District of Columbia
Office of the State Superintendent of Education

Student Hearing Office
810 First Street, N.E., Suite 2001
Washington, DC 20002

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STUDENT HEARING OFFICE

STUDENT[1], **By and through PARENT,** ***Petitioner,*** **v.** **DISTRICT OF COLUMBIA PUBLIC SCHOOLS,** ***Respondent.***	Case No. 2012-0582 Impartial Hearing Officer: Charles M. Carron Date Issued: October 19, 2012 Representatives: Domiento C.R. Hill, Esq. for Petitioner Maya L. Washington, Esq. for Respondent

HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND

This is a Due Process Complaint ("DPC") proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 USC §§1400 *et seq.*

The DPC was filed August 24, 2012, on behalf of Student, who resides in the District of Columbia, by Petitioner, Student's Parent, against Respondent, District of Columbia Public Schools ("DCPS").

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

On August 28, 2012, the undersigned was appointed as the Impartial Hearing Officer.

On August 31, 2012, Respondent filed its Response, stating that Respondent has not denied Student a free appropriate public education ("FAPE").

On August 31, 2012, Respondent filed a motion to dismiss the DPC.

On September 6, 2012, Petitioner filed an opposition to Respondent's motion to dismiss the DPC.

On September 7, 2012, the undersigned determined that no oral argument on the motion to dismiss was required, and the undersigned issued an order denying the motion.

On September 11, 2012, a Resolution Meeting was held but it failed to resolve the Complaint. The statutory 30-day resolution period ended on September 23, 2012. The 45-day timeline for the Hearing Officer's Determination started to run on September 24, 2012 and will conclude on November 7, 2012.

The Impartial Hearing Officer held a Prehearing Conference ("PHC") by telephone, on September 20, 2012, at which the parties discussed and clarified the issues and the requested relief. At the PHC, the parties agreed that five-day disclosures would be filed by October 9, 2012 and that the Due Process Hearing ("DPH") would be held on October 16, 2012.

The DPH was held on October 16, 2012, commencing at approximately 9:30 a.m. and concluding at approximately 3:30 p.m., at the Student Hearing Office, 810 First Street, NE, Suite 2001, Washington, DC 20002, Room 2008. Petitioner elected for the hearing to be closed. At the DPH, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-13

Respondent's Exhibits: R-2 through R-6

Impartial Hearing Officer's Exhibits: HO-1 through HO-8

Petitioner's proposed Exhibit R-1 was not admitted into evidence because it was not disclosed at least five business days prior to the DPH, as required by the Prehearing Order ("PHO") issued September 20, 2012, and by 34 C.F.R. § 512(a)(3).

The following witnesses testified on behalf of the parties at the DPH:

Petitioner's Witnesses:

(1) [redacted], Educational Advocate

(2) Parent

(3) Middle School Special Education Coordinator ("Middle School SEC")[2]

Respondent's Witnesses:

(1) Attending School Principal

(2) [redacted], DCPS Program Director, Office of Special Education, who was qualified at the DPH as an expert in special education programming for visually impaired and blind students

The parties made oral summations and did not file written closing arguments or briefs.

II. JURISDICTION

The DPH was held pursuant to the IDEA, 20 U.S.C. §1415(f); IDEA's implementing regulations, 34 C.F.R. §300.511, and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029 and E3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. § 1415(f), 34 C.F.R. §300.513, and §1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures.*

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[2] The Middle School Special Education Coordinator was called by Petitioner as an adverse witness pursuant to a Notice to Appear signed by the Chief Hearing Officer on September 25, 2012.

III. CIRCUMSTANCES GIVING RISE TO THE COMPLAINT

The circumstances giving rise to the Complaint are as follows:

Student is male, Current Age, and attends Current Grade at a public school (the "Attending School"). Student has been determined to be eligible for special education and related services as a child with multiple disabilities under the IDEA.

Petitioner claims that Respondent has denied Student a FAPE by unilaterally determining that the Student should attend the Middle School rather than the Attending School, without involvement or input from the Parent, and by selecting an inappropriate placement and location of services for the Student.

IV. ISSUES

As confirmed at the PHC, in the PHO, and in opening statements at the DPH, the following issues were presented for determination at the DPH:

1. Has Respondent denied the Student a FAPE by failing to provide him with an appropriate special education placement and location of services; specifically, is the Middle School able to implement the Student's current IEP?

2. Did Respondent deny the Student a FAPE by unilaterally changing the Student's placement from a full time separate special education program to a regular education school without the Parent's involvement or input?

