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

Adult Student[1],

Petitioner,
v.

Hearing Officer: Gary L. Lieber

District of Columbia Public Schools,

Respondent.

2012 NOV 20 PM 12: 13
OSSE
STUDENT HEARING OFFICE

HEARING OFFICER'S DETERMINATION

Introduction and Procedural Background

This case was brought as a Due Process Complaint pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §1400 *et. seq.* and Title 5-E, Chapter 5-E 30 of the District of Columbia Municipal Regulations. Petitioner (also referred to as "Student") is an Adult Student Age 21. Petitioner is classified as having Multiple Disabilities. The 2012-2013 School Year is her last year of eligibility under IDEA. Petitioner is currently enrolled at Private School (hereinafter "PS1"). However, in the summer of 2012, Respondent issued a Prior Written Notice for Petitioner to attend Private School 2 (hereinafter "PS2"). Petitioner wishes to remain at PS1 for her final year of school and alleges that PS2 is an inappropriate placement

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[1] Personal identification information is provided in Appendix A and the Appendix must be removed prior to public distribution.

and that requiring her to attend PS2 is a denial of a Free and Appropriate Public Education ("FAPE"). The Student requests that she be permitted to remain in PS1. Respondent contends that transferring Student to PS2 does not constitute a change of educational placement, but rather only a change in school location. The Respondent thus asserts that there was no denial of FAPE.

The Due Process Complaint was filed on September 5, 2012. Respondent District of Columbia Public Schools ("DCPS") filed a Response to the Due Process Complaint on September 14, 2012, in which it denied that it had failed to provide FAPE to the Student. The parties conducted two Resolution Meetings on September 20, 2012 and October 16, 2012, but did not resolve the matter (H.O. Exhs. c and d).[2] On October 3, 2012, the undersigned conducted a Prehearing Conference and on October 10, 2012, the undersigned issued a Prehearing Order setting November 1 and November 2, if necessary, as the hearing dates (P. Exh. 3). The five-day disclosures were filed on October 25, 2012.

The Due Process Hearing was conducted on November 1, 2012 and November 7, 2012. On November 1, 2012, Petitioner presented newly discovered evidence which could not have been obtained prior to the submission of the proposed exhibits as part of the five-day disclosures. The undersigned admitted this exhibit. Thereafter, the parties argued that

[2] The Hearing Officer Exhibits shall be referred to as H.O. Exh. ___. Petitioner's Exhibits as P. Exh. ___; and Respondent's Exhibits as R. Exh. ___.

additional time would be warranted to investigate this evidence and possibly calling a witness or witnesses to testify regarding this document. Accordingly, the undersigned agreed to postpone the second day of the hearing from November 2 until November 7, 2012.[3] The Due Process Hearing was open to the public and electronically recorded. Both parties were represented by counsel.[4]

The Record Evidence

The Petitioner called the following witnesses: Director of Community Relations for PS1; former Special Education Teacher at PS1 (now teacher at a DCPS school); Behavioral Manager for PS1; and Adult Student. Respondent called the following witnesses: Admissions Director, PS2; Outside Counsel for PS2; Manager, Non-Public Unit for Respondent; and Program Monitor for Respondent.

The following exhibits were offered and admitted into evidence: Hearing Officer's Exhibits a through d; Petitioner's Exhibits 1 through 5 and 7 through 11; and Respondent's Exhibits 1 through 8.

Stipulations

The parties stipulated that:

a. Petitioner is an adult and asserting her own rights under IDEA.

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[3] Separately, I granted Respondent's consent motion to extend the statutory time deadline for issuance of this Decision from November 19 to November 28.

[4] Petitioner was represented by Maria Blaeuer, Esquire and Respondent was represented by Tanya Joan Chor, Esquire.

b. 2012-2013 is the last school year of Petitioner's eligibility for special education and related services under IDEA.

c. The Petitioner's current IEP dated May 9, 2012 is appropriate and not in dispute.

Jurisdiction

This Hearing Officer has jurisdiction pursuant to IDEA, 20 U.S.C. § 1415, the statute's implementing regulations at 34 C.F.R. §§ 300.511 and 300.513 and the District of Columbia Code of Municipal Regulations ("DCMR") at 5-E § 3029 and 5-E § 3030. This decision constitutes the Hearing Officer's Determination, the authority for which is set forth in 20 U.S.C. §1415(f)(3)(E) and 34 C.F.R. § 300.513.

Statement of the Issues

1. Whether PS2 is able or unable to implement the Student's current IEP? If not, is PS1 able to implement that IEP?

Findings of Fact

Based upon the record as a whole, the undersigned makes the following Findings of Fact.

