District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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STUDENT HEARING OFFICE

Confidential

STUDENT, through the legal guardian[1]	)	
	)	
Petitioner,	)	
	)	
v.	)	Hearing Date: November 18, 2009
	)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
	)	
Respondent.	)	
	)	

HEARING OFFICER DETERMINATION

Counsel for Petitioner:
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[1] Personal identification information is provided in Attachment A.

I. JURISDICTION

This proceeding was invoked in accordance with the rights established under the Individuals With Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; Title V of the District of Columbia ("District" or "D.C.") Municipal Regulations ("DCMR"), re-promulgated on February 19, 2003; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25.

II. SUMMARY OF DECISION

For the reasons explained below, and primarily because Respondent admitted that it cannot implement the Student's individualized educational program, this Hearing Officer finds that Petitioner prevailed on the sole issue litigated at the hearing. For this reason, this Hearing Officer will require DCPS to fund the Student's placement, with transportation, at the non-public school.

III. BACKGROUND

Petitioner is the parent of a [redacted]tudent ("Student") who attends a non-public school in the District of Columbia. Both Petitioner and the Student reside in the District of Columbia.

On September 15, 2009, Petitioner filed a Due Process Complaint Notice ("Complaint") alleging that the Respondent, District of Columbia Public Schools ("DCPS"), failed to provide the Student an appropriate educational placement and conduct audiological and assistive technology evaluations. Petitioner requests as relief an order requiring DCPS to provide a prior notice of placement ("PNOP") for the Student to attend the non-public school at DCPS expense retroactive to September 18, 2008, with transportation and ordering DCPS to fund independent audiological and assistive technology evaluations.

On September 25, 2009, Respondent filed a Response to Parent's Administrative Due Process Complaint Notice ("Response"). Respondent asserts that, at a July 8, 2009, multidisciplinary team ("MDT") meeting, Petitioner requested a back-dated PNOP to the non-public school. Petitioner asserts that and that DCPS did not accede to Petitioner's request but instead agreed to issue a PNOP to a school that the MDT would determine at a subsequent meeting to review the Student's vocational evaluation. Respondent asserts that, at the subsequent MDT meeting, held on September 3, 2009, DCPS issued a PNOP to a DCPS Senior High School ("DCPS School"), the Student's neighborhood school. Respondent further asserts that the DCPS School can implement the Student's individualized educational program ("IEP".)

Respondent asserts that Petitioner's compensatory education claim was resolved at the June 29, 2009, MDT meeting. Respondent further asserts that DCPS never agreed that the Student needed audiological or assistive technology evaluations but, on September 16, 2009, authorized Petitioner to obtain an independent audiological evaluation at DCPS expense. Respondent requested that the Hearing Officer deny Petitioner's requests for relief.

The parties engaged in a prehearing conference held by this Hearing Officer on October 6, 2009. At the prehearing conference, counsel for Petitioner represented that the sole issue Petitioner planned to pursue at the due process hearing was whether DCPS failed to provide the Student an appropriate educational placement. Counsel for Petitioner further alleged that the DCPS School is unable to implement the Student's IEP.

The due process hearing commenced on November 18, 2009. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing.

IV. RECORD

Due Process Complaint Notice, filed September 15, 2009;
DCPS Response to Parent's Administrative Due Process Complaint Notice, filed September 25, 2009;
Prehearing Conference Order, issued October 13, 2009;
Petitioner Five-Day Disclosure, identifying ten witnesses and including proposed Exhibits 1-20, filed October 14, 2009; and
DCPS Five-Day Disclosure Statement, identifying five witnesses and including proposed Exhibits 1-6, filed October 14, 2009.

V. ISSUE PRESENTED

Petitioner proceeded to hearing on the sole claim of whether DCPS failed to provide the Student an appropriate educational placement.

VI. FINDINGS OF FACT

1. The Student is a seventeen-year-old special-education student who attends a non-public, out-of-general-education school.[2] The Student has global academic deficits.[3] Across all domains, his cognitive functioning is in really low range.[4]

2. The Student is functioning at a first- to second-grade level in reading and math.[5] He cannot compute money without using paper and he just started showing progress in spelling the days of week and months of year.[6]

3. The Student should not be educated in a regular educational setting because he would not survive academically.[7] He requires a small classroom setting with one to one instruction, a low student-teacher ratio, and highly structured setting.[8]

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[2] Petitioner Exhibit 12 (July 8, 2009, IEP).
[3] Testimony of Psychological Expert.
[4] *Id.*
[5] Testimony of Non-Public School Principal/Special Education Teacher; Psychological Expert.
[6] *Id.*

