DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE
810 First Street, N.E. 2d Floor
Washington, DC 20002

STUDENT,[1]	)	
	)	
Petitioner,	)	**Case No. 2012-0674**
v.	)	
	)	**Bruce Ryan, Hearing Officer**
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	**Issued: December 10, 2012**
	)	
Respondent.	)	
	)	

OSSE
STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This is a due process complaint proceeding pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.,* against Respondent District of Columbia Public Schools ("DCPS"). The complaint was filed September 26, 2012, by a 20-year old adult student (the "Student") who resides in the District of Columbia and who has been determined to be eligible for special education and related services as a student with a disability under the IDEA.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") under the IDEA by failing to provide him with an appropriate educational placement for the 2012-13 school year, when it sought to move him from Private School A to Private School B pursuant to a Prior Written Notice ("PWN") issued July 31, 2012. Both schools are full-time, non-public, special education day schools located in the District of Columbia.

DCPS filed a timely response to the complaint on September 28, 2012, denying the allegations that it failed to provide a FAPE to the Student. DCPS asserts (*inter alia*) that it has

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

not changed the Student's placement but only the "location of services" which is within the discretion of the LEA; and that Private School A is not appropriate for the Student because he no longer can obtain a high school diploma there.

On October 2, 2012, Petitioner moved to compel compliance with the "stay-put" provisions of the IDEA, which DCPS opposed. By Order issued October 21, 2012, the Hearing Officer granted the stay-put motion. In the 10/21/2012 order, the Hearing Officer ruled that the Private School A program in which Petitioner previously had been placed by DCPS was his "then-current educational placement," 20 U.S.C. §1415 (j), and that by proposing to move him from Private School A, DCPS had proposed a "fundamental change in, or elimination of a basic element of" the student's existing educational program under *Lunceford v. D. C. Board of Education,* 745 F. 2d 1577 (D.C. Cir. 1984). The Hearing Officer therefore ordered that Petitioner was to remain in his current educational placement at Private School A, with DCPS funding and transportation, during the pendency of this administrative due process complaint proceeding, until the completion of all proceedings including the issuance of the HOD in this matter.

The 30-day resolution period ended without agreement on October 26, 2012, and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") expires on December 10, 2012.

On November 2, 2012, a Prehearing Conference ("PHC") was held to discuss and clarify the issues and requested relief. The parties agreed to schedule the due process hearing for November 26, 2012, and they filed their five-day disclosures, as required, on or before November 16, 2012.

The Due Process Hearing was held in Hearing Room 2003 on November 26, 2012. Petitioner elected for the hearing to be closed. At the Due Process Hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner's Exhibits: P-1 through P-10.

Respondent's Exhibits: R-1 through R-8.

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

Petitioner's Witnesses: (1) Petitioner; and (2) Director of Community Relations, Private School A.

Respondent's Witness: [redacted], DCPS Progress Monitor. [2]

Written closing arguments were submitted by both parties on December 4, 2012.

II. JURISDICTION

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

III. ISSUE AND REQUESTED RELIEF

The sole issue presented for determination at hearing is:

> **Failure to Provide Appropriate Placement** — Did DCPS deny the Student a FAPE by failing to propose an appropriate placement and/or location of services for the Student for the 2012-13 school year?

Petitioner requests that DCPS should allow him to remain at Private School A for the 2012-13 school year to finish his eligibility for services.

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

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[2] In addition, in an effort to streamline the hearing, the parties agreed to have the Hearing Officer read into evidence a summary of the direct and cross examination of the above witnesses, as well as the Admissions Director of Private School B, as presented on the record in Case No. 2012-0660 on the morning of the same date in the same hearing room, with the same attorneys. The parties stipulated that these summaries would become part of the record in this case to the same extent as if the witnesses had testified in both cases.