1. Petitioner is an adult student age 21. She is classified as having Multiple Disabilities (P. Exh. 4).

2. Petitioner has had a very difficult upbringing. She suffered through one very traumatic and violent event within the past two years. This event together with other less but significant experiences have done serious

damage to her emotional state. Her family life was and remains dysfunctional. She had developed some very serious bad habits and associations. All of these circumstances and choices further undermined her ability to make progress towards adulthood. She lacks confidence and the training that many young adults would obtain in the normal course of life. She has not been successful in school. She is significantly below grade level in all of her classes. This is her last year in special education programs and she does not have sufficient credits to have any possibility of graduating by the end of this school year (Testimony of Student; Testimony of former Special Education Teacher; and Testimony of Behavioral Manager).

4. Petitioner's latest Individualized Education Plan is dated May 9, 2012. Among other things, it notes that Student is well below grade level in all her academic curriculum (math, reading, written expression). This IEP calls for twenty-nine (29) hours of specialized instruction outside of a general education environment and one hour per week of behavior support services outside of a general education setting (P. Exh. 4). The parties do not dispute that this IEP is appropriate.

5. She attends PS1. PS1 is a small private school exclusively serving disabled children. She attended PS1 for several years. At best, she has had some instances of occasional anecdotal academic success. For example, one of

her former teachers testified uncontrovertedly that she asked good questions and that the more she came to class the more she became engaged (Testimony of former Special Education Teacher). She has also developed more concrete goals, particularly since the birth of her children. Her overall goal is to obtain independent financial status for herself and her children. At various times she has expressed interest in being a cosmetologist, a home health care worker and a child care worker. Once this school year is over, she hopes to enroll in a program that will enable her to work towards the equivalent of a high school diploma through the National External Degree Program (NEDP) which is an adult-based program that is able to award a high school diploma to adults through a non-traditional curriculum concentrating on life skills relating to work, family and community. There are several organizations that operate and administer the NEDP including Living Wages, a non-profit volunteer organization that has a connection to PS1 and other schools in the community (Testimony of Student; Testimony of Director of Community Relations for PS1).

6. In addition to classes in reading, math and life skills, PS1 operates several classes geared towards vocational employment such as carpentry. Student has benefitted from these classes and other so-called "wrap around" services that have assisted her both within the walls of the school and outside of it (Testimony of Student; Testimony of Behavioral Manager). Additionally, PS1 has accommodated Student's child care needs when for one reason or another day care is not available to Student's children (Testimony of Student; Testimony of Director of Community Relations for PS1).

7. In July 2012, the Office of State Superintendent of Education ("OSSE") issued a Prior Written Notice providing for a change in school location of school to Student assigning her to PS2. This decision was made solely because PS1 had been given only a provisional status by OSSE (R. Exh. 1). Among other things, provisional status means that Respondent would no longer authorize the enrollment of new students (R. 5, p. 2). As a result of action taken because of this status, the enrollment at PS1 has decreased from 36 students to 13 students (Testimony of Director of Community Relations for PS1). The problems associated with PS1 are significant. They include insufficient staff, the consistent failure to attend meetings with OSSE staff, and failing to properly administer IEP's. In short, OSSE had concluded that PS1 was unwilling or unable to demonstrate that it exercised any management control (Testimony of Program Monitor; R. Exhs. 2, 3, 4 and 5). The representative for PS1, asserted that since the designation of Provisional Certification, PS1 has met all of the incremental benchmarks established by OSSE and that the only outstanding issue as of the date of the hearing is completion of a financial audit (Testimony of Director of Community Relations for PS1). Whether these benchmarks have been met in all cases or not, the school has suffered a loss of staff and students since this provisional status was given.

8. Student is stridently opposed to changing schools. Indeed, she categorically testified that she will not go to PS2. Her objection is not because of PS2, but rather because she wishes to stay at PS1 since over the past several

years she has developed a "comfort level." Indeed, several witnesses who either taught her at PS1 or worked with Student at PS1 stated without qualification that Student had developed a "comfort level" with PS1 and its staff because that staff had shown some faith and belief in her over the several years she went there and that that faith and trust was extended when she needed it the most when she was, due to her own fault or the fault of others, at her weakest. In fact, both witnesses stated without much doubt that with only a portion of a year left, no other school would have the time to achieve the good will that PS1 enjoyed with Student. They both stated without hesitation that the relative progress Student had made would terminate if she was forced to go to a different school at this point in her life and with only one year of special education eligibility (Testimony of former Special Education Teacher; Testimony of Behavioral Manager).

