STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

, on behalf of,

Student,
(DOB STARS

Petitioner,

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Case No.
Bruce Ryan, Hearing Officer

Decided: June 22, 2009

2009 JUN 23 PM 12:08
OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed on April 17, 2009, pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.* The case concerns a year old student " or the "Student") who resides in the District of Columbia and attends the School a private school in Northern Virginia. Petitioner was represented by Margaret Kohn, Esq., and Respondent District of Columbia Public Schools ("DCPS") was represented by Daniel McCall, Esq., Assistant Attorney General for the District of Columbia.

The complaint alleges that DCPS has denied the Student a free appropriate public education ("FAPE") under IDEA by failing to offer the Student a FAPE for SY 2008-09. Specifically, Petitioner claims that (a) the individualized educational program ("IEP") developed for the Student on or about October 9, 2008, was not appropriate to meet his needs; and (b) DCPS' proposed placement for the Student, implementing an IEP for a combination special and general education program at School was not appropriate. Petitioner requests reimbursement for the costs of tuition and related services, including transportation, for the Student at for SY 2008-09.[1]

On April 21, 2009, DCPS agreed to waive the resolution session and requested that this case proceed to a due process hearing on the merits. DCPS filed a response, notice of insufficiency, and motion to dismiss on May 1, 2009. The response asserted, *inter alia,* that: (a)

---

[1] The complaint also sought an order requiring DCPS to place and fund the Student at , with related services of speech/language therapy ("SLT") and occupational therapy ("OT") and transportation, for the remainder of SY 2008-09. This request now appears moot, since the school year has already been completed as of the date of this HOD.

on 10/9/08, DCPS provided the Student an initial eligibility, initial IEP and placement which would provide the Student with FAPE; (b) the proposed placement is appropriate and in the least restrictive environment ("LRE"), and the proposed location of can implement the IEP; and (c) reimbursement of Petitioner's unilateral placement of the Student at should be denied pursuant to 20 U.S.C. §1412(a)(10)(C), 34 C.F.R. §300.148(d), and applicable case law.

Prehearing Conferences were held on May 1 and May 11, 2009, in order to clarify the issues, address DCPS' notice and motion, and discuss other pre-hearing procedural matters. The Hearing Officer ruled that the due process complaint was legally sufficient under 34 C.F.R. §300.508. Five-day disclosures were filed by both parties by May 12, 2009, and DCPS filed a supplemental disclosure statement on May 26, 2009. The parent elected for the hearing to be closed.

The multi-day Due Process Hearing commenced on May 19, 2009. Hearing sessions were held on May 19, 20, 21, 28, and 29, and on June 1 and 8, 2009. During the hearing, a total of 48 documentary exhibits submitted by Petitioner and 10 documentary exhibits submitted by DCPS were admitted into evidence.[2] Petitioner presented the following witnesses: Ms.Anna Kyriakoudis (parent-Petitioner); Dr. Patricia Papero (Neuropsychologist); Ms. Suzanne Blattner (Educational Consultant); (Primary Grades Administrator, and (Academic Supervisor, DCPS presented the following witnesses: (DCPS School Psychologist); Ms. Tawana Hinton (speech/language provider); Mr. Winfield White (occupational therapist); Ms. Erica Joyner (Case Manager); (Special Education Coordinator, and (School Nurse,

Petitioner filed a written Closing Argument and Proposed Findings of Fact on June 12, 2009, and DCPS filed its Post-hearing Brief and Motion to Dismiss one business day later on June 15, 2009.[3]

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*, Section 1003.

---

[2] Petitioner's proposed exhibits were identified as -1" through -52." -4 and 36 were skipped entries with no corresponding exhibits; and exhibits 5 and 8 were not admitted. -6, 7, 10 through 19, 37 through 39, and 40 through 45 were admitted over DCPS' objections. All other exhibits were admitted without objection.

[3] On June 12, DCPS requested an extension of time to submit its written closing. Petitioner opposed any extension of time and, in particular, an open-ended extension for submission of the DCPS closing. Petitioner argued that DCPS would have the benefit of reviewing the parent's closing before submission of the DCPS closing and that this would not be even handed. *See* email correspondence from Margaret A. Kohn, Esq. (June 12, 2009, 4:46 PM). The Hearing Officer grants the one-day extension of time for submission of the DCPS post-hearing brief. Having reviewed the submission, it appears that Petitioner would not be prejudiced by its consideration as the DCPS brief primarily reasserted prior arguments contained in its motion to dismiss and does not unfairly respond to Petitioner's closing. Moreover, if closing statements had been submitted orally at the close of the hearing, DCPS' closing would ordinarily follow Petitioner's closing.