V. RELIEF REQUESTED

Petitioner requests the following relief:[3]

(a) a finding that Respondent denied the Student a FAPE;

(b) an Order that Respondent immediately place the Student at the Attending School with transportation and all previously provided supports, including a full time vision teacher[4];

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[3] In the DPC, Petitioner also requested the following relief that Petitioner withdrew at the PHC: (a) compensatory education services; (b) that a final decision be issued in this case within 45 days after the receipt of the request for a hearing; and (c) that the undersigned rule on the evidence as presented at the hearing and act in the best interest of the child, and make a ruling consistent with the obligations of Respondent and the hearing officer's responsibility. Notwithstanding Petitioner's withdrawal of this last request, the undersigned has ruled on the evidence as presented at the DPH, and in compliance with all applicable laws and regulations. At the PHC, as confirmed in the PHO, the undersigned determined the following requests for relief to be inappropriate: (a) Petitioner requested that Respondent be required to file its Response to the DPC within 10 calendar days of the filing of the DPC, and that if Respondent failed to do so, that the assertions in the DPC be deemed true and accurate and that Respondent be deemed to have waived its defenses and that the DPH be scheduled pursuant to the time lines in IDEA. This request is moot because Respondent filed a timely Response. (b) Petitioner requested that Respondent file any notice of insufficiency within fifteen days of receiving the DPC, and that if Respondent failed to do so, that this constitute a waiver to make an argument of insufficiency at a later date. This request is not ripe because Respondent has not filed a notice of insufficiency. (c) Petitioner requested a finding that Petitioner is the prevailing party and entitled to attorney's fees. The undersigned has neither the authority to award attorney's fees, nor to determine prevailing-party status that would entitle Petitioner to attorney's fees.

[4] Respondent's counsel asserted that this request for relief is moot because the Student continues to attend the Attending School. However, Respondent's most recent Prior Written Notice places the Student at the Middle School. The parties have characterized his continued attendance at the Attending School as a "stay put" placement and location of services *pendente lite* that ceases when this case is concluded. Accordingly, this request for relief is not moot. However, at the DPH the parties stipulated that the Attending School is not appropriate for the Student and cannot implement his IEP. Accordingly, the undersigned stated at the outset of the DPH that even if the undersigned found a denial of FAPE, the undersigned would not order Respondent to place the Student at the Attending School.

(c) an Order that Respondent issue referral packets on the Student to at least three appropriate, full time, special education programs that are able to implement his Individualized Education Program ("IEP");

(d) an Order that Respondent, within 45 calendar days, reconvene the Student's Multi-Disciplinary Team/IEP Team ("MDT/IEPT") meeting to discuss and determine the Student's placement and location of services to an appropriate full time, special education program that is able to implement his IEP and provide him with an education benefit;

(e) an Order that all meetings be scheduled through Petitioner's counsel in writing, via fax;

(f) an Order that Respondent send all notices to counsel for the Parent with copies to the Parent and in the Parent's native language (which is English); and

(g) any other just and appropriate relief.

VI. FINDINGS OF FACT

Facts Relating to Jurisdiction

1. The Student is a male, Current Age. P-5-1.[5]

2. The Student resides in the District of Columbia. *Id.*

3. The Student has been determined to be eligible for special education and related services under the IDEA as a child with multiple disabilities. P-8-1, Testimony of [redacted]

[5] When citing exhibits, the third range represents the page number within the referenced exhibit, in this instance, page 1.

Facts Relating to the Student's Disabilities

4. The Student is totally blind. P-8-9, P-12-1.

5. The Student has orthopedic disabilities. P-8-3.

6. The Student may or may not have an intellectual disability.[6]

Facts Relating to the Student's IEP

7. The Student's current IEP, dated March 8, 2012 and amended June 7 and August 2, 2012, is appropriate to provide the Student a FAPE. Stipulation of counsel for the parties on the record at the DPH ("DPH Stipulation").

8. The Student's current IEP (introduced both as P-8 and R-4) requires 32.5 hours per week of special education and related services, all to be provided outside the general education setting, as follows: 30 hours per week of specialized instruction, 240 minutes per month of adapted physical education, 120 minutes per month of occupational therapy, and 240 minutes per month of orientation and mobility. P-8-12, -14.

9. The Student's current IEP does not specify the quantity or number of minutes of vision services to be provided to the Student (P-8, DPH Stipulation) nor that those services be provided one-on-one (P-8, testimony of Parent).

