

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
November 24, 2014

STUDENT, ¹)	
through the Parents,)	
)	Date Issued: November 22, 2014
Petitioners,)	
)	Hearing Officer: John Straus
v.)	
)	
District of Columbia Public Schools (“DCPS))	
)	
Respondent.)	
)	
)	

HEARING OFFICER DETERMINATION

Background

The Petitioners, who are the parents of the Student, filed a due process complaint notice on September 8, 2014, alleging that the student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

The Petitioners alleged DCPS denied the Student a FAPE by failing to propose a placement or location of services for the 2014-2015 school year that is reasonably calculated to enable the Student to make progress in the general education curriculum and failing to provide the Petitioners a prior written notice after the July 10, 2014 IEP team meeting.

DCPS asserted that IEP team proposed a placement of all hours per week of specialized instruction to be provided outside of the general education environment. The team determine that this placement arrangement was the least restrictive environment for the student. The parents participated fully in the discussion and collaboration regarding the development of the placement for this student, they do not challenge that placement in this matter. Following the July 10, 2014 meeting, DCPS notified the parents that Nonpublic School A can implement the IEP and placement.

Subject Matter Jurisdiction

¹ Personal identification information is provided in Appendix A.

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Subject matter jurisdiction is conferred pursuant to the 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.”); and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on September 8, 2014. This Hearing Officer was assigned to the case on September 10, 2014. Neither the Petitioners nor the Respondent waived the resolution meeting. The resolution meeting took place on September 29, 2014. At the resolution meeting, parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on October 8, 2014, the 45-day timeline to issue a final decision began on October 9, 2014. The hearing was scheduled over two days on October 27 and 28, 2014. On October 27, 2014, the Petitioner presented four witnesses. On October 28, 2014, the Petitioner presented one witness and the Respondent presented four witnesses. A final decision is due by November 22, 2014.

Neither party objected to the testimony of witnesses by telephone. The Petitioners participated in person throughout the hearing.

The Petitioner presented five witnesses: the Student, a Clinical Psychologist, the Mother, the Father and Associate Head of Nonpublic School B (“Nonpublic B rep”). DCPS presented four witnesses: Nonpublic School A, School Counselor (“Counselor”), Nonpublic School A, Associate Director (“Associate Director”), Nonpublic School A, Dean of Students (“Dean of Students”) and Nonpublic School A, Director of Teachers and Learning (“Director”).

The Petitioner’s disclosures dated October 20, 2014, containing a witness list and Exhibits P-1 through P-23 were timely filed and admitted into evidence. DCPS’ disclosures dated October 15, 2014, containing a witness list and Exhibits R-1 through R-23, were timely filed and admitted into evidence. The parties stipulated that exhibits P-3 and R-2 are the student’s current IEP.

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

1. Whether the Respondent denied the Student a FAPE by failing to propose a placement or location of services for the 2014-2015 school year that is reasonably calculated to enable the student to make progress in the general education curriculum.
2. Whether the Respondent denied the student a FAPE by failing to provide the Petitioner a prior written notice after the July 10, 2014 IEP team meeting.

For relief, Petitioner requested the Hearing Officer to order DCPS to reimburse the Petitioner tuition and other educational expenses for enrollment at Nonpublic School B for the

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2014-2015 school year and for the Hearing Officer to order the student to remain at Nonpublic School B for the remainder of the 2014-2015 school year.

Findings of Fact²

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

1. The Student lives with his parents in the District of Columbia.
He left Nonpublic School A at the end of the 2013-2014 school year.³
2. On January 31, 2013, the IEP team convened. The Petitioners were concerned about the Student's progress and requested information regarding new school programs. DCPS determined the student would remain at Nonpublic School A.⁴
3. The Student and his parents became very concerned regarding the Student's safety at Nonpublic School A. During the 2012-2013 school year, when the Student was in eighth grade, the Student reported being teased and bullied by his classmates.

