

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

810 First Street, N.E. 2d Floor
Washington, DC 20002

OSSE
STUDENT HEARING OFFICE
2012 NOV - 3 AM 8:35

STUDENT,¹

Petitioner,

v.

**DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,**

Respondent.

Case No. 2012-0562

Bruce Ryan, Hearing Officer

Issued: November 3, 2012

HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, against Respondent District of Columbia Public Schools ("DCPS"). The complaint was filed August 20, 2012, by an 18-year old adult student (the "Student") who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a child with a disability under the IDEA. The Student currently attends Private School A. DCPS has proposed to place the Student at Private School B. Both schools are full-time, non-public, special education day schools located in the District of Columbia.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") under the IDEA by failing to provide her with an appropriate educational placement for the 2012-13 school year. She alleges that DCPS' "proposed placement; site location; setting; school at [Private School B] is inappropriate for this student and represents a change to a lesser restrictive placement from [Private School A]." *Administrative Due Process Complaint*, p. 4.

¹ Personally identifiable information is attached as an Appendix to this HOD and must be removed prior to public distribution.

DCPS filed a timely response to the complaint on August 28, 2012, denying the allegation that it failed to provide a FAPE to the Student. DCPS responds (*inter alia*) that it has not proposed any alterations to Petitioner's educational programming, and asserts that it has exercised its discretionary authority to determine the "location of services." *Response*, pp. 1-2.

On September 4, 2012, the parties held a resolution meeting, which did not resolve the complaint. The parties also did not agree to end the 30-day resolution period early. Accordingly, the resolution period ended on September 19, 2012, and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") expires on November 3, 2012.

On September 7 and 13, 2012, Prehearing Conferences ("PHCs") were held to discuss and clarify the issues and requested relief. The Hearing Officer also heard argument on Petitioner's motion to compel compliance with the stay-put provisions of the IDEA. At the PHC, the parties agreed to schedule the due process hearing for October 12, 2012 (which was later rescheduled to October 10, 2012).

On September 14, 2012, the Hearing Officer granted Petitioner's stay-put motion. *See Order*, issued Sept. 14, 2012. The Hearing Officer concluded that the Private School A program, into which Petitioner had been placed by prior HODs, was her then-current educational placement for purposes of the stay-put provision at the time that DCPS proposed to move Petitioner to Private School B and Petitioner filed the present complaint. The Hearing Officer agreed with Petitioner's assertion that by proposing to move her from Private School A's 11-month special education program to a less restrictive 10-month program operated by Private School B, DCPS proposed a "fundamental change in, or elimination of a basic element of" her existing educational program under *Lunceford v. D. C. Board of Education*, 745 F.2d 1577 (D.C. Cir. 1984). *Id.*, pp. 1-2. The Hearing Officer therefore ordered that Petitioner was to remain in her current educational placement at Private School A, with DCPS funding and transportation, during the pendency of this administrative due process complaint proceeding, until the completion of all proceedings including the issuance of the HOD in this matter. *Id.*, pp. 2-3.

On September 18, 2012, the Hearing Officer issued a Prehearing Order ("PHO"). The parties then filed their five-day disclosures, as required, by October 2, 2012. DCPS also filed an

amended disclosure statement on October 9, 2012, amending the name of the Private School B witness.

The Due Process Hearing was held in Hearing Room 2004 on October 10, 2012. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-28.

Respondent's Exhibits: R-1; and R-4 through R-10.²

Hearing Officer Exhibit: HO-1.³

In addition, the following Witnesses testified on behalf of each party:

Petitioner's Witnesses: (1) Petitioner; (2) Petitioner's mother; (3) Counseling Director, Private School A;⁴ and (4) Founder & CEO, Private School A.

Respondent's Witnesses: (1) DCPS Progress Monitor ("PM"); and (2) Admissions Director ("AD"), Private School B.

Oral closing arguments were presented on the record at the conclusion of the hearing.

² DCPS withdrew and did not offer into evidence its disclosed Exhibits R-2 and R-3 (consisting of prior HODs) because the exhibits duplicated Petitioner's Exhibits P-13 and P-25.

³ Exhibit HO-1 consists of three (3) pages of an Amended IEP dated 03/27/2012, which was produced at hearing but had not been included in either party's prehearing disclosures. The Hearing Officer determined that this document was needed to provide an accurate, updated picture of Petitioner's current educational programming.

⁴ The Counseling Director has a Ph.D in Counseling Psychology and is a D.C. licensed professional counselor. She testified as an expert in counseling psychology, especially as it pertains to special education students in a separate non-public school setting. *See P-18; P-19.*

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* 5-E DCMR §§ 3029, 3030. This decision constitutes the Hearing Officer's Determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP"). The statutory HOD deadline is November 3, 2012.

