DCPS had failed to provide her with a FAPE by failing to provide her with an appropriate placement/location of services.[26] By letter dated 08/22/11, DCPS refused to fund the placement.[27] On 09/06/11, Petitioner began attending a separate special education school.[28]

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:

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. 34 C.F.R. 300.1.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast,* 44 IDELR 150 (2005).

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).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to provide Petitioner with notice of the Multidisciplinary Team ("MDT") meeting that occurred on 08/02/11 as was required by the IDEA and a Hearing Officer Determination ("HOD") dated 10/09/10, and where at that meeting the decision was made to change Student's placement to a lesser restrictive environment.

"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

[26] P-5-1.
[27] P-6-1.
[28] Educational director at Academy.

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).

There is no evidence in the record that Student's 11/08/10 IEP was changed at any time after 11/08/10, including at the 08/02/11 IEP/LRE meeting. Although Petitioner's 11/08/10 IEP prescribed 100% out of general education specialized instruction and behavioral support services for 11 months out of the school year, Student's IEP did not require that Petitioner receive instruction in a separate special education school. Student's educational program had not changed at the time that DCPS chose as the location of services for the 2011-2012 school year.

could implement Student's 11/08/10 IEP. The evidence in the record was that although was co-located in a traditional high school that serviced non-disabled peers, Student could receive services in a 100% out of general education setting, with small classes and individualized instruction and without co-mingling with the general education population. The evidence showed that DCPS was able to provide Student with 10 months of special education services at and an 11th month of ESY services, as was required by Student's IEP. Student's IEP also required that she receive specialized instruction from a special education teacher, which is what could provide. The credible testimony of the DCPS co-locations classroom coordinator was that the teachers were all special education certified, and in combination with computer based instruction in all academic areas, Petitioner could receive Carnegie credits towards her diploma. Additionally, computer based instruction at could be individually tailored to meet Petitioner's educational needs. There was no requirement in Student's IEP that she graduate by a certain date and this undermined Petitioner's argument that it was necessary for her to attend Academy so that she could graduate in June 2012.

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, an other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and is made in conformity of 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. 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. 34 C.F.R. 300.114.

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.

Petitioner failed to meet her burden of proof that DCPS changed Student's placement on 08/02/11 or that was unable to implement Student's IEP or that was a lesser restrictive environment in which Student' s IEP would be implemented. The Hearing Officer determines that the decision to place Student at Spectrum 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 Student a FAPE.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to provide Petitioner with notice of the Multidisciplinary Team ("MDT") meeting that occurred on 08/02/11 as was required by the IDEA and a Hearing Officer Determination ("HOD") dated 10/09/10, and where at that meeting the decision was made to change Petitioner's placement to a lesser restrictive environment.

As determined with respect to the first issue, DCPS did not change Student's placement to a lesser restrictive environment; in fact, Student's programming did not change at all.

The meeting that took place on 08/02/11 was an IEP/LRE meeting. The IDEA mandates that DCPS ensure that Student is present at each IEP Team meeting or afforded the opportunity to participate, including notifying Student of the meeting early enough to ensure that she will have an opportunity to attend and scheduling the meeting at a mutually agreed on time and place. 34 C.F.R. 300.322(a). The notice must indicate the purpose, time, and location of the meeting and who will be in attendance. 34 C.F.R. 300.322(b). If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls. 34 C.F.R. 300.322(c).

The 10/09/10 HOD did not require that Petitioner's Attorney be notified of the meeting on 08/02/11.[29] Regardless, there was undisputed evidence in the record that Academy sent an E-mail notification to Petitioner's Attorney on 07/19/11 about the scheduling and purpose of the meeting on 08/02/11.

[29] See P-8.

Hearing Officer Determination

The Hearing Officer determines that DCPS made sufficient efforts to contact Student and/or Student's mother, with whom Student lived, about the change of school location to Academy. Prior to the end of the school year, Petitioner and her mother were aware that Academy was closing and that all students were be relocated. DCPS tried to contact Petitioner by telephone prior to the meeting on 08/02/11 and then many times thereafter in order to meet with Petitioner to discuss the relocation transition process. There was a working telephone at Student's home residence, and the credible testimony of the DCPS case manager was that he left messages on the answering service. Petitioner's testimony, i.e., that no messages were left by DCPS because she regularly checked the voicemail messages, was not credible. Furthermore, Petitioner was aware during the week of Aug 2-Aug 5 2011 that DCPS intended to school Student at Academy. From July 7, 2011 until the time that Student enrolled at Academy, neither Petitioner nor her mother made any effort to contact DCPS to determine Student's location of services.

DCPS also made two attempts at a home visit to engage Petitioner in the relocation process. Unfortunately, an error on the home address listed on Student's IEP could not lend substance to DCPS' efforts to contact Student by regular U.S. mail or in person; however, there was credible testimony that the certified letter that was sent to Petitioner's home was returned to the U.S. postal service as "Un-retrieved."

Petitioner failed to meet her burden of proof that DCPS violated the IDEA by failing to provide Student with notice of the 08/02/11 IEP/LRE meeting. Even if the Hearing Officer were to conclude that DCPS had violated the IDEA by not providing Student with proper notice, Petitioner failed to prove harm. The relocation of Student to Academy was a decision within the sole discretion of DCPS; it was not a placement determination decision that affected Student's substantive right to a FAPE.

The third issue to be determined is whether DCPS denied Petitioner a FAPE by failing to convene a full IEP Team on 08/02/11 that included Petitioner and Petitioner's teachers and related services providers from Academy.

The public agency must ensure that the IEP Team for each child with a disability includes the parents of the child, not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment; not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child; a representative of the public agency who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of the child with disabilities; is knowledgeable about the general education curriculum; and is knowledgeable about the availability of resources of the public agency; and whenever appropriate, the child with a disability. 34 C.F.R. 300.321(a).

Petitioner failed to meet her burden of proof on this issue. Academy was available by telephone to participate in the meeting on 08/02/11, but refused to participate in the meeting. Therefore, DCPS did not deny Student a FAPE by failing to include the Academy service providers in the 08/02/11 meeting.

Although the meeting should have included Student, Petitioner and Petitioner's Attorney did not inquire or appear for the 08/02/11 meeting despite a telephone message from DCPS, a certified letter from DCPS and E-mail correspondence to Petitioner's Attorney on 07/19/11 that the meeting would take place on 08/02/11 at a designated time and place. Petitioner failed to show any harm by her absence at the meeting as there were no substantive changes to her IEP and the only decision that was made, i.e., that Student would be relocated to Spectrum, was an administrative location of services decision solely within the discretion of DCPS.

The complaint is **DISMISSED** with prejudice. Petitioner failed to meet her burden of proof on any of the issues presented.

All relief requested by Petitioner is **DENIED.**

IT IS SO ORDERED.

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: December 29, 2011

/s/ Virginia A. Dietrich
Hearing Officer