

On December 27, 2011, DCPS filed its Response to the Complaint, denying the alleged failure to provide an appropriate school placement. DCPS asserts, *inter alia*, that Middle School continues to implement the Student's IEP dated June 6, 2011.

On December 29, 2011, the parties held a resolution meeting, which did not resolve the Complaint. The parties also did not agree to end the statutory 30-day resolution period early. The resolution period therefore ended January 13, 2012, and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") expires on February 27, 2012.

On January 25, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues and requested relief. At the PHC, the parties agreed to schedule the due process hearing for February 8, 2012. A Prehearing Order was issued on January 26, 2012. *See Prehearing Order, Case No. 2011-1184* (Jan. 26, 2012). The parties filed their five-day disclosures, as required, on February 1, 2012.

The Due Process Hearing was held in hearing room 2008 on February 8, 2012, at 9:30 A.M. 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-6.

Respondent's Exhibits: R-1 through R-7.

Hearing Officer Exhibit: HO-1 (IEP dated 06/06/2011).

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

Petitioner's Witnesses: (1) Parent-Petitioner; (2) Caseworker; and
(3) Admissions Director, and

Respondent's Witnesses: (1) Special Education Teacher; and (2)
School Social Worker.

Oral closing arguments and written statements of authorities were thereafter submitted by both parties and reviewed by the Hearing Officer.

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 February 27, 2012.

III. ISSUES AND REQUESTED RELIEF

The sole issue presented for determination at hearing is:

Failure to Provide Appropriate Placement — Did DCPS deny the Student a FAPE by failing to determine and provide an appropriate educational placement for the 2011-12 school year?

As noted above, Petitioner alleges that the Middle School program is not appropriate for the Student because it cannot implement her IEP and cannot provide her with the academic and behavioral supports she requires, such that she can receive educational benefit. Petitioner's counsel confirmed at the PHC that Petitioner does not challenge the content of the Student's IEP.

Petitioner requests that the Hearing Officer order DCPS to issue a notice of placement to an appropriate therapeutic school program. Petitioner's counsel confirmed at the PHC that this was the only relief requested in this matter.

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

IV. FINDINGS OF FACT

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

1. The Student is an -year old student who is a resident of the District of Columbia. Petitioner is the Student's father. *See Parent Test.; P-2.*
2. The Student has been determined to be eligible for special education and related services as a child with a disability under the IDEA. Her primary disability is Emotional Disturbance ("ED"). *See HO-1; R-3; Parent Test.*
3. The Student currently attends Middle School, her neighborhood DCPS school, where she is in the grade. *See Parent Test.; R-2; R-3.* During the 2010-11 school year, the Student attended her neighborhood DCPS elementary school ("Elementary School"). *Id.*

4. In March 2011, the Student was referred for an independent comprehensive psychological evaluation to assess her current intellectual, academic, and social-emotional functioning and to provide recommendations to assist with her educational planning. A written report of the evaluation was prepared by a licensed psychologist on March 28, 2011. *P-2*. The 03/28/2011 report noted, *inter alia*, that the Student carried previous diagnoses of Attention Deficit Hyperactivity Disorder (“ADHD”) and Mood Disorder Not Otherwise Specified; that she had been hospitalized for one week at the Psychiatric Institute of Washington (“PIW”) due to uncontrolled behaviors in March 2011; that she received several community-based mental health services and was currently prescribed medicines for her condition; and that her father had serious concerns about her behavior and social-emotional functioning. *Id.*, pp. 2, 10.
5. The March 28, 2011 report found that the Student’s general cognitive ability was in the Low Average range and that her ability to apply academic skills was within the Very Low range, as measured on the Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”) and Woodcock Johnson III Normative Update Tests of Achievement (“WJ-III”), respectively. *P-2*, pp. 10-11. The report further found that her behavior fit the diagnosis of Oppositional Defiant Disorder, and concluded that overall she met the requirements for the disability classifications of Emotional Disturbance and Other Health Impairment. *Id.*, p. 11.
6. In the March 28, 2011 report, the independent psychological evaluator recommended that the Student be placed into a highly structured, more restrictive educational environment than Elementary School, which the evaluator found allowed her a greater degree of freedom than she could handle at that time. *P-2*, p. 12, ¶ 2. The evaluator also recommended (*inter alia*) that individual school-based counseling services should be provided, that a functional behavior assessment (FBA) should be conducted, and that a behavior intervention plan should be implemented. *Id.*, ¶¶ 3-4.
7. On or about June 6, 2011, DCPS developed an IEP for the Student. *HO-1*. The 06/06/2011 IEP provides for 26.5 hours per week of specialized instruction and 240 minutes per month of behavioral support services, all in a setting outside of general education. *HO-1*, p. 6. The MDT/IEP Team agreed that an “out of general education” setting was justified as the least restrictive environment (“LRE”) and would meet the

Student's IEP goals and objectives due to her significant behavior problems. *Id.*, pp. 6-7.