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[6] Although psychological testing found the Student to have an intelligence quotient ("IQ") of 59, special testing for the blind was not employed. P-12-1. Accordingly, the Student has not been medically determined to be "retarded" (the term used by a physician who evaluated the Student, P-12-2) or intellectually challenged (Testimony of Attending School Principal). However, the Student's IEP states that he has intellectual disability. P-8-3. Because counsel for the parties stipulated at the DPH that the Student's current IEP is appropriate to provide him a FAPE, any difference of opinion as whether the Student has an intellectual disability is immaterial to resolution of the issues in this case.

10. The Student's current IEP does not specify that the Student must attend a separate special education school, *i.e.*, a school that serves only students with IEPs and has no non-disabled students.[7] P-8.

11. The Student's current IEP does not specify that other students with IEPs must be present in the setting where the Student receives his special education and related services. *Id.*

12. The Student's current IEP does not specify that the Student must be segregated from non-disabled students at times other than when he is receiving the special education and related services prescribed in his IEP. *Id.*

Facts Relating to the Attending School

13. The Attending School is a separate special education day school. DPH Stipulation.

14. The Student has been attending the Attending School for the past three and a half years. Testimony of [redacted]; testimony of Parent.

15. The Student's teachers at the Attending School report that he is making progress. Testimony of Parent.

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[7] At the DPH, counsel referred to a school that serves only students with disabilities and IEPs as a "separate special education school." That terminology is employed *infra* to mean a school that serves only students with disabilities and IEPs. The Parent's educational advocate, [redacted], testified that in his opinion the Student's IEP requires that he attend a separate special education school. However, [redacted] was not qualified as an expert witness. The opinion testimony of an educational advocate who has not been qualified and admitted as an expert witness is "inadmissible to prove anything." *Gill v. District of Columbia*, 770 F. Supp. 2d 112 (D.D.C. 2011). Upon questioning by the undersigned, [redacted] acknowledged that specialized instruction can be provided in an outside of general education setting in a school that also has general education classrooms.

16. The Student's educational performance is at six or seven grade levels below his Current Grade. P-8-1, -4, -5; Testimony of [redacted].

17. The educational day at the Attending School comprises 32.5 hours per week including lunch period and other breaks; this schedule is standard for DCPS schools. Testimony of Attending School Principal.

18. If a student requires 32.5 hours per week of specialized instruction and other services, a support person would be with the student through the lunch period and other breaks. *Id.*

19. The Attending School is not appropriate for the Student and cannot implement his IEP. DPH Stipulation.[8]

Facts Relating to the Student's Proposed Transfer to the Maryland School for the Blind

20. On June 7, 2012, the Student's IEP Team, including the Parent and her educational advocate, [redacted], met to review the Student's recent orientation and mobility assessment, to discuss new assistive technology and additional services to be provided to the Student, and to discuss Respondent's proposed transfer of the Student to the Maryland School for the Blind ("MSB"). Testimony of [redacted], P-7-1.

21. MSB is a separate special education day school that also has a residential program. DPH Stipulation.

[8] Because of this stipulation, it is unnecessary to recite or weigh the testimony of the witnesses as to the educational benefit, if any, the Student is receiving at the Attending School, nor to address the differences of opinion between the Parent and the Attending School Principal regarding how to address the Student's separation anxiety and other issues.

22. [redacted], DCPS Program Director, proposed the Student's transfer to MSB because she believed the Student would benefit from MSB's life skills program. Testimony of Parent.

23. MSB would offer the Student intensive interaction with other blind students and blind adults, immersion in blind culture, extensive orientation and mobility services and assistive technology, access to public transportation, and social skills development that he could not obtain at the Attending School. Testimony of [redacted].

24. The Parent and [redacted] opposed transferring the Student to MSB because of the travel time from the District of Columbia (90 minutes to two hours each way), because of the Student's severe separation anxiety, and because several of MSB's instructional staff lacked special education certification. Testimony of Kevin Carter; testimony of Parent.

25. Despite the objections of the Parent and [redacted], Respondent issued a Prior Written Notice ("PWN") proposing to transfer the Student to MSB. Testimony of Parent.

26. Respondent's Least Restrictive Environment (LRE) Support Team asked [redacted] to "think outside the box" for an alternative to MSB for the Student that would meet his needs better than the Attending School, and that the Student's family would accept. Testimony of [redacted].[9]

[9] Apparently, Respondent subsequently withdrew the PWN proposing the transfer of the Student to MSB, although the record is devoid of evidence on this point.