4. When the Student was enrolled in the DCPS School prior to his enrollment at the non-public school, his attendance was sporadic.[9] The Student felt intimidated by the DCPS School, in part due to the number of students at the DCPS School.[10] The Student was bullied by other students at the DCPS School.[11] At some point, he stopped attending the DCPS School.[12]

5. The Student's IEP requires that he receive 27.5 hours per week of specialized instruction and related services in an out-of-general education environment.[13] The IEP provides that he will receive 24.5 hours of specialized instruction, one hour of counseling, and two hours of speech-language therapy per week.[14]

6. The Student's IEP was developed at a July 8, 2009, MDT meeting that included the Non-Public School Principal/Special Education Teacher, Petitioner, an educational advocate, related service providers, and an official of the non-public school.[15] Also present at the meeting was a DCPS Compliance Case Manager.[16] The MDT relied on the Student's psychological and speech-language evaluations in developing the goals and hours of specialized instruction on the Student's July 8, 2009, IEP.[17] The MDT agreed that the student required a full-time IEP that provides the Student specialized instruction, related, vocational and transition services outside of the general education setting.[18] The Student's IEP requires that the Student spends his entire school day, including lunch, outside the general education environment.[19]

7. At the July 8, 2009, meeting, the MDT agreed that the non-public school would be the most appropriate educational placement for the Student because, during the past school year at the non-public school, the Student had progressed academically and socially.[20] The team attributed the Student's progress to the small classroom setting offered at the non-public school and the Student's consistent attendance.[21] The non-public school can implement the Student's IEP.[22] The DCPS Compliance Case Manager did not object to the contents of the July 8, 2009, IEP.[23]

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[7] *Id.*
[8] *Id.*
[9] Testimony of Non-Public School Principal/Special Education Teacher.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Petitioner Exhibit 12.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Testimony of DCPS Compliance Case Manager.
[18] *Id.*
[19] Testimony of DCPS School SEC.
[20] Testimony of Non-Public School Principal/Special Education Teacher.
[21] *Id.*
[22] *Id.*; testimony of DCPS Compliance Case Manager.
[23] Testimony of DCPS Compliance Case Manager.

8. At a subsequent MDT meeting on September 3, 2009, the DCPS Compliance Case Manager proposed placing the Student at the DCPS School.[24] The Non-Public School Principal/Special Education Teacher objected to this placement because she believed the classrooms at the DCPS School contained too many students for the Student to progress academically.[25] The Non-Public School Principal/Special Education Teacher also objected to the placement at the non-public school because the DCPS school cannot provide the vocational program required by the Student's IEP.[26]

9. The non-public school services only special education students from ages sixteen to twenty three years old.[27] The non-public school offers life skills classes and vocational programs that include automotive, cosmetology, and barbering classes.[28] Each of the vocational classes is co-taught by general education and special education teachers.[29]

10. The Student is interested in pursuing a career in the automotive industry.[30] At the non-public school, the Student is enrolled in an automotive class with eight other special education students.[31] This class includes automotive theory and hands-on experience.[32] The Non-Public School Principal/Special Education Teacher co-teaches the automotive class with an ASE certified automotive mechanic.[33]

11. The DCPS School has a cluster program that is self-contained and separate from general education students.[34] This program has a four-to-one student- adult ratio.[35] The program has one teacher and two aides.[36] Students have four classes a day: vocational, transition, math and reading.[37]

12. At the DCPS School, the only interactions students in the cluster program have with general education students are during lunch and gym.[38] The DCPS School does not provide self-contained special education lunch, art, or gym.[39] The vocational automotive class at the

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[24] Testimony of DCPS Compliance Case Manager, Non-Public School Principal/Special Education Teacher.
[25] Testimony of Non-Public School Principal/Special Education Teacher.
[26] *Id.*
[27] Testimony of Non-Public School Principal/Special Education Teacher.
[28] *Id.*
[29] *Id.*
[30] Testimony of Non-Public School Principal/Special Education Teacher.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Testimony of DCPS School SEC.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*

DCPS School is an inclusion class.[40] The DCPS School does not offer an out-of-general-education vocational class.[41]

VII. CREDIBILITY DETERMINATIONS

The testimony of all the witnesses at the hearing was credible. DCPS presented no testimony that contradicted the testimony of Petitioner's witnesses. The Special Education Coordinator testified consistently with Petitioner's witnesses. Thus DCPS presented no testimony to counter Petitioner's evidence at the hearing on the sole issue in this case.