II. ISSUE(S) AND REQUESTED RELIEF

As alleged in the Due Process Complaint and summarized at the outset of the Due Process Hearing, the following issues and requested relief were presented for determination:

1.) ***Has DCPS Offered the Student a FAPE for SY 2008-09?*** — Whether DCPS failed to provide a FAPE has two components:

(A) ***Appropriateness of IEP*** — Is the IEP developed for the Student on October 9, 2008 appropriate to meet his special education needs?

(B) ***Appropriateness of Placement*** – Is the placement proposed for the Student on October 9, 2008, *i.e.,* implementation of an IEP for a combination special and general education program at appropriate for SY 2008-09?

2.) ***Is DCPS Required to Reimburse the Parents for the Costs of Tuition and Related Services, including Transportation, for the Student at for SY 2008-09?***

As part of the request for private placement reimbursement, the complaint requested findings on related or subsidiary issues, including: (1) that the IEP is not reasonably calculated to provide the Student with a FAPE for SY 2008-09; (2) that the placement offered for 12.5 hours of specialized instruction and one hour each of OT and SLT is inappropriate because the Student requires a more intensive special education program than what is available at (3) that the Student has received educational benefit at and (4) that has been an appropriate program for the Student for SY 2008-09. These matters are addressed as appropriate in the Findings and Discussion/Conclusions below.

DCPS' motions to dismiss also present several threshold legal issues and defenses requiring resolution prior to addressing the above hearing issues. DCPS asserts (1) a defense of waiver pursuant to 34 C.F.R. §300.300(b) based on Petitioner's refusal to consent to the initial provision of special education and related services to the Student, (2) the argument that 20 U.S.C. §1412(a)(10)(C)(ii) bars reimbursement because the Student had not previously received special education and related services under the authority of a public agency; and (3) the argument that 20 U.S.C. §1412(a)(10)(C)(iii) limits reimbursement because the parents did not inform DCPS that they were rejecting DCPS' proposed placement prior to removal of the Student from public school. These threshold legal issues are addressed in the Discussion in Part IV. A. *infra.*

III. FINDINGS OF FACT

1. The Student is an -year old resident of the District of Columbia whose date of birth is His DCPS neighborhood/home school is

2. The Student currently attends School a private school in Northern Virginia. The Student was enrolled by his parents at for SY 2008-09, and his parents are paying for tuition and related services there. *See Parent Testimony; -1.*

3. The Student has been determined by DCPS to be eligible for special education and related services, with a disability classification of Learning Disabled ("LD"). His current IEP, dated October 9, 2008, provides for 12.5 hours of specialized instruction and one hour each of OT and SLT services in a combination general education/resource setting. *See 24.*

4. The Student has never attended a public school; he has never received special education services from a public agency; and before summer 2008 he had never been evaluated by a public agency for special education eligibility. *See Parent Testimony; Parent's Proposed Findings of Fact,* p. 2.

5. Prior to attending , the Student attended School, an independent day school in the District of Columbia, for two years of Pre-K, Kindergarten and most of 1st grade, concluding in approximately April 2008. While attending struggled with academics as well as paying attention and following directions, in all or most instructional settings in Kindergarten and First Grade. He had great difficulty with handwriting, mastery of numbers and letters, and sound symbol relationships, and had both an expressive and a receptive language disorder. *See . -28; . 37; . -38; Spencer Testimony, Blattner Testimony.* [4]

6. While at received various accommodations and additional services beyond the normal general education curriculum. For example, he received OT and speech/ language therapy in Kindergarten and First Grade, along with some individualized academic instruction. *See Spencer Testimony; Parent Testimony; Blattner Testimony; . -28; 37.* Additionally, he received phonological training at the Lab School of Washington for three summers. *Parent Testimony; . -17.* Most of this information was provided to DCPS Center personnel and the IEP team by and/or Petitioner. *See 28; Parent Testimony.*