Facts Relating to the Student's Proposed Transfer to the Mamie D. Lee School

27. At the June 7, 2012 IEP Team meeting, [redacted] offered to transfer the Student to the Mamie D. Lee School as an alternative to transferring the Student to MSB. Testimony of [redacted].

28. The Mamie D. Lee School is a separate special education day school. DPH Stipulation.

29. The Mamie D. Lee School is a program for "mentally retarded"[10] students. Testimony of Kevin Carter.

30. The Parent and [redacted] opposed transferring the Student to the Mamie D. Lee School because they do not believe the Student is "mentally retarded." *Id.*

31. [redacted] became upset or agitated and left the meeting. *Id.*

Facts Relating to the Student's Proposed Transfer to the Middle School

August 2, 2012 Meeting

32. On August 2, 2012, the Student's IEP Team, including the Parent and [redacted], met to discuss new assistive technology and transportation services, and to revisit placement for the Student for the upcoming 2012-2013 school year. P-8-1.

33. [redacted] proposed to transfer the Student to the Middle School, where she had developed a new program for students with visual impairments. Testimony of [redacted].

[10] This is the term used by [redacted] in his testimony. In colloquy, counsel for the parties recognized that the appropriate term is "intellectually challenged" or "intellectually deficient."

34. [redacted] explained that she had developed the new vision program to address the historically bad post-secondary outcomes of visually impaired students in the District of Columbia. Specifically, the new program concentrates resources for visually impaired students, including orientation and mobility services and assistive technology, so that full-time special education teachers and service providers can deliver more intensive services to visually impaired students than if the students are scattered among schools where they receive services from itinerant special education teachers and service providers.

35. [redacted] described the program as follows: The Student and three or four other blind students would attend their core classes in the inclusion (*i.e.* general education) setting, accompanied by a full time vision teacher and special education teacher. Testimony of [redacted]; testimony of Parent.

36. [redacted] explained that the Student would receive very intensive vision services in a vision classroom; heavy emphasis on a parallel ("expanded core") curriculum modifying the topics from the core area general education curriculum to his level of learning; Braille literacy, numeracy and writing; use of technology; and sensory efficiency skills, self-determination skills, self-advocacy skills, and orientation and mobility services from Columbia Lighthouse for the Blind extending to the District of Columbia community, teaching the Student to use public transportation and other aspects of independent living. Testimony of [redacted].

37. [redacted] and the Parent expressed concern about the Student being in the inclusion setting. Testimony of [redacted]

38. [redacted] requested more specifics about the program, but none were offered by Respondent's representatives. *Id.*

39. [redacted] offered to arrange a tour of the Middle School for the Parent and [redacted], to take place during the following week. P-11.

40. [redacted] and the Parent agreed to visit the Middle School but reiterated that the Student's IEP should be implemented as written, not revised to accommodate the "transition" to the Middle School. Testimony of [redacted].

41. [redacted] agreed to wait a week for [redacted] and the Parent to visit the Middle School before Respondent issued a PWN transferring the Student to the Middle School. P-11.

August 2 - 14, 2012

42. Shortly after the August 2, 2012 meeting, [redacted] emailed the Parent and the Parent's attorney stating when the Parent's tour of the Middle School could take place but she received no response to that email. *Id.*, testimony of [redacted].

43. On August 9, 2012, Respondent issued a PWN proposing to transfer the Student to the Middle School. P-9-2, P-10, P-11, R-3-1.

44. On August 10, 2012, [redacted] emailed [redacted], expressing concern that the PWN proposing the Student's transfer to the Middle School had been issued prior to the Parent having an opportunity to visit the Middle School and to provide her input. P-10-1.

45. [redacted] August 10, 2012 email also expressed concern that the Student's IEP could not be implemented at the Middle School because, *inter alia*, he would receive

some of his instruction in a general education setting, and because the Student would not be accompanied by a vision teacher for all of his instruction. *Id.*

46. [redacted] August 10, 2012 email stated that if Respondent could fashion a program at the Middle School whereby the Student received all of his academic subjects in a self-contained class for visually impaired students and if his classroom supports included a full-time vision instructor and a full-time special education teacher complemented by assistive technology supports and resources, the Middle School would be appropriate for the Student, and the Parent might be receptive to the Student's gradual introduction to "specials and recess with nondisabled peers" so long as proper supports were in place. P-10-1 and -2.

47. On August 10, 2012, less than an hour after [redacted] emailed [redacted], she replied via email stating that she had communicated when the Parent's tour of the Middle School could take place but neither [redacted] nor the Parent had responded within the week after the August 2, 2012 meeting, which was the time period that [redacted] had stated that Respondent would wait to issue the PWN. P-11.