The Student believed his classmates took his property,

As a result, the Student refused to go on school field trips during the entire school year.⁵

4. On March 18, 19, and 23, 2013, the Student received a neuropsychological assessment to assist the Student's parents in educational planning. The assessment included a Wechsler Intelligence Scale for Children-Fourth Edition which yield average scores in verbal comprehension and borderline scores in perceptual reasoning, working memory and processing speed. The assessment also included a Woodcock Johnson – Third Edition Normative Update: Tests of Achievement that yielded average to low average scores. The evaluator stated the Student has a strong sense of justice and can persevere when he feels someone has been mistreated or when something has not gone as it should have. The evaluator recommended the Student be placed in a class with a low student to teacher ratio and supportive school environment in which he can continue to develop his academic, social and coping skills. He will benefit from school staff who understand and

² Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

³ Student, Mother, Father

⁴ R-6

⁵ P-7, Student, Mother

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appreciate students with learning disabilities who learn best through multisensory strategies and approaches.⁶

5. The Student received outside therapy services to address his fears regarding school bullies. the Student's disability makes it difficult for him to understand the motivation and perspectives of his classmates. She believes the Student requires a school where he feels safe in order for him to have a milieu where he can begin to understand others perceptions and perspectives.⁷
6. Nonpublic School a staff developed a safety plan for the student after the Petitioners express concerns regarding the Student's safety.⁸
7. the Student's parents were told by staff at Nonpublic School A that the Student would not be in the same class as the students who bullied him during the 2012-2013 school year.⁹
8. At the beginning of the 2013-2014 school year, due to an administrative error by Nonpublic School A, the Student was placed in the same class as students who bullied him during the 2012-2013 school year.¹⁰
9. The student was moved out of the class with the students that bullied him during the 2012-2013 school year. The Student's new class was given less work and materials with lower reading levels than the students in the class were the Student was initially assigned. The Student's parents were not consulted regarding the change in the Student's class assignment. They wanted the Student to receive the same amount of work he would have received had he remained in the class where he was originally assigned.¹¹
10. On January 28, 2014, the IEP team convened. The team noted the Student demonstrates weak interpersonal skills as well as impulse control and poor social judgment. He sometimes exhibits considerable difficulty understanding another's point of view or taking another's perspective. These difficulties have an adverse impact on his capacity to function in the classroom and his availability for learning. The team determined the Student requires hours of specialized instruction outside the general education setting, occupational therapy outside the general education setting, speech-language pathology outside the general education setting and 180 minutes per month of behavior support services outside the general education setting.¹²

⁶ P-19, R-5

⁷ Clinical Psychologist

⁸ P-8, R-1, Student

⁹ P-9, Mother

¹⁰ Mother, Father

¹¹ P-11, P-12, P-13, P-14, Mother, Father

¹² P-2, P-3

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11. The Student reported to the Dean of Students and other school personnel an alleged theft of his property at school on May 16, 2014¹³ and an alleged assault by a student on June 10, 2014.¹⁴
12. The student received an A- in English 9, A in Algebra 1, B+ in Earth Science, A+ in Computer Applications, A in Innovation, A+ in Health and A in Ancient World History during the 2013-2014 school year.¹⁵
13. the Student, his parents and their attorney met with a DCPS representative and Nonpublic School A staff. The Petitioners stated that Nonpublic School A lacked safety, did not address the bullying and lacked academic rigor that the Student needed. The team noted the student's perception was that he does not feel safe at Nonpublic School A. The parents informed the DCPS representative the Student was accepted at Nonpublic School B and requested DCPS fund the Student's placement at Nonpublic School B that he took at Nonpublic School A.¹⁶
14. DCPS notified the Petitioner via email and first class mail, dated August 8, 2014, that DCPS did not agree to have the student move to Nonpublic School B because DCPS asserted that Nonpublic School A can implement the student's IEP.¹⁷
15. the Petitioners, through counsel, notified DCPS of their intent to unilaterally place the Student at Nonpublic School B for the 2014-2015 school year.¹⁸
16. DCPS notified the Petitioners of their intent not to fund the Student's enrollment at Nonpublic School B for the 2014-2015 school year.¹⁹
17. Nonpublic School B is certified by the Office of the State Superintendent. It has a college preparatory curriculum. The school provides speech and language pathology, occupational therapy and behavior support services. The teachers and related services personnel are certified. The Student's current IEP is being implemented at Nonpublic School B even though the Student does not require the behavior support services due to the milieu at Nonpublic School B. The Student feels safe at Nonpublic School B. He does not require a safety plan. He is repeating several 9th grade classes at Nonpublic School B.²⁰

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:

¹³ P-17, Student

¹⁴ P-18, Student

¹⁵ R-4

¹⁶ R-3, R-12, Director, Mother, Father

¹⁷ P-4, P-5, R-13, Mother

¹⁸ P-6, R-14

¹⁹ R-15

²⁰ P-23, Student, Nonpublic B rep.

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“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).

Free appropriate public education or FAPE means special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP)...