7. In April 2008, parents withdrew him from due to his extreme unhappiness at school, low self-esteem, and related difficulties. He was then home-schooled by his parents for the remainder of SY 2007-08. During that time, he continued to receive OT and speech/language therapy services through the end of SY 2007-08. Additionally, he attended a specialized intensive reading program taught by the speech language pathologist at Lab School during the summer of 2008, as he had previously during the summers of 2007 and 2006. *Parent Testimony; 28, . -17.*

8. On or about June 10, 2008, Petitioner registered the Student as a non-attending student and requested special education services for him from the D.C. Center. The parent received a copy of the parent rights manual, and she was asked to provide DCPS with current evaluations and other information. A student evaluation plan ("SEP") was prepared; DCPS

---

[4] also has a history of a seizure disorder and has been treated by two neurologists, Dr. Schuelein of Georgetown University and Dr. Rubenstein of Johns Hopkins. seizures were controlled with medication after a series of trials of different medications. At the time of the 6/10/08 referral to DCPS, had not had seizures for over two years and was in the process of being weaned from seizure medications. *See DCPS-1 (MDT meeting notes).* He had a recurrence of seizures in late June-July 2008, which required hospitalization and the resumption of medication. *See Parent Testimony; Papero Testimony;* 10; -18; -20; . -25; 23. Near the end of 2008, after the IEP had been developed, neurological treatment moved to Dr. Rubenstein, who increased his medication in March 2009 and again in May 2009. *JM-19; Parent Testimony.*

proposed to review existing evaluations, determine whether any additional testing was needed, and conduct an observation. *See Parent Testimony; . 1; -9; . 29-. -32.*

9. In late June or early July 2008, Petitioner delivered the requested information and documentation to the DCPS Center and followed up with staff there about her case. *Parent Testimony; -1.* The documents provided by Petitioner included the Lab School's 2006 report of Speech Language Pathologist Amanda Smith and the reports of Neuropyschologist Dr. Papero. *See -23,* at 1-3. Over the course of summer 2008 and into the fall, Petitioner delivered additional documents to the Center staff as they became available, including the private-religious school student referral for special education services with Kindergarten progress report for June and two report cards from First Grade *38, -39),* an OT progress report *17*), and a letter from neurologist Dr. Schuelein *18*). *See Parent Testimony* (5/20/09).

10. While DCPS is allowed 120 days from the date of referral to assess or evaluate a student who may have a disability and may require special education services, D.C. Code § 38-2561.02 (a), Petitioner tried to move the eligibility process forward in the hope of having a determination before the 2008-09 school year began. *See -29, -30.* In mid-July 2008, Petitioner visited and met with the principal to discuss needs and the available services. She also met with the school nurse. Due to summer vacations, she was unable to meet the special education teachers. *1; Parent Testimony.* However, Petitioner told the principal that she had heard "wonderful things" about the school and was considering enrolling there. *Parent Testimony.*

11. In early August 2008, the DCPS school psychologist had conversations with Petitioner about further testing. After reviewed the evaluations by Dr. Papero, he determined that he would not need to conduct additional testing, but would need to observe in a classroom setting. Observations in the summer academic and sports activities in which was involved were not acceptable to as an alternative to a classroom observation, and thus said he would need to observe after school started. Petitioner informed that she was still in the process of deciding where should attend school in fall 2008, but that he would not be returning to . *See . -33; Parent Testimony; Testimony2.*

12. At the same time, Petitioner was busy exploring a possible private placement at She first learned about from Ms. Blattner in April 2008 and then applied to the school in June 2008, shortly after contacting the DCPS Center. *Parent Testimony; -46.* was accepted into at the end of July, and Petitioner paid a deposit to to hold his space by the beginning of August 2008. Petitioner then devoted significant time to working out an acceptable transportation plan to enable to attend During this period of time, Petitioner did not tell or anyone else at DCPS about the steps she had taken with *See Parent Testimony.*

13. The parents made the decision in mid-August to send to after learning that the evaluation and eligibility process with DCPS would likely not be completed before the start of the school year. The parents were concerned that would receive no special education services or related services when SY 2008-09 started because DCPS had not yet determined eligibility. Petitioner did not inform DCPS that she intended to enroll the Student at prior to doing so. *Parent Testimony.*

14. In early September 2008, the DCPS psychologist conducted a classroom observation of the Student and completed his review of the independent psychological evaluation submitted by Petitioner. *DCPS-2; Testimony.*