The MDT also agreed that behavior support services were warranted "due to inappropriate behavior, language, and its impact [on] academic progress." *Id.*, p. 7.

8. The Student was placed into and began attending Middle School at the beginning of the 2011-12 school year.
9. On or about September 14, 2011, the Student was reviewed and accepted as an appropriate candidate for enrollment into the ED program at _____ and _____ contingent upon proper _____ documentation and authorization from DCPS. *See P-5.*
10. On or about October 17, 2011, DCPS convened a so-called "30-day review" meeting to review her progress at Middle School. At this meeting, Petitioner expressed concern regarding the Student's progress and stated that he believed Middle School did not fit the Student's needs. *R-2* (10/17/2011 meeting notes), pp. 2-3. DCPS staff reported that the Student was making some progress in class and with respect to social/emotional functioning. *Id.*, p. 3. DCPS stated that Middle School could meet Student's needs. *Id.*
11. As of October 28, 2011, at the end of the first Advisory of the 2011-12 school year, the Student received "C" or "C-" grades in all of her first-semester academic courses (Language Arts 6; Mathematics 6; and World Geography & Cultures). *See R-7* (10/28/2011 Report to Parents on Student Progress). Comments regarding "poor behavior" and failure to complete class assignments were noted by the teachers in two of these courses. *Id.*
12. Petitioner disagreed with the Student's continued placement at Middle School and filed a due process complaint on December 14, 2011.
13. On or about January 17, 2012, during the pendency of this proceeding, DCPS convened another MDT/IEP Team meeting and developed a revised IEP for the Student. *See R-3.* The 01/17/2012 IEP includes revised PLOPs and goals and continues essentially the same services in the same setting as the 06/06/2011 IEP. *Id.*, pp. 2-6.

V. DISCUSSION AND CONCLUSIONS OF LAW

For the reasons discussed below, the Hearing Officer concludes that Petitioner did not prove by a preponderance of the evidence that DCPS denied the Student a FAPE by failing to determine and provide an appropriate educational placement for the 2011-12 school year.

Under the IDEA, 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. An “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.” *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982); see also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988).²

Educational placement, in turn, must be “based on the child’s IEP.” 34 C.F.R. 300.116 (b) (2). Under the IDEA, “[d]esigning 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). Moreover, statutory law in the District of Columbia mandates that DCPS place a student with a disability in “***an appropriate special education school or***

² Judicial and hearing officer review of IEPs is “meant to be largely prospective and to focus on a child’s needs looking forward; courts thus ask whether, at the time an IEP was created, it was ‘reasonably calculated to enable the child to receive educational benefits.’” *Schaffer v. Weast*, 554 F.3d 470,477 (4th Cir. 2009) (citing *Rowley*, 458 U.S. at 207). And the issue of whether an IEP is appropriate is a question of fact for hearing. See, e.g., *S.H. v. State-Operated School Dist. of Newark*, 336 F. 3d 260, 271 (3d Cir. 2003).

program” in accordance with the IDEA. D.C. Code 38-2561.02 (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”); *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991) (“If no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school.”). In addition, DCPS must 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.

In this case, Petitioner does not challenge any goals or other content of the Student’s IEP. Petitioner alleges that the Student has been placed into the ED program at Middle School, and that this program is not appropriate for the Student because it is unable to provide her with the academic and behavioral supports she requires. *Complaint*, pp. 3-4. According to Petitioner, “[t]he school has been unable to implement effective strategies to address the student’s significant behavioral concerns” and “[a]s a direct result of DCPS’ failure to effectively address the Student’s behavioral concerns the Student’s academics have suffered.” *Id.*, p. 2 ¶ 2. Petitioner also argued at hearing that the Student requires a “more structured” and “therapeutic” environment than Middle School can feasibly provide. This claim fails for several reasons.

First, Petitioner failed to prove that Middle School cannot fulfill the requirements set forth in the Student’s IEP. The June 6, 2011 IEP (which was in effect at the time of the 2011-12 SY placement) contains goals, interventions, and strategies in the various academic and behavioral areas of concern to address the Student’s significant problems with staying focused, respecting authority, and controlling emotional outbursts. *See HO-1*, pp. 2-5 (e.g., providing multi-sensory instruction, breaks between assignments, and stress management techniques to improve effective coping skills). None of these goals, interventions, and strategies was challenged by Petitioner, and there is no evidence that DCPS cannot successfully implement them at Middle School. There also is no evidence that Middle School cannot provide all of the required services in the required settings, as set forth in either the 06/06/2011 IEP or the current 01/17/2012 IEP, or that it cannot provide all accommodations and supplemental supports therein.