48. [redacted] August 10, 2012, email concluded that she was happy to set another time for the Parent and [redacted] to tour the Middle School, but the PWN would stand. *Id.*

49. Sometime between August 10 and 15, 2012, the Middle School SEC telephoned the Parent and left a message that the Student had appeared on her list of incoming students and invited the Parent to meet with her. Testimony of Parent.

50. Sometime between August 10 and 15, 2012, the Parent and the Middle School SEC had several telephone conversations, and made an appointment to meet on August 15, 2012. *Id.*

August 15, 2012 Meeting

51. On August 15, 2012, the Parent and the Student's grandmother met with the Middle School SEC, and [redacted] participated in the meeting by telephone. Testimony of Parent; testimony of [redacted].

52. The August 15, 2012 meeting was arranged without the knowledge of [redacted]. Testimony of [redacted].

53. The Middle School SEC had not been briefed by [redacted] concerning how the vision program would be tailored for the Student. Testimony of Parent, testimony of [redacted].

54. The Middle School SEC provided an overview of the Middle School's program for visually impaired students—an inclusion program for five students who would be in general education classrooms accompanied by a vision teacher[11] and a special education teacher. Testimony of Parent; testimony of [redacted].

55. [redacted] stated that the Student's IEP requires all of his instructional services to be delivered outside the general education setting. *Id.*

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[11] The Parent testified that the Middle School SEC stated that the Student would be "pulled out" of the general education classroom twice a day for 45 minute sessions with the vision teacher. The difference in her recollection and [redacted] recollection is not material to deciding the issues in this case.

56. The Parent described the Student's current level of functioning, to which the Middle School SEC replied that he would be the lowest functioning student in the program and she was concerned whether the Student would obtain educational benefit from the inclusion setting. *Id.*

57. At the end of the meeting, the Middle School SEC advised the Parent and [redacted] to contact [redacted] with their concerns. Testimony of Parent.

August 15 – September 11, 2012

58. Between August 15 and September 11, 2012, neither the Parent nor [redacted] contacted [redacted] to express their concerns about the Middle School. Testimony of [redacted].

59. On August 24, 2012, the instant DPC was filed and Petitioner's counsel sent a letter to Respondent demanding that the Student be permitted to continue to attend the Attending School pending the conclusion of this case.[12] P-2.

September 11, 2012 Meeting

60. On September 11, 2012, a Resolution Session Meeting was held at which the Attending School Principal elicited more specifics from [redacted] concerning the program that was proposed for the Student at the Middle School, in particular to clarify

[12] The undersigned was not requested to issue a "stay put" order and has not ruled on whether Respondent was required to allow the Student to continue attending the Attending School pending the issuance of this HOD, or whether Respondent is required to allow the Student to continue attending the Attending School pending any appeal of this HOD.

that the Student would not be in the general education classroom. Testimony of Attending School Principal.

61. [redacted] described her revised plan for the Student's attendance at the Middle School, with all of his special education and related services delivered outside the general education environment for 30 days, after which the Student's progress would be evaluated and she hoped the family would agree to some "inclusion" for the Student. Testimony of [redacted].

62. The Parent rejected the revised program that [redacted] had described. *Id.*

63. The Attending School Principal recommended that the Parent visit the Middle School again now that the school year had begun and the students were present. Testimony of Attending School Principal.

64. The Parent and the Student's grandmother directed disparaging comments at [redacted], who left the meeting. Testimony of [redacted].

September 19, 2012 Meeting

65. On September 19, 2012, the Parent, the Student's grandmother, and [redacted] met with the Middle School SEC, [redacted], the Middle School Grade Level Principal, and one other Middle School staff member to discuss how the Student's IEP would be implemented at the Middle School. Testimony of [redacted]; testimony of Parent.

66. [redacted] described a reconfigured program for the Student, whereby the Student would be in a self-contained classroom by himself for most of his school day, and in a self-contained classroom with other blind and vision-impaired students for 90 minutes each day. *Id.*

67. [redacted] and the Parent requested specifics as to how much of the time the vision teacher would be with the Student. According to [redacted], [redacted] could not provide specifics. Testimony of [redacted]. According to [redacted], she explained that the Student would be in a class with the other vision students for two 45-minute periods per day in the vision classroom, and would be with the vision specialist the rest of the day while receiving the rest of his hours of specialized instruction. Testimony of [redacted].