15. On or about October 9, 2008, DCPS found the Student eligible for special education and related services. This eligibility determination was timely, as it was completed within approximately 120 days of the date of referral of June 10, 2008. The MDT determined that met the criteria to qualify as a student with a learning disability, and that he would also require speech/language and OT services. *25.* DCPS then moved on to develop an IEP with goals for reading, math, and written language, in addition to speech/language therapy and OT. *-24; -25.* As noted above, the IEP provides for 12.5 hours of specialized instruction and one hour each of OT and SLT services in a combination general education/resource setting. *24.*

15. At the October 9, 2008 MDT meetings, Petitioner objected to having the services implemented at Petitioner also informed the MDT that she would go visit again to find out more about the program there, but that in the interim would remain at *See -1; Parent Testimony.*

16. Petitioner returned to visit in mid-December 2008, over two months after the 10/9/08 IEP meeting. At that time, she met with the Special Education Coordinator was given a tour of the school, and had the opportunity to ask questions concerning the special education program and services available at *Parent Testimony.* SEC told Petitioner that could provide the services covered in the 10/9/08 IEP, and that it would also conduct a normal 30-day review of the IEP after began there. *Testimony.* has four certified special education teachers on staff and is capable of implementing all elements of the IEP, including pull-out instruction in reading, math, and written expression. *Id.*

17. At the conclusion of the meeting, Petitioner declined to complete an enrollment packet for to attend and said she was still trying to evaluate whether to remove from *Testimony.* Petitioner did not follow up with the MDT/IEP team concerning the program at She did not provide any written comments, report or other response to the team or to anyone else at DCPS regarding her visit. *Parent Testimony* (cross examination).

18. The IEP was reasonably calculated to confer meaningful educational benefits on the Student, and thus was appropriate under the IDEA as of October 9, 2008. The IEP incorporates goals and objectives that are appropriate to the Student's learning disability and adequate to address his needs, and it provides an appropriate number of hours of specialized instruction and related services.

19. The proposed placement/location of a combination general education/resource setting at was reasonably calculated to confer meaningful educational benefits on the Student, and thus was appropriate under the IDEA as of October 9, 2008.

20. The parent's private placement at is appropriate to the child's needs and otherwise proper under the Act. All of the students enrolled at have experienced mild to moderate learning difficulties comparable to is accredited by the Virginia Association of Independent Specialized Education Facilities (VAISEF), licensed by the Virginia State Board of Education, and has been approved by the DC Board of Education. *-40 at 14;*

Autry testimony; Blattner Testimony. This certification satisfies the Department of Education for the Commonwealth of Virginia that is suitable for students eligible for special education as a result of learning disabilities.[5] has received educational benefit from the year at and his parents have paid for all of his tuition and costs at for SY 2008-09, including the costs of additional speech/language, OT and transportation services. *See Parent Testimony; Blattner Testimony; Autry Testimony; -41* through . *-45;* . *-46* through *-52.*

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Analysis of DCPS' Motion to Dismiss/Legal Defenses

Parental Consent/Waiver

1. DCPS asserts a defense of waiver pursuant to 34 C.F.R. Section 300.300(b)(4), based on the parents' refusal to provide initial consent for the provision of special education and related services on October 9, 2008. DCPS cites two recent HODs by other hearing officers in the District dismissing complaints on this basis and argues that this Hearing Officer should apply the same analysis. The Hearing Officer's own research also revealed a district court decision in Alabama that appears to lend some support to DCPS' argument. *See Colbert County Board of Education v. B.R.T.,* 51 IDELR 16 (N.D. Ala. 2008). There apparently are no controlling court decisions on this issue within the District of Columbia Circuit.

2. The Department of Education regulations cited by DCPS track the statutory language under IDEA. Specifically, 20 U.S.C. §1414(a)(1)(D)(ii)(III)(aa) provides as follows:

> "If the parent of such child [with a disability] refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent –
>
> (aa) the local educational agency *shall not be considered to be in violation of the requirement to make available a free appropriate public education* to the child for the failure to provide such child with the special education and related services *for which the local educational agency requests such consent....*" (emphasis added).

DCPS contends that the plain language of this provision makes parental consent to initial services/placement a prerequisite to bringing any due process complaint against an LEA, including a complaint challenging the appropriateness of the proposed program or offer. The Hearing Officer disagrees.