9. PS2 is an established private school. PS2 has been fully certified for the referral of children with learning disabilities. PS2 has similar vocational programs as PS1. Many students from PS1 were assigned to PS2 during the same time period as Student. The staff at PS2 made good faith efforts to have the students that were reassigned from PS1 attend an Open House. There was resistance from most if not all of the PS1 students. The PS2 staff believed that this resistance was due to the fact that students at PS1 receive some form of financial remuneration from PS1 in connection with certain vocational related internships that require attendance at class. PS2 does not provide for such remuneration (Testimony of PS2 Admissions Director).

10. By letter dated October 26, 2012 – just a few days before the scheduled hearing – OSSE informed PS2 that it was removing its Certificate of Approval and placing it on "probationary approval status." In short, the reason for this change in status was due to the fact that PS2's application for certification was "incomplete." Among other things, the notice of change in status states, "[w]hile your school's certificate of approval is on probationary status, _____ may not enroll any additional students from the District of Columbia" (P. Exh. 11). PS2 vigorously objected to this change in status and maintains that OSSE did receive most of the material that the Notice asserted was missing and that the few remaining issues will be rectified in the next few weeks. PS2 further asserts that none of the alleged deficiencies were "substantive" and that they do not impact the well-being of any student (Testimony of Outside Counsel to PS2).

Legal Analysis and Conclusions

The sole issue in this case is whether PS2 is an appropriate educational placement for Student. In this respect, Respondent asserts that the change in school physical location does not constitute a change in placement since PS2 can effectively implement Student's IEP. Petitioner asserts that PS2 is inappropriate not because it is a bad or poor school but exclusively because of the unique needs of Student that, *a fortiorari*, serve to disqualify PS2 or for that matter undoubtedly any other school that Respondent might suggest other than PS1. The latter point is only made to illustrate that Petitioner's theory is grounded exclusively upon the contention that the physical transfer of Student

to another school at this point in her life is presumptively inappropriate so as to constitute a denial of FAPE.

IDEA does not define the term "educational placement." The courts have defined it as a term that "falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP." *Alston v. District of Columbia*, 439 F. Supp. 2d 86, 91 (D.D.C. 2006), quoting *Bd. of Ed. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ.*, 103 F.3d 545, 546 (7th Cir. 1996). This definition thus makes it plain that while the particular physical school is significant, it is not necessarily controlling. As the Federal District Court in the District of Columbia stated, "the IDEA clearly intends 'current educational placement' to encompass the whole range of services that a child needs not just the 'physical school building a child attends.'" *Alston*, 439 F. Supp. at 93 quoting *Spilsbury v. Dist. of Columbia*, 307 F. Supp. 2d 22, 26-27 (D.D.C. 2004)(other citations omitted).

Furthermore, in analyzing this issue IDEA requires that the "unique needs of the child" and more specifically, "any potential harmful effect on the child or on the quality of services that he or she needs" be taken into account. 34 C.F.R. §300.114(b)(ii) and 34 C.F.R. §300.116(d). These principles must be harmonized with the overall limited goal of IDEA to which the Supreme Court stated would be satisfied ". . . by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 203 (1982). Thus, the Act does not require that the placement be the most appropriate only that it be

appropriate. As the Fourth Circuit stated, "[i]n essence an appropriate education is one which allows the child to make educational progress. *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 153 (4th Cir. 1991).

The burden of proof to demonstrate that the transfer of Student to PS2 is an inappropriate educational placement lies with the Petitioner. It must meet that burden by a preponderance of the evidence. *Schaffer v. Weast*, 126 S.Ct. 528 (2005).

I find that Petitioner has met that burden. As an initial matter, the usual deference extended to the professional opinion of the school officials who made the choice to transfer Student to PS2 should be limited. *See McKenzie v. Smith*, 771 F.2d 1527, 1535 at n.17 (D.C. Cir. 1985). ("In considering the evidence, the reviewing court must give 'due weight' to the expertise of the school officials responsible for providing the child's education. Where there is no indication that the school officials' expertise has been brought to bear on the individual needs of the handicapped child, however, the deference granted will be commensurately lower.") (citations omitted).