Viewing the 06/06/2011 IEP “as a snapshot, not a retrospective,” *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008), moreover, the IEP established

what academic and behavioral supports the Student required at the time it was created. While the Student has continued to experience behavioral difficulties this school year,³ a “reasonably calculated” IEP does not guarantee success. The evidence also shows that the Middle School ED classroom in which the Student is placed has only six to eight students, with similar behavioral needs;⁴ and that the DCPS social worker regularly provides the Student with a form of therapeutic counseling designed to strengthen her coping skills and reduce aggressive behaviors. *See Caseworker Test.; Social Worker Test.*⁵

In addition, the evidence does not show that the Student’s academic performance has suffered this school year. As noted above, at the end of the 1st Advisory (Oct. 2011), the Student received passing grades of “C” or “C-“ in all of her first-semester academic courses (Language Arts 6; Mathematics 6; and World Geography & Cultures). *See R-7 (10/28/2011 Report to Parents on Student Progress)*. While the Student’s most recent academic achievement test scores (*e.g.*, 2.4 GE in Broad Reading and 2.9 GE in Broad Math, *P2-15*) obviously are troubling, Petitioner has not connected such scores to any inappropriate educational placement at Middle School – which did not even begin until five months after the tests were administered in March 2011. The Hearing Officer further notes that this case does not involve any claims of denial of FAPE prior to August 2011, or any claim that the Student’s IEP has not been fully implemented since that time.

³ Petitioner presented the testimony of a caseworker who has provided services to the Student under a community-based intervention program since March 2011, and who visited her at Middle School on a weekly basis since September 2011. *See Caseworker Test.* She testified that the Student has continued to experience behavioral outbursts which require significant redirection and sometimes removal from the classroom, and that the Student would benefit from a more controlled structure and more consistent implementation of behavior plans. *Id. See also Teacher Test.* (describing circumstances in which Student is sent to in-school suspension). However, the Student’s teacher testified that her behavior improved significantly during the 2d Advisory beginning in November 2011 and that she has not received any in-school suspensions in the 3d Advisory. *Id.*

⁴ This appears to compare favorably with the size and structure of the classroom at Petitioner’s proposed private placement, *See Clarke Test.*

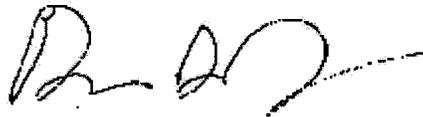
⁵ Petitioner also testified that the Student does better with 1:1 instruction, which is not available to the extent desired at Middle School. *See Pet. Test.* But the Student’s IEP does not require such instruction, and Petitioner has not challenged the content of the IEP. In any event, “the IDEA ‘does not necessarily guarantee the child [with a disability] the best available education.’ Nor does it guarantee that the child will receive the education that the parent thinks is best.” *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 51 IDELR 9 (D.D.C. 2008) (citations omitted), slip op. at 17. A student’s program must only be reasonably calculated to confer meaningful educational benefits on the child. *See Rowley, supra.*

Finally, citing 34 C.F.R. §300.156, Petitioner argues in closing that the Student's special education teacher and social worker are not qualified to provide services under the IEP, and therefore Middle School does not have staff capable of implementing the IEP. Section 300.156(a) requires the SEA to establish and maintain qualifications for special education teachers and related services personnel, including that those personnel have the content knowledge and skills to serve children with disabilities. 34 C.F.R. §300.156. And the OSSE has promulgated appropriate certification requirements for teachers in this jurisdiction. The Hearing Officer does not believe that the evidence presented at hearing establishes any failure to meet these requirements with respect to Middle School.⁶ However, even assuming *arguendo* that it had, the IDEA makes clear that a parent or student may not file a due process complaint for the failure of a particular SEA or LEA employee to be highly qualified. Complaints about staff qualifications must be filed with the SEA as a state-level complaint. *See* 34 C.F.R. §300.156 (e); 34 C.F.R. §300.18 (f); 71 Fed. Reg. 46,613 (2006).

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 his Due Process Complaint filed December 14, 2011 are hereby **DENIED**; and
2. The Complaint is **DISMISSED, With Prejudice**.



Dated: February 27, 2012

Impartial Hearing Officer

⁶ The Special Education teacher testified that she is part of D.C. Teaching Fellows which has been described as "a highly selective program that trains accomplished professionals and recent college graduates to become high-impact teachers in schools serving high-need students throughout the D.C. area." <http://dcteachingfellows.ttrack.org/Home.aspx>. The OSSE determines the eligibility and teacher certification requirements for these individuals. *Id. See also DCPS' post-hearing submission* (Feb. 8, 2012).