IV. FINDINGS OF FACT

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

1. Petitioner is a [redacted] who is a resident of the District of Columbia.
2. Petitioner has been determined to be eligible for special education and related services as a student with a disability under the IDEA. His primary disability is classified as Specific Learning Disability ("SLD"). *See P1* (4/10/2012 IEP).
3. Petitioner's current IEP was developed at the last annual review held on April 10, 2012. *See P1.* The IEP provides 28 hours per week of specialized instruction, one hour per week of behavioral support services, and one hour per week of speech-language pathology services, all delivered in an Outside General Education setting. *P1-17.* The IEP states that "Student requires structured specialized instruction out of general education setting to make academic progress." *P1-18* (LRE justification).
4. Petitioner's April 10, 2012 IEP also includes a post-secondary transition plan that identifies specific transition services for post-secondary education, training and employment from 04/10/2012 to 04/09/2013. These include: (1) one hour per month of "support researching career and education goals"; (2) one hour per week of "assistance with researching post-secondary goals"; (3) five hours per year of "career lecture series"; (4) 10 hours per year of "mock job interviews"; (5) 30 hours per year of "job shadowing"; (6) three hours per year of "job opening awareness"; (7) nine hours per year of "job fair attendance"; and (8) 30 hours per year of "job coaching." *P1-21 – P1-23.* The transition services covered under categories (1) – (4) are listed as being delivered in the Private School A setting, while the services covered under categories (5) – (8) are listed as being delivered in the community. *Id.*
5. Petitioner's April 10, 2012 IEP provides for a "Projected Exit Category" of H.S. Diploma and a date of projected graduation of 08/09/2012. *P1-23.*
6. Petitioner currently attends Private School A, a non-public special education day school located in the District of Columbia, where he is focusing on vocational development, internships and job readiness. Petitioner has attended Private School A for the past four school years, pursuant to DCPS' placement. *See Pet. Test.; Priv. Sch. A Test.*

7. The main goal of the Private School A program is for the students to achieve their post-secondary goals in job training, employment, and independent living. Private School A provides intense functional remediation in academic areas as it relates to success in the workplace. Students also are introduced to a variety of career opportunities through internships, job placement and vocational projects. *Pet. Test.; Priv. Sch. A Test.*

8. Petitioner's primary vocational interests include barbering and firefighting. *See P1-20; Priv. Sch. A Test.* He also has completed a number of vocational internships in the retail and maintenance fields. *Pet. Test.; Priv. Sch. A Test.*

9. On July 31, 2012, DCPS issued a Prior Written Notice ("PWN") in which the "LEA proposed a change in location of services from [Private School A] to [Private School B]." *P3-1.* The explanation of reasons that DCPS provided was as follows: "[Private School A] does not have a COA [*i.e.,* certificate of authority] from OSSE. [Private School B] can meet student's educational needs." *Id.* The PWN stated that "no options" were considered and "no factors" other than the COA related to the proposal. *P3-2.* And DCPS did not inform Petitioner of any other reason or factor relevant to this determination prior to the filing of his due process complaint. *See also P2* (08/08/2012 letter confirming change in schools); *Priv. Sch. A Test.*

10. On or about August 3, 2012, the OSSE issued a provisional COA to Private School A, based on its review of the documentation submitted in support of the school's June 2012 CAO application. *See P8; R4.* The provisional COA requires Private School A to meet certain conditions for full approval status by 02/04/2013. *See R4-2; R5; R6.*

11. Private School A can implement the requirements of Petitioner's 04/10/2012 IEP, except for the projected exit category of high school diploma. The school provides academic remediation, vocational training, and other transition services, consistent with the goals of the IEP. The school also has a licensed clinical social worker on staff and employs certified special education teachers. *See Priv. Sch. A Test.* Petitioner believes he is moving forward and progressing toward his goals at the school. *Pet. Test.*

12. Academically, Petitioner has made only limited progress while attending Private School A. *See* [redacted] *Test.; Priv. Sch. A Test.* As of the start of the 2012-13 school year,

Petitioner had not earned any Carnegie Unit credits toward a high school diploma, and his academic achievement scores remained low. *Id.; P5.*