III. ISSUE AND REQUESTED RELIEF

As specified in the PHO, the sole issue presented for determination at hearing is:

Failure to Provide Appropriate Placement — Did DCPS deny the Student a FAPE by proposing to change the Student's educational placement and/or location of services from Private School A to Private School B for the 2012-13 school year, pursuant to a May 15, 2012 Prior Written Notice?

Petitioner requests that DCPS be ordered (a) to fund the Student's placement at Private School A or some other 11-month full-time out of general education program, with transportation, for the 2012-13 school year; and (b) to provide compensatory education and/or retroactive reimbursement of expenses for attending Private School A since the beginning of the 2012-13 school year (to the extent not already paid by DCPS through stay-put relief).⁵

As the party seeking relief, Petitioner was required to proceed first at the hearing and carried the burden of proof on the issue specified above. 5-E DCMR §3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005).

⁵ Petitioner had the burden of proposing a well-articulated plan for compensatory education in accordance with *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005), and was ordered to include a written plan for compensatory education in his five-day disclosures. However, a compensatory education plan was not included in Petitioner's disclosures, and it was agreed at hearing that the request for compensatory relief was deemed withdrawn in light of the grant of stay-put relief. Petitioner's witnesses testified that there has been no disruption in tuition payments, although some minor interruptions in transportation services occurred. *See, e.g., FounderTest*.

IV. FINDINGS OF FACT

Based upon the evidence presented at the due process hearing, this Hearing Officer makes the following Findings of Fact:

1. Petitioner is an [REDACTED] who is a resident of the District of Columbia.
2. Petitioner has been determined to be eligible for special education and related services as a student with a disability under the IDEA. Her primary disability is classified as Intellectual Disability (also known as mental retardation). *See Pet. Test.; P-1; P-2; HO-1.*
3. Petitioner's current IEP was developed at the last annual meeting held on December 6, 2011. *See P-2; R-4.* The IEP provides 27 hours per week of specialized instruction and 30 minutes per week of behavioral support services in an Outside General Education setting. *R-4-7.* The IEP states that Petitioner "will benefit from full-time special education instruction to facilitate explicit and direct instruction in the areas of reading, written expression, and math to address deficits that impact her academic success." *R-4-8* (LRE justification). The 12/06/2011 IEP was also amended on March 27, 2012 to remove Extended School Year ("ESY") services. *HO-1.*
4. In February 2011, an HOD was issued in Case No. 2010-1573, which found that DCPS failed to offer Petitioner a FAPE and which placed her at Private School A for the 2010-11 school year. *See P-13*
5. In March 2012, an HOD was issued in Case No. 2011-1210, ordering DCPS to continue funding Petitioner's placement at Private School A through the end of the 2011-12 school year. *P-25.* The HOD found that the program and services offered at Private School A were appropriate to meet Petitioner's needs, even though some of the school's teachers were not certified. *Id., p. 18.* The HOD further found that the equities supported an award of prospective funding for placement at Private School A "for the remainder of the 2011-12 school year only." *Id.* DCPS was then ordered to "reconvene an IEP meeting to assess the appropriateness of the Student's placement and to designate a setting" at the end of that school year. *Id., pp. 18-19.*
6. On or about May 15, 2012, pursuant to the March 2012 HOD, DCPS convened a meeting of Petitioner's MDT/IEP Team to review her educational placement and determine an appropriate educational placement/location of services for the 2012-13 school year. *P-22.*

Petitioner and her parent participated in the meeting, along with Petitioner's attorney by telephone. *Id.*

7. At the May 15, 2012 meeting, the DCPS Compliance Case Manager ("CCM") stated that DCPS had identified Private School B "as the location of service/placement for the 2012-2013 SY." *P-22-2*. The DCPS Nonpublic Progress Monitor stated that "a lot of the concerns stem from the student being provided FAPE because the teachers at [Private School A] are not certified special education teachers." *P-22-3*; *see also PM Test*. The CCM also stated "that DCPS feels the academic and transitional opportunities would better suit the student as well." *P-22-3*.⁶ *See also PM Test*. (Private School B serves wider range of disabilities, including ID students, whereas Private School A's certificate of authority (COA) is limited to learning disabled students).
8. At the May 15, 2012 meeting, Petitioner responded to DCPS' proposed change of placement/location of services by stating that she feels like she is progressing at Private School A and would like to stay there. Petitioner, through his attorney, also stated that she would like to receive a comparable 11-month program like Private School A's. Petitioner nevertheless agreed to visit the school. *P-22-3*; *Pet. Test*.
9. Also at the May 15, 2012 meeting, the Head of School of Private School A stated that by Fall 2012, all staff would have necessary certifications in special education. *P-22-3*.
10. Following the May 15, 2012 meeting, DCPS issued a Prior Written Notice ("PWN") dated 5/15/2012 formally proposing Private School B as the "location of services" for Petitioner for the 2012-13 school year. *R-5*.
11. After visiting Private School B, Petitioner objected to the proposed change in placement/location of services and thereafter filed the present due process complaint. As of the date of hearing, Petitioner was still attending Private School A. She is scheduled to graduate in approximately February 2014. *See Founder Test.*; *Pet. Test*.
12. The record evidence shows that both Private School A and Private School B offer full-time, special education day programs for disabled students that are 100% outside general education. Neither school has any non-disabled students.