DCPS denied the student a FAPE by failing to propose a placement or location of services for the 2014-2015 school year that is reasonably calculated to enable the student to make progress in the general education curriculum

According to the U.S. Department of Education, bullying is characterized by aggression used within a relationship where the aggressor has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated.²¹ *See Dear Colleague Letter*, 61 IDELR 263 (OSERS/OSEP 2013). The US Department of Education stated that the bullying of a student with a disability which results in the student not receiving meaningful educational benefit constitutes a denial of FAPE. *Id. See also Dear Colleague Letter*, 111 LRP 45106 (OCR 07/25/00). Moreover, the US Department of Education stated, the bully's motivation is irrelevant in terms of the victim's right to FAPE under the IDEA. "Whether or not the bullying is related to the student's disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied."

In this case, when the Student was in eighth grade, the Student reported being teased and bullied by his classmates. The Student told his parents that he was punched by other students pushed in a stairwell so that he potentially could have fallen down a flight of stairs. The Student also believed his classmates took his property. As a result, the Student refused to go on school field trips and avoided using a stairwell to get to class. Whether or not the Student was actually bullied at Nonpublic School A, the Student's has difficulty with perspective taking or understanding the motivation of his classmates, so that the Student believes he was being bullied

²¹ The United States Department of Education has acknowledged that significant harm can be done that can be caused by bullying related to disability since 2000. In July 25, 2000, the Office of Civil Rights and the Office of Special Education and Rehabilitative Services wrote a "Dear Colleague" letter to public school administrators nationwide providing guidance on avoiding disability-related harassment; stating

Disability harassment can have a profound impact on students, raise safety concerns, and erode efforts to ensure that students with disabilities have equal access to the myriad benefits that an education offers. Indeed, harassment can seriously interfere with the ability of students with disabilities to receive the education critical to their advancement.

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by his classmates at Nonpublic School A. Therefore, under the definition of bullying provided by the US Department of Education, the Student was in fact being bullied at Nonpublic School A.

The US Department of Education's 2013 Dear Colleague Letter states:

Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or her IEP. The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly. Additionally, parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a parental request for an IEP Team meeting where a student's needs may have changed as a result of bullying.

The letter further states "schools may not attempt to resolve the bullying situation by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services. These decisions must be made by the IEP Team and consistent with the IDEA provisions that address parental participation." In this case, the IEP team should have convened in the Spring of 2013 to revise the IEP to address the Student's concerns regarding safety. Instead, Nonpublic School A acted without DCPS in developing a safety plan and attempting to separate the Student from the bullies. That class failed to provide the Student with a curriculum that challenged the Student to make progress in the general education curriculum.

The facts in this case are similar to *Shore Reg'l High School Bd. Of Educ. v. P.S.*, 381 F.3d 194 (3d Cir. 2004).²² In *Shore*, the 3d Circuit found a denial of FAPE based on the likelihood that a proposed placement would subject a student with a disability to continued bullying. The 3d Circuit stated that the LEA's placement of the student was inappropriate because the school would not be able to prevent or stop the continued bullying. The placement would expose him to further bullying and harassment, which would in effect deny the student

²² In *Shore*, a student and his parents successfully argued that a student with a disability could not receive a free and appropriate public education at the regional high school because he had been bullied in elementary and middle school. The Administrative Law Judge ("ALJ") agreed, and the school district had to fund a private placement. The court of appeals found no basis for overturning the ALJ's determination, based on the following evidence:

Fairly read, [the] testimony was that Shore would not have been able to remedy the problem because, among other things, the same bullies would be present at Shore; bullies generally do not stop on their own; even 'intensive interventions' are often not effective when they are not begun until after a course of harassment has continued for some time; the presence at Shore of students who had not attended [the middle school] would have not shielded [the student]; the bullies would have a ripe opportunity to harass [the student] on the bus; and in short; no matter what program Shore implemented, [the student] would not have been adequately protected.

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FAPE, the court reasoned. The environment began to cripple the student, who had a disastrous experience in middle school. For high school, the parents investigated placements other than Shore Regional High School, the local public high school. They decided to pursue another high school. The IEP Team proposed an IEP with placement at Shore and the Student's parents unilaterally placed him at the other high school and sought reimbursement. The Administrative Law Judge sided with the parents, concluding that Shore could not provide the Student with the FAPE required by IDEIA, "because of the legitimate and real fear that the same harassers who had followed the Student through elementary and middle school would continue" to harass him.