---

[5] is a small school for children ages 5 through 14 located in Annandale, Virginia. is in a class with nine other 2d or 3d grade students, all of whom have learning issues with reading and writing and many of whom have learning issues in math, and is taught by two teachers who are both certified in special education. *See 40 at 11; Autry Testimony*. The school offers OT and speech/language services on-site during the school day when needed by students, at a cost in addition to the school's standard tuition and fees. *-46*. One other student is funded at by DCPS this school year. *Autry Testimony*

3. DCPS' argument ignores the last clause of the provision, which indicates that it is intended to relieve public agencies of any potential liabilities only for claims that it failed to provide the services "for which the [LEA] requests such consent." In other words, the parents could not sue DCPS in this case claiming that it denied . a FAPE by failing to provide services under the 10/9/08 IEP at when it refused to consent to those very services. But the statutory language does not purport to preclude a challenge to the adequacy of the offer itself.

4. The legislative history is not very instructive, but appears to support this more sensible construction. *See S. Rpt. 108-185*, 108th Cong., 1st Sess. (Nov. 3, 2003) ("In this situation, Section 614(a)(1)(D)(iii) states that a local educational agency does not violate the FAPE requirement by failing to provide *the special education and related services refused by the parent on behalf of the child.*") (emphasis added). *See also* M. Weber, *Special Education Law and Litigation Treatise* §6.1, at 6:4 (cited by DCPS): "When the parent fails or refuses to consent to the provision of special education and related services, the school district is not to be considered in violation of the requirement to provide free, appropriate public education to the child *on the basis of failing to provide the unconsented-to services....*" (emphasis added).

5. The Hearing Officer also agrees with Petitioner that DCPS' broader interpretation of Section 300.300(b)(4) should not be favored, as it appears inconsistent with (a) the paramount importance attached to the procedural due process rights incorporated into the IDEA, (b) the requirements for LEAs to provide full explanations of procedural safeguards in an easily understandable manner, (c) the general remedial purposes of the IDEA, and (d) the equitable powers of hearing officers and courts to afford remedies that will ensure that every child with a disability requiring special education is provided a FAPE. *See Parent's Closing Argument,* pp. 6-9. [6]

Statutory Bar or Limit on Reimbursement

6. DCPS next argues that 20 U.S.C. §1412(a)(10)(C) applies to this case and operates to bar reimbursement for the parental placement. DCPS asserts that "the reimbursement provisions of the IDEIA are strictly limited to the '...parents of a child with a disability, who previously received special education and related services under the authority of a public agency...'" *DCPS' Post Hearing Brief and Motion to Dismiss,* pp. 4-5 (*quoting* 20 U.S.C. § 1412(a)(10)(C)(ii)). DCPS also asserts the corollary argument that §1412(a)(10)(C)(iii) limits reimbursement in this matter because Petitioner failed to provide notice to DCPS in advance of removal of the Student. *Id.,* p. 4.

7. This precise issue is currently pending before the Supreme Court in *Forest Grove School District v. T.A.,* 523 F. 3d 1078 (9th Cir. 2008), *cert granted,* No. 08-305 (Jan. 16, 2009), *oral argument conducted,* April 28, 2009. The question on which the Court granted certiorari is: "Whether the [IDEA] permits a tuition reimbursement award against a school district and in favor of parents who unilaterally place their child in private school, where the child had not

[6] The Hearing Officer does not find the reasoning of the *Colbert County* case persuasive. The court did not quote the full text of 20 U.S.C. §1414(a)(1)(D)(ii)(III)(aa) in concluding that the "express language" precluded the school board from being held liable for not providing a FAPE, and it appeared to focus primarily on correcting the ALJ's erroneous analysis of the mediation and due process provisions. *See* slip op. at pp. 9-10. In addition, an independent jurisdictional ground for reversing the ALJ's decision was the parties' failure to waive or conduct a resolution meeting. *Id.* at 11-12. DCPS does not even cite *Colbert County* for support in its post-hearing brief.

previously received special education and related services under the authority of a public agency." If the Court answers that question in the negative, then the complaint in this case would likely need to be dismissed. However, due to the statutory timeline requirements of IDEA, the Hearing Officer cannot await the Court's ruling. [7] The D.C. Circuit has not decided this issue, nor has the U.S. District Court for D.C., to the knowledge of the Hearing Officer. There is a split of authority in the other circuits. *Compare Frank G. v. Board of Educ.*, 459 F. 3d 356 (2d Cir. 2006), *cert denied,* 128 S. Ct. 436 (2007); *M.M. v. School Board of Miami-Dade Cty., Fla.*, 437 F. 3d 1085, 1099 (11th Cir. 2006) (*per curiam)*; and *Forest Grove, supra, with Greenland Sch. Dist. v. Amy N.*, 40 IDELR 203 (1st Cir. 2004).