⁶ Prior to the May 15, 2012 meeting, DCPS had obtained an acceptance letter from Private School B dated May 7, 2012, informing DCPS that Petitioner was "an appropriate candidate for enrollment into our LD [learning disabled] program at [Private School B] for the duration of the 2011-2012 school year."

13. The record evidence shows that Private School B is capable of implementing a full-time IEP during the 2012-13 school year, which includes at least 27 hours per week of specialized instruction and 30 minutes per week of behavioral support services in an Outside General Education setting, consistent with the goals and objectives contained in the Student's December 2011 IEP, as amended in March 2012. *See PM Test.; AD Test.*

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioner carries the burden of proof. *See* 5-E DCMR §3030.3; *Schaffer v. Weast*, 546 U.S. 49 (2005). "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education (FAPE)." 5-E DCMR §3030.3. The hearing officer's determination is based on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on the sole issue presented for hearing.

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)..." 20 U.S.C. § 1401(9) (emphasis added); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "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)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. "The IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid v. District of Columbia*, 401 F. 3d 516, 519 (D.C. Cir.

2005), quoting *Board of Education v. Rowley*, 458 U.S. 176, 200, 207 (1982).⁷ “Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes *offering placement in a school that can fulfill the requirements set forth in the IEP.*” *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (emphasis added).

In addition, statutory law in the District of Columbia requires that “DCPS shall *place* a student with a disability *in an appropriate special education school or program*” in accordance with the IDEA. D.C. Code § 38-2561.02 (b) (emphasis added). See also *Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), citing *McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming “placement based on match between a student’s needs and the services offered at a particular school”). Educational placement under the IDEA must be “based on the child’s IEP.” 34 C.F.R. § 300.116 (b) (2). DCPS must also ensure that its placement decision is made in conformity with the Least Restrictive Environment (“LRE”) provisions of the IDEA. See 34 C.F.R. §§ 300.114-300.116.

The fact that stay-put relief has been granted does not determine the adequacy of the proposed placement or whether DCPS has denied the Student a FAPE by means of that proposal. As the United States District Court for the District of Columbia recently noted, “the question of whether a particular placement is appropriate is a different question than what the then current educational placement is.” *Johnson v. District of Columbia*, 112 LRP 13381 (D.D.C. March 16, 2012), slip op. at 5 (quoting plaintiff’s reply). The stay-put provision contained at 20 U.S.C. § 1415 (j) is triggered when a change in placement is proposed in the form of a “fundamental change in, or elimination of, a basic element of the educational program,” *Lunceford v. D. C. Board of Education*, 745 F. 2d 1577 (D.C. Cir. 1984), and it imposes an automatic statutory injunction designed to *preserve the status quo* until the pending dispute with regard to proper placement is resolved on the merits of the due process complaint.⁸ Section 1415(j) thus “represents Congress’ policy choice that all handicapped children, regardless of whether their

⁷ See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009) (“IEP must be ‘reasonably calculated’ to confer educational benefits on the child, but it need not ‘maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.’”).

⁸ See, e.g., *Johnson v. District of Columbia*, *supra*; *Ashton v. District of Columbia*, 439 F. Supp. 2d 86 (D.D.C. 2006); *Cole v. Metro Gov’t of Nashville*, 954 F. Supp. 1214 (M.D. Tenn. 1997).

case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved.”⁹

In this case, the Complaint alleges that Private School B is not an appropriate special education school or program for Petitioner because it “only runs for 10 months out of the year” and thus “represents a change to a lesser restrictive placement from [Private School A].” *P-1*, p. 4. Petitioner claims that this constitutes a denial of FAPE, and requests continued funding and transportation to attend Private School A “or some other 11-month full-time out of general education program.” *Id.*, pp. 5-6.