13. If Petitioner were to attend Private School B, he would be placed into the Pre-General Education Equivalency Diploma ("GED")/Adult Basic Education Program. *See R7.* This program would not provide an opportunity to earn Carnegie Unit credits toward a high school diploma, but would focus on preparing Petitioner to enroll in a GED preparatory program.
14. Currently, there are no students enrolled in the Pre-GED program at Private School B. The program was created on paper last summer, at DCPS' request, for students being transferred out of Private School A. The program never materialized when these students failed to attend and, as of the date of hearing, did not yet exist. [redacted] *Test.*
15. As of October 26, 2012, Private School B's COA has been placed into probationary status by the OSSE. *P9.* OSSE has directed that while its COA is on probationary status, Private School B may not enroll any additional students from the District of Columbia. *P9-2.*
16. DCPS also considered an alternative program for Petitioner called "Project Search," an internship program within federal agencies that is jointly funded and administered by DCPS and the U.S. Department of Labor. [redacted] *Test.* DCPS has discussed this program with Petitioner, but has not formally proposed it as a placement and/or location of services for him. *Id.; see P3.* However, DCPS' Progress Monitor continues to believe that this would be the best program for Petitioner, given his low academic scores and the program's ability to improve reading and math while supporting valuable internship opportunities. [redacted] *Test.*

V. DISCUSSION AND CONCLUSIONS OF LAW

As the party seeking relief, Petitioner carries the burden of proof. *See* 5-E DCMR §3030.3; *Schaffer* v. *Weast,* 546 U.S. 49 (2005). "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a Free Appropriate Public Education (FAPE)." 5-E DCMR §3030.3. The hearing officer's determination is based

on the preponderance of the evidence standard, which generally requires sufficient evidence to make it more likely than not that the proposition sought to be proved is true.

For the reasons discussed below, the Hearing Officer concludes that Petitioner has met his burden of proof on the sole issue presented for hearing. In proposing to change Petitioner's placement from Private School A to Private School B, DCPS has proposed a school/program that cannot fulfill all the requirements of his IEP and does not appear to be reasonably calculated to meet his unique special education needs. Thus, at least on the present record, DCPS has failed to place him in an appropriate special education school or program in accordance with D.C. Code § 38-2561.02 (b) and the IDEA.

A. Governing Legal Principles

FAPE means "special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include ***an appropriate preschool, elementary school, or secondary school education in the State involved***; and are provided in conformity with the individualized education program (IEP)..." 20 U.S.C. § 1401(9) (emphasis added); *see* 34 C.F.R. § 300.17; DCMR 5-E3001.1.

The "primary vehicle" for implementing the goals of the IDEA is the IEP, which the statute "mandates for each child." *Harris v. District of Columbia,* 561 F. Supp. 2d 63, 65 (D.D.C. 2008) (*citing Honig v. Doe,* 484 U.S. 305, 311-12 (1988)). *See* 20 U.S.C. 1414(d)(1)(A)(i); 34 C.F.R. 300.320; DCMR 5-E3009.1. "The IEP must, at a minimum, `provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid v. District of Columbia,* 401 F. 3d 516, 519 (D.C. Cir. 2005), *quoting Board of Education* v. *Rowley,* 458 U.S. 176, 200, 207 (1982). [3]

"Designing an appropriate IEP is necessary but not sufficient. DCPS must also implement the IEP, which includes ***offering placement in a school that can fulfill the requirements set forth in the IEP.***" *O.O. v. District of Columbia,* 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (emphasis added). Educational placement under the IDEA must be "***based on the***

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

child's IEP" and be "as close as possible to the child's home." 34 C.F.R. § 300.116 (b) (2), (3) (emphasis added). DCPS must also ensure that its placement decision is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA. *See* 34 C.F.R. §§ 300.114-300.116.

In addition, statutory law in the District of Columbia mandates that "DCPS ***shall place*** a student with a disability ***in an appropriate special education school or program*** in accordance with this chapter and the IDEA." D.C. Code § 38-2561.02 (b) (emphasis added). *See also Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005), *citing McKenzie v. Smith*, 771 F.2d 1527, 1534-35 (affirming "placement based on match between a student's needs and the services offered at a particular school").