8. The Hearing Officer agrees with the well-reasoned analysis of the 2d Circuit's decision in *Frank G.* and the 9th Circuit's decision in *Forest Grove*, and believes that reasoning would more likely be accepted by the D.C. Circuit and federal district courts in this Circuit. For the reasons stated in those decisions, the Hearing Officer concludes that the reference in 20 U.S.C. §1412 (a) (10) (C)(ii) to students "who previously received special education and related services" does not create a categorical bar to recovery of private school reimbursement for all other students. Reimbursement is still available as a remedy under general principles of equity as "appropriate" relief pursuant to 20 U.S.C. §1415 (i)(2)(C), as it was before the 1997 amendments adding §1412(a)(10)(C)(ii). *See Burlington,* 471 U.S. at 370; *Carter,* 510 U.S. 7, 12-13 (1993). This conclusion is supported by the text of the statute, traditional canons of statutory construction, and the general remedial purpose underlying the IDEA and the 1997 amendments. It is also consistent with regulatory interpretations by the U.S. Department of Education. *See Frank G.,* 459 F. 3d at 367-76; *Forest Grove,* 523 F. 3d 1078, at Discussion, Part A; *Parent's Closing Argument* (pp. 3-6).

9. Moreover, for students like who have never received special education and related services under the authority of a public agency, the provisions of §1412(a)(10)(C) "simply do not apply." *Forest Grove,* 523 F. 3d 1078. Thus, the requirements of that section – including the specific prior notice requirements of 20 U.S.C. §1412 (a) (10) (C)(iii) and 34 C.F.R. §300.148(d)(1)(ii) – do not operate to limit the parent's reimbursement remedy. However, as discussed below, courts and hearing officers may consider similar factors in deciding reimbursement under §1415 and general principles of equity.

[7] ***UPDATE:*** As this HOD was being issued today, the Hearing Officer has learned that the Supreme Court has just issued its decision in *Forest Grove,* affirming the 9th Circuit's decision. *Forest Grove School Dist. v. T.A.*, No. 08-305, 557 U.S. ___ (June 22, 2009). Because this HOD is required to be issued today, the Hearing Officer has not had the opportunity to review the Court's decision in any detail and/or incorporate its reasoning into the HOD, but the Hearing Officer notes that his ruling on this issue is consistent with the Court's result.

B. Analysis of Petitioner's Issues/Requested Relief

10. The burden of proof in a special education due process hearing is on the party seeking relief. [8] In this case, "[t]he task of the parent is to demonstrate that the specific IEP, program and placement proposed by DCPS for is not appropriate to provide with FAPE." *Parent's Closing Argument*, at 10. For the reasons discussed below, the Hearing Officer concludes that the parent has **NOT** carried this burden of proof, and thus Petitioner is not entitled to the relief requested in the complaint.

(1) Has DCPS Offered the Student a FAPE for SY 2008-09?

11. "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); *J.G. v. Abington School,* 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit." The issue of whether an IEP is appropriate is a question of fact. *See, e.g., S.H. v. State-Operated School Dist. of Newark,* 336 F. 3d 260, 271 (3d Cir. 2003). Whether an IEP is appropriate "can only be determined as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Bd. of Educ.,* 993 F. 2d 1031, 1040 (3d Cir. 1993).

12. Petitioner alleges that both the 10/9/08 IEP and the proposed placement at Key ES were inappropriate, *i.e.,* they were not reasonably calculated to confer educational benefits. Petitioner primarily argues that the program is inappropriate because (a) the IEP incorrectly states that the Student is age and in the grade; [9] (b) 12.5 hours of specialized instruction is insufficient to address academic needs; and (c) placement at would not provide the supports, small classes, low student/teacher ratio, and other consistent environment that needs to succeed. *See Parent's Closing Argument,* at 10-11. Petitioner argues that the "IEP was not appropriate because required a full-time special education program, which would require at least 27.5 hours of specialized instruction and related services." *Parent's Proposed Findings of Fact,* p. 7. Given the requirement that courts (and hearing officers) must "afford some deference to the expertise of ... school officials responsible for the child's education," *Lyons v. Smith,* 829 F. Supp. 414, 418 (D.D.C. 1993), the Hearing Officer finds insufficient evidentiary support for these claims.