68. [redacted] stated that Respondent would implement the Student's IEP as written. *Id.*, testimony of [redacted].

69. The Parent and [redacted] expressed concern about the Student's socialization[13] if he were in a class by himself, to which [redacted] responded[14] that

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[13] Although the Parent and [redacted] expressed this concern as specific to the Middle School, the Attending School Principal testified that the Student sits alone at lunch and rarely does another student initiate any interaction with him. The Attending School Principal testified that being in a classroom without other students most of the day could have a negative impact on the Student, or it could have a positive impact. However, the impact of the Student having no classmates for most of the day is beyond the scope of the issues in this case because the Student's current IEP, which the parties have stipulated is appropriate for the Student, does not specify any interaction with other students for the Student's socialization.

[14] In his testimony, [redacted] characterized [redacted] as "very frustrated." The undersigned makes no finding as to [redacted] state of mind, nor whether the conduct of the Parent, the Student's grandmother, or [redacted] provoked [redacted] frustration, as neither of these facts is material to resolution of the issues in this case.

the Parent could not "have it both ways," *i.e.*, if the Student were to receive all of his instruction in a self-contained classroom as required by his IEP, he would have to get his socialization at recess and other non-classroom times such as physical education, on the Metro, or on Library visits. Testimony of [redacted]; testimony of Parent.

70. The parties also discussed the Student's likely interaction with non-disabled peers,[15] with [redacted] stating that some interaction probably would occur during "specials." *Id.*

Subsequent to September 19, 2012

71. Subsequent to the September 19, 2012 meeting, [redacted] has had no further communication with [redacted]. Testimony of [redacted].

Additional Information About the Middle School

72. The Middle School is not a separate special education school. Testimony of Middle School SEC.

73. 409 students attend the Middle School, of whom 49 are special education students with IEPs. *Id.*

74. Three students at the Middle School have other vision impairments; one of these students may be totally blind. *Id.*

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[15] The Attending School Principal testified that some interaction with non-disabled peers would be "great" for the Student. As discussed *supra*, the Student's IEP, which the parties have stipulated is appropriate for him, does not require or prohibit interaction with non-disabled students during non-instructional time. Accordingly, the degree of interaction that the Student would have with non-disabled peers outside of his instructional time is not material to the resolution of the issues in this case.

75. The Middle School is a less restrictive environment than MSB for the Student. Testimony of Attending School Principal.

76. The educational day at the Middle School begins at 8:45 a.m. and ends at 3:15 p.m., comprising approximately 27.5 hours per week of classroom instruction time, plus five hours per week combined for lunch period and other breaks. Testimony of Middle School SEC.

77. If a special education student's IEP requires more than 27.5 hours of special education and related services, the additional hours can be provided by the student's case manager during that student's lunch period and/or other breaks. *Id.*

VII. BURDEN OF PROOF

In a special education DPH, the burden of persuasion is on the party seeking relief. DCMR 5-E3030.3; *Schaffer v. Weast,* 546 U.S. 49 (2005). Through documentary evidence and witness testimony, the party seeking relief must persuade the Impartial Hearing Officer by a preponderance of the evidence. DCMR 5-E3022.16; *see also, N.G. v. District of Columbia,* 556 F. Supp. 2d 11, 17 n.3 (D.D.C. 2008).

VII. CREDIBILITY

The undersigned found all of the witnesses to be credible, to the extent of their first hand knowledge or professional expertise.

IX. CONCLUSIONS OF LAW

Purpose of the IDEA

1. The IDEA is intended "(A) 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 [and] (B) to ensure that the rights of children with disabilities and parents of such children are protected..." 20 U.S.C. § 1400(d)(1). *Accord*, DCMR 5-E3000.1.

FAPE

2. The IDEA requires that all students be provided with a FAPE. FAPE means:

> special education and related services that –
>
> > (A) have been provided at public expense, under public supervision and direction, and without charge;
> >
> > (B) meet the standards of the State educational agency;
> >
> > (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> >
> > (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. §1401(9); *see also,* 34 C.F.R. §300.17 and DCMR 5-E3001.1.

IEP

3. The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the IDEA "mandates for each child." *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (citing *Honig v. Doe*, 484 U.S. 305, 311-12 (1988)).

4. The parties have stipulated that the Student's current IEP is appropriate. If an appropriate IEP is developed, but the Local Educational Agency ("LEA") fails to implement the IEP fully, the failure constitutes a denial of FAPE if the failure is "material." *See, e.g., Banks v. District of Columbia*, 54 IDELR 282, 110 LRP 39207 (D.D.C. 2010).