Finally, the fact that stay-put relief has been granted does not determine the adequacy of the proposed placement or whether DCPS has denied the Student a FAPE by means of that proposal. As the United States District Court for the District of Columbia recently noted, "the question of whether a particular placement is appropriate is a different question than what the then-current educational placement is." *Johnson v. District of Columbia,* 112 LRP 13381 (D.D.C. March 16, 2012), slip op. at 5 (quoting plaintiff's reply).[4] The question before the Hearing Officer now is simply whether Petitioner can receive a FAPE at Private School B. *Cf. N.T. v. District of Columbia,* 58 IDELR 69 (D.D.C. Jan. 11, 2012), slip op. at 5.

B. Analysis of Proposed Placement and Appropriate Relief

The evidence presented at hearing reveals several troubling aspects to DCPS' July 31, 2012 proposed change of placement, which together lead to the conclusion that DCPS needs to revisit the determination of an appropriate special education school or program for Petitioner in accordance with the IDEA and the relevant D.C. Code provisions.

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[4] The stay-put provision contained at 20 U.S.C. § 1415 (j) is triggered when a change in placement is proposed in the form of a "fundamental change in, or elimination of, a basic element of the educational program," *Lunceford v. D. C. Board of Education,* 745 F. 2d 1577 (D.C. Cir. 1984), and it imposes an automatic statutory injunction designed to ***preserve the status quo*** until the pending dispute with regard to proper placement is resolved on the merits of the due process complaint.[4] Section 1415(j) thus "represents Congress' policy choice that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current educational placement until the dispute with regard to their placement is ultimately resolved." *Greenwich Board of Education v. Torok,* 40 IDELR 44 (D. Conn. 2003) (emphasis added).

First, the reason given in the 07/31/2012 Prior Written Notice ("PWN") for proposing to move Petitioner from Private School A to Private School B was that Private School A did not have a valid certificate of authority ("*COA*") from the OSSE. *See P3-1.* The PWN stated that "no factors" other than the COA related to the proposal, and DCPS did not express any other reason. *P3-2; see also P2* (08/08/2012 letter confirming change in schools); *Priv. Sch. A Test.* Yet just a few days later, OSSE issued a provisional COA to Private School A; and while this case was pending, Private School B's COA was placed into probationary status. Thus, the COA concern does not appear to supply a rational basis for changing Petitioner's placement and/or location of services in the manner proposed in the 7/31/2012 PWN.

Second, the proposed GED preparation program at Private School B admittedly cannot fulfill the high-school diploma requirement of Petitioner's IEP. While testimony indicated that Private School A also cannot meet that requirement – and that it is impossible for Petitioner to earn the necessary credits now at any school – placement must be based on the IEP. *See* 34 C.F.R. § 300.116 (b) (2); *DCPS' Closing Argument,* p. 2, *citing Rourke v. D.C.,* 460 F. Supp. 2d 32, 44 (D.D.C. 2006) ("Placement decisions must be made in conformity with the child's IEP. The decision to place a student before developing an IEP on which to base that placement violates the IDEA regulations.... The IEP determines whether a placement is appropriate."). Thus, the correct process for DCPS to follow is the one suggested (in the alternative) in DCPS' closing argument – *i.e.*, to convene another MDT meeting to revise Petitioner's IEP, and ***then*** to discuss and determine the most appropriate placement to meet his defined IEP needs. *See DCPS' Closing Argument,* p. 6.

Third, DCPS did not satisfactorily explain how all of the various transition activities, specified in the April 2012 IEP as taking place specifically at Private School A, will continue to be performed fully at Private School B. This is crucial in the case of an almost 21-year old student who is approaching the final stretch of a multi-year vocational program at Private School A. Again, this points up the wisdom and necessity of reviewing and revising (as appropriate) the IEP before deciding to move Petitioner to another school/program that can implement that IEP.

Fourth, were Petitioner to attend Private School B, he would be placed into the Pre-General Education Equivalency Diploma ("GED")/Adult Basic Education Program. *See R7; Walters Test.* However, Petitioner testified that he had no interest in a GED certificate, and the

IEP Team has not yet decided that this is the appropriate exit category for Petitioner (as opposed to a high school diploma).

Fifth, the Private School B program into which DCPS proposes to place Petitioner did not exist as of 7/30/2012 and does not even exist today. *See* Findings, ¶¶ 13-14. It is an entirely new program proposed to be set up specifically for students being transferred out of Private School A, and it has no students presently attending. In addition, Private School B has recently been put into probationary status by the OSSE, *P9,* which may impact the factors underlying the 7/30/2012 PWN decision.