---

[8] DCMR 5-3030.3; *see also Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3. The normal standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia,* 556 F. Supp. 2d 11 (D.D.C. 2008); *see also* 20 U.S.C. §1415(i)(2)(C)(iii).

[9] The Hearing Officer concludes that, in the context of the whole document and proposed program offered by DCPS, this and other procedural errors in the IEP were minor; they did not impede the Student's right to a FAPE or cause any deprivation of educational benefit. *See* 34 C.F.R. §300.513(a).

13. Here, the IEP team convened and developed an IEP and proposed placement that satisfies the LEA's obligation to provide a program reasonably calculated to confer meaningful educational benefit. DCPS utilized all evaluations the parents provided, developed IEP goals and objectives in a coordinated and collaborative manner, and wrote an IEP that contains the required components. The placement was then based upon the requirements of the IEP, and a site was selected closest to home that can implement the IEP and be consistent with the LRE. The DCPS witnesses all testified that can implement the IEP as written and can provide the Student with educational benefit. *See generally DCPS Post Hearing Brief,* at 4-7; *SEC Testimony; -24; -25.*

14. Petitioner devoted considerable time during the hearing to presenting evidence of the Student's seizure disorder, including testimony by a highly qualified expert in the neuropsychology of epilepsy (Dr. Papero), who examined . in March 2006 and again in December 2007, and then met with him briefly in April 2009. *See Papero Testimony; Parent's Proposed Findings of Fact,* pp. 2-6. However, the Hearing Officer agrees with DCPS that this issue was largely a "red herring" (*DCPS' Post Hearing Brief,* at 7), in that, *inter alia:*

(a) Although Petitioner now claims that the Student's "seizures and/or the medication to control them impacts his education" (*Parent's Proposed Findings of Fact,* p. 3), Petitioner never claimed in the IEP process or in her complaint that the Student's disability classification should include this condition; and the IEP was only required to address educational needs that result from the child's disability (*see, e.g.,* 34 C.F.R. 300.320);

(b) The information provided to the IEP team at the time of the 10/9/08 eligibility meeting indicated that the condition was generally under the control of medication, and subsequent information on problems during SY 2008-09 are not relevant to show the inappropriateness of the IEP at the time it was written;

(c) There is no evidence that lacks the capacity through its school health services and school nurse services (*see* 34 CFR 300.34(c)(13)) to address any medical concerns or emergencies that may arise out of seizure disorder during the school day had he attended school there, *see DCPS-10; Galiardi Testimony*; and

(d) IDEA generally does not require DCPS to provide medical services unless they are for diagnostic or evaluation purposes, *see, e.g., Irving Independent School Dist. v.Tatro,* 468 U.S. 883 (1984); 34 C.F.R. 300.34(a). .

15. Finally, as the U.S. District Court for the District of Columbia recently explained in another unilateral placement case:

> "The IDEA 'guarantees a free appropriate education, [but] it does not ...provide that this education will be designed according to the parent's desires.' *Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002) (citing *Rowley*, 458 U.S. at 207). 'Thus, proof that loving parents can craft a better program than the state offers does not, standing alone, entitle them to prevail under the Act.' *Kerkam v. Mckenzie*, 862 F. 2d 884, 887 (D.C. Cir. 1988).

> [The private school] may well be a better environment for but DCPS has made available a free appropriate public education to this child, and, in such circumstances, DCPS cannot be required to pay for the education his parents would prefer."

Anderson v. District of Columbia, 109 LRP 18615 (D.D.C. 2009), slip op. at pp. 7-8. The same reasoning applies in this case. While Oakwood may well be a better environment for DCPS has made available a FAPE to the Student in the form of the 10/9/08 IEP and proposed placement to In such circumstances, DCPS cannot be required to pay for the private education his parents would prefer.

(2) Is DCPS Required to Reimburse the Parents for the Costs of Tuition and Related Services, including Transportation, for the Student at for SY 2008-09?