Ability of the Middle School to Implement the Student's IEP

5. The Middle School can provide the Student the 32.5 hours per week of specialized instruction and related services that his IEP specifies.[16] Findings of Fact 76 and 77.

6. Even if the Middle School could provide the Student only 27.5 hours per week of specialized instruction and related services, in view of the fact that the Student would be accompanied the remaining five hours per school week by a case manager, dedicated aide, vision teacher or other special education teacher, I find the difference between 27.5 hours and 32.5 hours to be immaterial in this context.

7. The Student's IEP does not specify the quantity or number of minutes of vision services to be provided. Finding of Fact 9. Accordingly, the proposed 90 minutes per day

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[16] Petitioner's assertion that the Middle School cannot provide more than 27.5 hours per week of specialized instruction assumes that lunch periods and breaks cannot be used for specialized instruction. However, any student in a DCPS school whose IEP requires 32.5 hours of specialized instruction receives some of that instruction by having a case manager or other appropriate staff member accompany the student during the lunch period and breaks. Finding of Fact 17 and 18. It is beyond the scope of the issues in this case for the undersigned Hearing Officer to address whether Respondent should specify in an IEP how many hours of specialized instruction will be provided during the normal instructional hours of the school, and how many hours will be provided during the lunch period and other breaks, and how such instruction will take place.

satisfies the Student's IEP even if that is a reduction from the hours he currently receives at the Attending School.

8. The Middle School can deliver all of the specialized education and related services specified in the Student's IEP to him in an out of general education setting. Findings of Fact 61 and 66.

9. The fact that the Student will be in a classroom with one-on-one instruction, *i.e.*, without classmates, for most of the school day, does not violate his IEP (Finding of Fact 11) nor has Petitioner identified any provision of IDEA or its implementing regulations that precludes such an arrangement.[17]

10. The fact that the Student may have some contact with non-disabled peers outside of the times when he is receiving special education and related services does not violate his IEP (Finding of Fact 12) nor has Petitioner identified any provision of IDEA or its implementing regulations that precludes such contact.

11. Based upon the entire record, the undersigned finds that the Middle School is capable of implementing the Student's current IEP and is an appropriate location/site of services for the Student.

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[17] Apparently the Student's interaction with other students will be limited to two 45-minute periods per day when he attends the vision classroom with the Middle School's other blind and visually impaired students, and perhaps additional time during the lunch period, breaks, physical education, and weekly field trips to the public library. While this approach is somewhat socially isolating for the Student, by attending the Middle School, he remains in the community for his non-school hours. By way of contrast, if the Student attended the only other alternative site of service identified in the record as able to implement his IEP, *i.e.*, MSB, he would spend at least three hours each day traveling to and from MSB, or attend the residential program at MSB which is even more restrictive, either of which would separate him more from his family and community. In addition, MSB would be the lowest-priority location/site of services for the Student among locations/sites that can implement his IEP, because MSB is not a public school and it is outside the District of Columbia. *See,* DC ST §38-2561.02(c).

Alleged Unilateral Change in the Student's Placement

12. Changing the physical school where the student receives services does not amount to a change in educational placement unless there is a fundamental departure from the services provided in the IEP.[18] *Savoy, Parent and Next Friend of T.W. v. District of Columbia*, 112 LRP 8777 (D.D.C. 2/21/12); *Johnson v. District of Columbia*, 112 LRP 13381 (D.D.C. 3/15/12) ("the District is free to change [the Student's] physical placement as long as the new placement does not amount to a fundamental departure from [the Student's] IEP").

13. The undersigned Hearing Officer finds that Respondent's decision to transfer the Student to the Middle School, and to implement his current IEP at the Middle School