Likewise, in this case, Nonpublic School A was not capable of preventing the continued bullying of the Student because the same students the bullied the Student were still enrolled at Nonpublic School A. Unfortunately, separating the Student from the bullies by placing the Student in another class did not help because the Student's disability prevents the Student from understanding the motivations of the bullies. The relationship between the Student and the bullies was such that their mere presence in the same school has an adverse effect on the Student. Therefore, like in *Shore*, the Petitioners unilaterally placed the Student in Nonpublic School B.

In *T.K. and S.K. ex rel. L.K. v. New York City Dep't of Educ.*, 56 IDELR 228 (E.D.N.Y. 2011), remanded, 112 LRP 8001 (E.D.N.Y. 05/02/11),²³ the court required a district to defend itself against allegations that the bullying of a 12-year-old girl with a disability justified her parents' decision to place her in a private school. In *T.K.*, the District Court stated that the critical question was whether the child had been deprived of some educational benefit.

In this case, the student received good grades at Nonpublic School A. Yet, when he was unilaterally placed by his parents at Nonpublic School B, he elected to repeat some of the classes he took at Nonpublic School A. Surprisingly, the Student is willing to repeat the classes that he passed with high grades last year without protest. The Student feels safe at Nonpublic School B and is willing to retake those classes. He is doing well in those classes this school year. The Student has average intelligence and his academic achievement has not been affected as measured by his standardized scores. However, the evidence indicates that the Student was denied educational benefit by being placed in a lower functioning class during the 2013-2014 school year and, as a result, he is repeating some of his classes. Therefore, the Hearing Officer finds that DCPS denied the Student a FAPE by failing to propose a location of services that is reasonably calculated to enable the Student to make progress in the general education curriculum.

DCPS did not deny the Student a FAPE by failing to provide the Student a FAPE by failing to provide the Petitioner a prior written notice after the July 10, 2014 IEP team meeting

²³ In *T.K.*, rejecting the district's dismissal request, the District Court held that it was necessary to address whether the district in fact failed to respond to the harassment, and whether the student was deprived of some educational benefit. The student's parents stated that her peers ostracized her, pushed her, refused to touch items she touched, and ridiculed her daily. The District Court stated that the parents did not have to show that the student was deprived of all educational benefit or that she regressed. They merely had to show that her educational benefit was "adversely affected."

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Pursuant to 34 C.F.R. §300.503(a), written notice must be given to the parents of a student with a disability when the public agency proposes to initiate or change the identification, evaluation or placement of a child or refuses to initiate or change the identification, evaluation, or educational placement of a child. The purpose of the Prior Written Notice ("PWN") "is to provide sufficient information to protect the parents' rights under the [IDEA] and to enable parents to make an informed decision whether to challenge the DCPS' determination and to prepare for meaningful participation in a due process hearing on their challenge. *Taylor v. District of Columbia*, 770 F.Supp.2d 105, 109-110 (D.D.C. 2011). The PWN protects parents' rights by ensuring they are made aware of the decisions regarding their children.

DCPS did not fail to provide the parent PWN of the student's change in placement or location of services. On July 10, 2014, the Student, his parents and their attorney met with a DCPS representative and Nonpublic School A staff where the Petitioners informed the DCPS representative the Student was accepted at Nonpublic School B and requested DCPS fund the Student's placement at Nonpublic School B. On August 20, 2014, DCPS notified the Petitioner, via email and first class mail, that DCPS did not agree to have the student move to Nonpublic School B because DCPS asserted that Nonpublic School A can implement the student's IEP. Although DCPS took a long time to notify the Petitioner of its determination, there was no substantive impact on the student's education program. Therefore, the Hearing Officer finds that DCPS did not deny the Student a FAPE by failing to provide the Petitioner a prior written notice.

Compensatory Education

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits." *Id.* at 526.

The Hearing Officer concludes based on the evidence offered at hearing that the Student was denied a FAPE during the 2013-2014 school year by being placed in a remedial class where the Student was not challenged academically. Therefore, the Hearing Officer concludes that to award the student compensatory services would be equitable.

ORDER

- (1) The student is a student with Autism under the IDEA;
- (2) DCPS shall place the student in Nonpublic School B for the 2014-2015 school year, including transportation, as necessary;
- (3) DCPS shall convene an IEP team meeting at Nonpublic School B within 10 school days to review and revise the student's IEP;

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- (4) For every day of delay by the Petitioner, DCPS shall have one day to convene the meeting;
- (5) DCPS shall provide the Student compensatory education in the form of tutoring for 90 minutes per week for a six months period; and
- (6) No further relief is granted.

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: November 22, 2014

/s/ John Straus
Hearing Officer