16. If an LEA fails in its obligation to provide a FAPE to a disabled child, the parents may enroll the child in a private school and seek retroactive reimbursement for the cost of the private school. *School Comm. of Burlington v. Department of Education,* 471 U.S. 359, 369-70 (1985). In determining whether parents are entitled to reimbursement, the Supreme Court has established a basic two-pronged test: (1) was the IEP proposed by the school district inappropriate; and (2) was the private placement appropriate to the child's needs? *See Burlington,* 471 U.S. at 470; *see also Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 12-13 (1993) (parents "are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the Act."); *id.* at 15 (emphasizing that parents who "unilaterally change their child's placement during the pendency of review proceedings, without consent of state or local officials, do so at their own financial risk"); *Roark v. District of Columbia,* 460 F. Supp. 2d 32 (D.D.C. 2006).

17. As discussed above, Petitioner has not demonstrated that the October 9, 2008 IEP and public placement proposed by DCPS were inappropriate. Since DCPS' proposed placement at afforded educational benefit and the IEP for SY 2008-09 was appropriate, DCPS has satisfied its obligation to offer a FAPE under the IDEA. *See Roark,* 460 F. Supp. 2d at 44. Accordingly, Petitioner is not entitled to the remedy of retroactive reimbursement for the private placement, even if that private placement is otherwise proper under the Act. *See, e.g., Anderson v. District of Columbia,* 109 LRP 18615 (D.D.C. 2009) ("If the public school placement was appropriate, a disabled child's parents are not entitled to reimbursement and there is no need to analyze the second factor."); *Schoenbach v. District of Columbia,* 309 F. Supp. 2d 71, 77 (D.D.C. 2004) (same).

18. Moreover, because the authority to grant reimbursement is discretionary, "equitable considerations [relating to the reasonableness of the action taken by the parents] are relevant in fashioning relief." *Burlington,* 471 U.S. at 374; *Frank G. v. Board of Education of Hyde Park,* 459 F. 3d 356, 363-64 (2d Cir. 2006); *see* 20 U.S.C. §1415(i)(2)(C)(iii) (authorizing "such relief as the court determines is appropriate"). *Cf.* 34 C.F.R. §300.148 (d) (3) (reimbursement under §1412 may be reduced or denied upon a "finding of unreasonableness with respect to actions taken by the parents"). "In considering the equities, courts should generally presume that public-school officials are properly performing their obligations under

IDEA." *Forest Grove School Dist. v. T.A.*, No. 08-305, 557 U.S. ___ (June 22, 2009), slip op. at 16 (citing *Schaffer v. Weast,* 546 U.S. 49, 62-63 (2005 (Stevens, J., concurring). [10]

19. In this case, even assuming *arguendo* that DCPS were found to have failed to provide a FAPE, the Hearing Officer would conclude that the relevant factors and equities do not support a grant of the requested reimbursement. As noted in the Findings, the parents in this case chose to immediately enroll their child in private school during the pendency of the initial eligibility review process, without providing DCPS notice of the intended private placement and without completing the 120-day process provided under D.C. law. They then waited over two months to visit the proposed DCPS placement and over six months to file a due process complaint alleging that the IEP and placement were inappropriate. In proceeding in this fashion, they acted "at their own financial risk." *Carter,* 510 U.S. at 15 (quoting *Burlington,* 471 U.S. at 373-74); *see also Forest Grove,* 557 U.S. __ (June 22, 2009), slip op. at 16.

V. ORDER

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

1. DCPS' Motion to Dismiss is **DENIED;**
2. Petitioner's requests for relief in her Due Process Complaint are **DENIED;**
3. Petitioner's Due Process Complaint is **DISMISSED, With Prejudice;** and
4. This case shall be, and hereby is, **CLOSED.**

Dated: June 22, 2009

/s/

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 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).

---

[10] *See also Forest Grove School Dist. v. T.A.*, No. 08-305, 557 U.S. ___ (June 22, 2009), slip op. at 16-17 ("even then courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant – for instance, if the parents failed to give the school district adequate notice of their intent to enroll the child in private school. ....When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted."); *id.* at 11 n. 8 (notice provisions of §1412(a)(10)(C)(iii) "should not be understood to preclude courts and hearing officers from considering similar factors in other scenarios").