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[18] There is an apparent split in authority among the U.S. Circuit Courts of Appeal on the issue whether an IEP must identify the specific location of the student's services. The Second Circuit, in *T.Y. and K.Y. v. New York City Dep't of Educ., Region 4*, 584 F.3d 412, 53 IDELR 69 (2d Cir. 2009), *cert. denied* 130 S. Ct. 3277, 110 LRP 28696 (2010), held that an IEP is not deficient simply because it fails to identify a specific school. According to the Second Circuit, "location" for purpose of the IEP means in the general education classroom, in a self-contained classroom, etc. By way of contrast, in *A.K. by J.K. and E.S. v. Alexandria City School Board*, 484 F.3d 672, 47 IDELR 245 (4th Cir. 2007), *cert. denied* 128 S. Ct. 1123, 110 LRP 19412 (2008) (cited approvingly by the U.S. District Court for the District of Columbia in *Eley v. District of Columbia*, 112 LRP 43091 (D.D.C. 8/24/12)), the Fourth Circuit held that failure to identify a specific school in a student's IEP was a denial of FAPE. However, on the facts of that case, the IEP specified that the student should be placed in an unspecified private day school but there was no school in the area that was capable of meeting the student's needs. These lines of authority are not, therefore, in conflict. Regardless of the meaning of "location" in IDEA, if there are two or more specific schools that are capable of meeting the student's needs, the specific school need not be identified in the student's IEP, and the local educational agency has the authority unilaterally to select the specific school. However, if the local education agency fails to select *any* school for the student by the beginning of the school year, the failure to identify a school in the IEP does constitute a denial of FAPE. *Eley v. District of Columbia, supra.* In the instant case, Respondent identified MSB, then the Mamie D. Lee School, and finally the Middle School.

without any changes, constitutes a change in the location/site of services and not a change in placement.[19]

14. Even if Respondent's initial unilateral decision for the Student to receive his special education services in a general education classroom were found to be a procedural IDEA violation, such a procedural violation does not necessarily equate to a denial of FAPE. Rather, a hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. 20 U.S.C. § 1414(f)(3)(E)(ii). *See also*, 34 C.F.R. § 300.513(a). *Accord, Lesesne v. District of Columbia*, 447 F.3d 828, 45 IDELR 208 (D.C. Cir. 2006).

15. Because the unilateral decision to educate the Student in a general education classroom was rescinded before implementation, the undersigned Hearing Officer finds that any lack of Parental involvement in that initial decision did not impede the Student's right to a FAPE, did not significantly impede the Parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student, and did not cause a deprivation of educational benefits.

16. Although Respondent had the unilateral right to change the Student's location/site of services, Respondent did include the Parent, repeatedly, in the decision-making process. Findings of Fact 32-42, 47-57, 60-63, and 65-70.

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[19] Had Respondent implemented its initial plan to place the Student in the general education classroom at the Middle School (Finding of Fact 35), this would have been a change in placement. However, after the Parent and [redacted] expressed concerns about the general education setting, the plan was revised prior to implementation to comply with the Student's current IEP (Finding of Fact 61). Thus, the transfer became a change in location/site of services only, which Respondent had the unilateral right to do.

17. Respondent demonstrated flexibility in responding to the Parent's concerns. Findings of Fact 39, 41, 42, and 48.

18. Any delay in Respondent adjusting the plan for the Student to fully implement his IEP at the Middle School was caused by the Parent and [redacted] avoiding communicating with [redacted].[20] Findings of Fact 42, 47, 52, and 58.

[20] The Parent, [redacted] and the Student's grandmother appear to have a personality conflict with [redacted]. While this may explain why they attempted to deal directly with staff members at MSB and at the Middle School, excluding [redacted] delayed prompt resolution of the Student's location/site of services for the 2012-2013 school year. In particular, by setting up a meeting with the Middle School SEC without [redacted] knowledge (Findings of Fact 51 and 52), the Parent, [redacted] and the Student's grandmother received only an overview of the vision program at the Middle School, not a description of a specific plan for the Student. By failing to follow up with [redacted] to express their concerns, as instructed by the Middle School SEC (Findings of Fact 57 and 58), the Parent and [redacted] further delayed resolution of the Student's location/site of services for the 2012-2013 school year. Having heard the testimony of the Parent, [redacted], the Attending School Principal, the Middle School SEC, and [redacted], the undersigned finds that all of them are genuinely committed to the Student's success.

X. ORDER

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

Petitioner's DPC dated August 24, 2012, is dismissed in its entirety, with prejudice.[21]

Dated this 19th day of October, 2012.

Charles Carron
Impartial Hearing Officer

[21] In his closing argument, Petitioner's counsel requested that, even if this Hearing Officer finds the Middle School to be an appropriate placement and location of services for the Student, that the Hearing Officer order Respondent to provide all of the services specified in the Student's IEP. Having found no denial of FAPE, the undersigned has no authority to issue any such order. Should Respondent fail to implement the Student's IEP, Petitioner has recourse via a new DPC.

NOTICE OF APPEAL RIGHTS

The decision issued by the Impartial Hearing Officer is final, except that any party aggrieved by the findings and decision of the Impartial Hearing Officer shall have 90 days from the date of the decision of the Impartial 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).