DCPS responds (*inter alia*) that Petitioner’s “current IEP makes no reference to the duration of the school year necessary to receive the prescribed amount of specialized instruction and related services,” and that its proposed placement/location of services at Private School B is able to implement the IEP. *Response*, p. 3. DCPS further asserts that “[w]hen it issued the PWN to [Private School B], [Private School A] was unable to implement the student’s IEP because many [Private School A] teachers did not hold the certification required to provide the student with a FAPE in the District of Columbia.” *Id.*

DCPS is correct that Petitioner’s IEP does not require an 11-month program,¹⁰ and Private School B can implement all of its requirements. Public School B will still provide a full-time special education program that is suited to meet Petitioner’s unique educational needs in a 100 % outside of general education setting and with a comparable student/teacher ratio. *See PM Test.; AD Test.* Moreover, Petitioner has not shown that the specialized instruction and related services would be delivered other than in conformity with the goals and objectives of her IEP.¹¹

There also is no dispute that Petitioner has done quite well at Private School A. The Counseling Director testified that Petitioner was “in crisis” and engaged in “acting out” behaviors when she first arrived in February-March 2011, but then made substantial progress and

⁹ *Greenwich Board of Education v. Torok*, 40 IDELR 44 (D. Conn. 2003).

¹⁰ The only reference to Private School A’s having an 11-month program appears in the ESY section of the May 2011 IEP, as part of the rationale for not requiring ESY services during the 2011 summer. *P-5-11* (noting Private School A “is an 11-month program that provides continued academic and related services for students during an extended school year session, thus providing continuity to reinforce skills that may otherwise be lost during large gaps of instructional time.”). The evidence shows that Petitioner’s IEP team will have the opportunity to consider ESY services for the 2013 summer at another meeting later this school year. *See also PM Test.; AD Test.* And Petitioner has not challenged the March 2012 IEP amendment removing ESY for the 2012 summer.

¹¹ Moreover, both private schools are located within the District of Columbia, and thus are accorded the same statutory priority for special education placements under D.C. Code §38-2561.02 (c) (2).

“turned the corner” around the mid-point of the 2011-12 school year. In her opinion, Petitioner’s social/emotional issues have declined, and she is now much more available for learning and counseling and is able to access the curriculum successfully. *See Couns. Dir. Test. See also Founder Test.; P-25-16, P-25-17.*

Nevertheless, the question before the Hearing Officer is not whether Private School A could better educate Petitioner than Private School B, but *whether Petitioner can receive a FAPE at Private School B.* *Cf. N.T. v. District of Columbia*, 58 IDELR 69 (D.D.C. Jan. 11, 2012), slip op. at 5. The record evidence shows that DCPS properly determined, *as of May 15, 2012*, that Public School B can fulfill the requirements set forth in Petitioner’s IEP, can meet Petitioner’s demonstrated needs, and can provide educational benefit consistent with the *Rowley* standard. As a result, the Hearing Officer cannot find that DCPS has denied Petitioner a FAPE by proposing Private School B as her placement for the 2012-13 school year.

Nor is it for the Hearing Officer to decide whether DCPS has provided the most well-reasoned analysis for desiring to move Petitioner from one private school to another. An IDEA hearing officer is not charged with reviewing an LEA’s actions under an arbitrary and capricious standard. To the contrary, courts and hearing officers should generally presume that public-school officials are properly performing their obligations under IDEA. *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484 (2009); *Schaffer v. Weast*, 546 U.S. 49, 62-63 (2005).¹²

Accordingly, the Hearing Officer concludes that DCPS has acted within its rights under IDEA to change Petitioner’s placement and/or location of services to Private School B for the 2012-13 school year, consistent with the May 15, 2012 PWN.¹³

¹² It does appear that, as of May 15, 2012, Private School A could not produce required OSSE certifications for all of its teachers. *See Founder Test. (cross examination); R-8.* While it appears that this may have impacted Petitioner less than other students, given her specific course schedule (*P-28-2*), DCPS could still conclude that regulatory requirements technically were not satisfied for this placement. *See Response, p. 3 n. 3, citing 5 DCMR §2823.2* (“Effective no later than school year 2011-12, each member of the teaching staff shall hold a certification from the state or district in which the school is located, to the same level as required for teaching staff in public schools of that state or district.”). *See also* D.C. Code §38-2561.03 (a) (2) (DCPS cannot place a student in a nonpublic special education school or program that has not been approved by the SEA).

¹³ In closing, Petitioner also argued that the equities do not favor a mid-year change of placement (citing *Block v. District of Columbia*, 748 F. Supp. 891 (D.D.C. 1990), *see also P-25-15*), but the facts show that DCPS proposed a change for the 2012-13 school year back in May 2012. Petitioner remains at Private School A only because she waited three months to file her due process complaint and then asserted stay-put rights. At the same time, nothing in this HOD would preclude DCPS from now revisiting that decision based on any new facts or considerations that may have since arisen, regarding either Private School A or Private School B.

VI. ORDER

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

1. Petitioner's requests for relief in her Due Process Complaint filed August 20, 2012, are hereby **DENIED**; and
2. The Complaint is **DISMISSED, With Prejudice**.



Dated: November 3, 2012

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).