VIII. CONCLUSIONS OF LAW

The burden of proof is properly placed upon the party seeking relief.[42] Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[43]

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.[44] FAPE is defined as:

> [S]pecial 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)..."[45]

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."[46] FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."[47]

DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."[48] In deciding whether DCPS provided the Student a FAPE, the inquiry is limited to (a) whether DCPS complied with the procedures set forth in IDEIA; and (b)

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[40] *Id.*
[41] *Id.*
[42] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).
[43] 20 U.S.C. § 1415 (i)(2)(c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).
[44] 20 U.S.C. §§ 1400(d)(1)(A),1412(a)(1).
[45] 20 U.S.C. § 1401(9), 34 C.F.R. § 300.17, 30 DCMR Sec. § 3001.1.
[46] 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1.
[47] *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).
[48] 34 C.F.R. § 300.101.

whether the Student's IEP reasonably calculated to enable the Student to receive educational benefits.[49]

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.[50] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[51]

Once a procedurally proper IEP has been formulated, a reviewing court should be reluctant indeed to second-guess the judgment of education professionals.[52] The court should not "disturb an IEP simply because [it] disagree[s] with its content."[53] The court is obliged to "defer to educators' decisions as long as an IEP provided the child the basic floor of opportunity that access to special education and related services provides."[54]

IX. DISCUSSION

DCPS Failed to Provide the Student an Appropriate Educational Placement.

The IDEIA requires that unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.[55] In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs.[56] A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.[57]

Placement decisions must be made in conformity with the child's IEP.[58] Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is

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[49] *Rowley* at 206-207.
[50] 20 U.S.C. § 1415 (f)(3)(E)(ii).
[51] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Kruvant v. District of Columbia,* 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").
[52] *Tice v. Botetourt County School Board*, 908 F.2d 1200, 1207 (4th Cir. 1990) (internal citation and quotations omitted).
[53] *Id.*
[54] *Id.*
[55] 34 C.F.R. § 300.116 (c).
[56] 34 C.F.R. § 300.116 (d).
[57] *Id.* at (e)
[58] 34 C.F.R. § 300.116 (a)(2)(b), 5 D.C.M.R. § 3013 (2006).

appropriate.[59] In the District of Columbia, special education placements shall be made in the following order or priority, provided, that the placement is appropriate for the student and made in accordance with IDEIA:

> (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school;
>
> (2) Private or residential District of Columbia facilities; and
>
> (3) Facilities outside of the District of Columbia.[60]

Here, the Student's MDT agreed that the student required a full-time IEP that provides he receive specialized instruction, related, vocational and transition services outside of the general education setting. The Student's IEP further requires that the Student spend every school day, including lunch, outside the general education environment. DCPS participated in the July 8, 2009, MDT meeting at which the Student's IEP was developed and did not object to the content of the IEP.

Nonetheless, just two months later, DCPS attempted to place the Student in a DCPS School that cannot implement the Student's IEP. The SEC of the DCPS School admitted that this school cannot implement the Student's IEP because the DCPS School does not provide a self-contained setting for lunch or physical education, art, and vocational classes. The SEC admitted that the Student's IEP does not permit him to be in an inclusion setting at any time during the school day. Thus, DCPS cannot implement the Student's IEP.

Petitioner proved that the non-public school can implement the Student's IEP. The non-public school is located in the District of Columbia, and thus complies with D.C. Code § 38-2561.02. Petitioner also proved that the Student has progressed academically and socially at the non-public school.

Thus, Petitioner prevailed on her claim that DCPS failed to provide the Student an appropriate educational placement.[61] For this reason, this Hearing Officer will order DCPS to fund the Student's placement at the non-public school with transportation.

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[59] *See, Rourke v. District of Columbia,* 460 F.Supp.2d 32, 44 (D.D.C. 2006).
[60] D.C. Code § 38-2561.02.
[61] Petitioner did not present any evidence that Petitioner is entitled to reimbursement for the cost of the non-public school from the date she unilaterally placed the Student there.

ORDER

Upon consideration of the agreement of the parties in this case, it is this 28th day of November 2009 hereby:

ORDERED that that the Student shall attend the non-public school at DCPS expense for the 2009-2010 school year;

IT IS FURTHER ORDERED that DCPS shall provide the Student transportation services to and from the non-public school on school days; and

IT IS FURTHER ORDERED that this Order is effective immediately.

By: /s/ *Frances Raskin*
Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Distributed to:

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Harsharen Bhuller, Attorney at Law
Hearing Office