The reason for that is that while the school officials sought to find what in their view was an appropriate school setting for Student, there is no question that the driving impetus or the proximate cause for the transfer was not the "unique needs of the student" but rather the provisional status given to PS1 by OSSE (R. Exhs. 1, 2, 3, 4). Thus, but for the provisional designation, Student would have remained in PS1. While that provisional status existed, PS1 was

prohibited from enrolling "any additional students from the District of Columbia" (R. Exh. 5).[5]

I rule in favor of Petitioner for essentially one reason: this is Student's last year of school. She is a woman who has had to deal with one horrific event and a series of the most serious ongoing challenges. Many children and adult students, particularly disabled students, face such challenges. She has found some level of solace and comfort at PS1. And while she has not thrived at this school, the evidence points to the fact that she has made incremental progress. I found particularly informative and relevant the testimony of her former Special Education Teacher that "she might just give up" if forced to leave PS1 and that of PS1's Behavioral Manager that she has "made a lot of progress," that she "touched some success" and that while PS2 might be a good and effective school there is "not enough time" for it to cause her to advance. In short, the evidence was substantial, if not actually overwhelming, that Student has a major attachment to the staff and programs of PS1 and that it has given her some direction in her life.[6]

If this were not her last year of IDEA eligibility, it is likely that I would rule otherwise. I found particularly compelling the contentions made by Student and the just before-mentioned witnesses that a transfer at this late

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[5] While it was never satisfactorily explained to this Hearing Officer why Student would fall under this prohibition given that she was an existing current student of the school, I deem that distinction as insignificant if not completely irrelevant since it is clear that under the regulations, and as both counsel agree, a Hearing Officer has such authority to effectively override this limitation. See 5 D.C.M.R. §A 2803.10 cited in R. Exh. 5 at p. 2.

[6] It is important to note that I am not relying on the bald suggestion by Student that if not allowed to stay at PS1 she would just simply cease attending. Whether true or not, I do not believe it is an appropriate factor to consider.

hour in her education, given the extensive dimensions of her disabilities and life challenges could not be productive under any circumstances. Accordingly, I conclude that the decision to transfer Student to PS2 would have "serious potential harmful effect" and that the decision to seek her transfer failed to take into account the "unique needs of the child" (emphasis added). See 34 C.F.R. §300.116(d) and 34 C.F.R. §300.114(b)(2).

This decision is fully consistent with precedent. In *Z.W. v. Smith*, 47 IDELR 4 (4th Cir. Dec. 21, 2006), the Fourth Circuit distinguished that case from a line of cases with facts similar to those here. In distinguishing these cases, the court declared:

> The parents further argue that the ALJ should have decided that keeping Z.W. at Baltimore Lab was the proper course of action because courts have held that the IDEA favors maintaining the status quo when a child is already receiving an appropriate education. The cases cited by the parents (none of them decisions of this Court) for this proposition are inappropriate. Those cases involve a court's determination that a child should not be moved during the final year of high school, in the middle of the school year, or when the court lacks any evidence that the proposed school could actually meet the child's needs. *See Hale v. Poplar Bluffs, R-I Sch. Dist.*, 280 F. 3d 831, 833 (8th Cir. 2002); *Block v. Dist. of Columbia*, 748 F. Supp. 891, 895 (D.D.C. 1990); *Holmes v. Dist. of Columbia*, 680 F. Supp. 40, 41-42 (D.D.C. 1988). These circumstances do not apply in Z.W.

Id. at p. 5. *c.f. O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 54 (D.D.C. 2008)("In fact, the regulations require that 'consideration is given to any potential harmful effect on the child'. 34 C.F.R. § 300.116(d). If the record shows that another transition would have been detrimental to O.O's education,

then the Hearing Officer should have taken that into account in his determination whether Prospect was 'appropriate' for O.O.").

Conclusion

For the reasons set forth above, the undersigned concludes that the proposed transfer of Student to PS2 is inappropriate and that Student should remain at PS1 as she requested.

The Hearing Officer further concludes that Petitioner is the prevailing party.[7]

[7] This decision is not based in any respect on the probationary status given to PS2 by OSSE on the eve of this proceeding. Whatever the facts underlying this change in status, I did not find it germane to the central issue in the case.

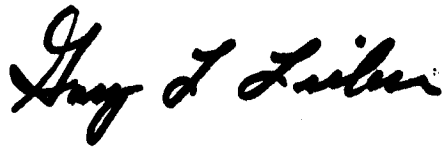
ORDER

Based upon the above Findings of Fact and Conclusions of Law, the entire record herein including the testimony and exhibits and with due consideration to the arguments of counsel, it is hereby

ORDERED

1. Student shall remain enrolled at PS1 at public expense for duration of this school year.

2. This case shall be, and is hereby closed.



Date: November 20, 2012

Gary L. Lieber
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. §1451(i)(2)(B).