Sixth, DCPS' Progress Monitor testified that she thought Petitioner belonged in a totally different program called "Project Search," an internship program within federal agencies that is jointly funded and administered by DCPS and the U.S. Department of Labor. [redacted] *Test.* DCPS has discussed this program with Petitioner, but has not formally proposed it as a placement and/or location of services for him. *Id.; see P3.* [redacted] testified that this program may better fit Petitioner's academic and vocational needs than either Private School A or Private School B. *Id.* A further IEP Team meeting to review and revise Petitioner's IEP and to discuss and determine placement would provide an opportunity to address such proposal.

Finally, the equities do not favor a mid-year change of placement. *See Block v. District of Columbia,* 748 F. Supp. 891 (D.D.C. 1990). Thus, any such proposal should be well supported by current facts and analysis, which this one is not.

Accordingly, the Hearing Officer concludes that DCPS should convene an MDT/IEP Team meeting to review and revise (as appropriate) Petitioner's IEP, including with respect to its post-secondary transition activities and goals and its projected exit category. The Team should then discuss and determine an appropriate special education school or program to implement the IEP in the brief time remaining in Petitioner's special education eligibility. In the interim, DCPS must continue funding Petitioner's placement at Private School A during the 2012-13 school year.

VI. ORDER

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

1. Within **30 calendar days** of this Order (*i.e.*, by **January 9, 2013**), DCPS shall convene a meeting of the Student's MDT/IEP Team (including Petitioner) to (a) review and revise (as appropriate) the Individualized Education Program ("IEP") for Petitioner, including specifically the elements of the Post-Secondary Transition Plan and Graduation Planning sections of the IEP; and (b) discuss and determine an appropriate special education school or program in which to place Petitioner that can implement all the requirements of the revised IEP.

2. Following the meeting convened pursuant to paragraph 1, DCPS shall issue a Prior Written Notice ("PWN") proposing to place Petitioner in an appropriate school or program for the remainder of the 2012-13 school year and/or the 2013-14 school year.

3. Pending the IEP Team meeting and PWN required under paragraphs 1 and 2 of this Order, DCPS shall continue to fund Petitioner's placement at **Private School A** [5] for the 2012-13 school year.

4. All other requests for relief in Petitioner's Due Process Complaint filed September 26, 2012, are hereby **DENIED;** and

5. The case is **CLOSED.**

Dated: December 10, 2012

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).

[5] **Private School A** is identified in the Appendix to this HOD.

APPENDIX

CASE NO. : **2012-0674**

STUDENT: **KENNETH BARNES**

DATE OF BIRTH: 04/23/1992

STARS STUDENT ID: 9013789

PRIVATE SCHOOL A: BUILDING FOR THE FUTURE ACADEMY

PRIVATE SCHOOL B: HIGH ROAD SCHOOL OF WASHINGTON, DC

DIRECTOR OF COMMUNITY RELATIONS, PRIVATE SCHOOL A: MONICA LIVINGSTON

ADMISSIONS DIRECTOR, PRIVATE SCHOOL B: TINA STITH-TWINE

PETITIONER'S ATTORNEY: DONOVAN ANDERSON, ESQ.

RESPONDENT'S ATTORNEY: LYNETTE COLLINS, ESQ.

DCSHO: Re: Case # 2012-0674 From <Bruce.Ryan@dc.gov>

admin@dcsho.i-sight.com [admin@dcsho.i-sight.com]

Sent: Monday, December 10, 2012 9:48 PM

To: danderson@donovananderson.com; Collins, Lynette (DCPS)

Cc: Due, Process (OCTO); HearingOffice, Student (OSSE); Merced, Deusdedi (OSSE-Contractor); Ryan, Bruce (OSSE-Contractor)

Attachments: Hearing Officer Decision-C~1.pdf (123 KB)

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** This email was sent by Bruce Ryan [mailto: Bruce.Ryan@dc.gov] **

Attached please find the Hearing Officer Determination ("HOD") issued in this case. Student is Kenneth Barnes.

Bruce Ryan, IHO

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