

RECEIVED

AUG 30 2010

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
STUDENT HEARING OFFICE

STUDENT,¹)
By and through PARENT,)
)
Petitioner,)
v.)
)
DISTRICT OF COLUMBIA)
PUBLIC SCHOOLS,)
)
Respondent.)

Case No.

Bruce Ryan, Hearing Officer

Issued: August 27, 2010

HEARING OFFICER DETERMINATION

I. PROCEDURAL BACKGROUND AND RECORD

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.*, and its implementing regulations. The Complaint was filed June 21, 2010, against Respondent District of Columbia Public School ("DCPS"). It concerns an -year old student (the "Student") who resides in the District of Columbia and has been determined to be eligible for special education and related services as a child with a disability under the IDEA. Until the end of the 2009-10 School Year, the Student had been attending a private school ("School A") located in the District of Columbia pursuant to DCPS' placement. Although the Student has attained the age of the Parent-Petitioner is his legal guardian and thus has standing to bring this action under the IDEA.

Petitioner claims that DCPS has denied the Student a free appropriate public education ("FAPE") by failing to provide the Student with an appropriate placement for both (a) Extended School Year ("ESY") services for the 2010 summer and (b) the 2010-11 School Year. Petitioner alleges that, due to School A's pending closure at the end of the 2009-10 school year, there is a

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

need to identify an alternate placement/location of services that can provide the Student with a full-time therapeutic placement as required by his June 15, 2010 IEP. As of the date of the complaint and the prehearing conferences, DCPS had not yet identified and proposed a specific placement/location for the 2010-11 School Year.

DCPS filed a Response on July 1, 2010, which responds, *inter alia*, that: (a) “DCPS can provide the student with ESY services at a DCPS school to prevent severe regression of the benefits the student gained over the school year”; and (b) “DCPS intends to provide the student with an appropriate location of services before the beginning of the 2010-2011 School Year” (*i.e.*, by August 23, 2010).²

The resolution process was not successful, and the 30-day resolution period ended early by agreement of the parties on July 6, 2010. Prehearing Conferences (“PHCs”) were held on July 13 and 23, 2010, at which the parties discussed and clarified the issues and requested relief. *See P-2* (Prehearing Order, issued July 12, 2010), ¶ 6.

At the July 13 PHC, it was agreed that the hearing would take place on August 4, 2010, but at the July 23 PHC the parties agreed to reschedule the hearing for August 19, 2010. To accommodate the rescheduled hearing date and provide adequate time for issuance of the HOD, the parties filed a joint motion for continuance, which was granted. In addition, DCPS counsel represented at the July 23 PHC that DCPS would soon issue a letter of invitation for a Multi-disciplinary Team (“MDT”) meeting and propose one or more non-public placements for discussion with Petitioner at such meeting. Rescheduling the hearing to August 19 would thus provide an opportunity for the MDT and parties to consider such proposal(s).

The parties also agreed that DCPS would identify any specific school placement and/or location of services that it proposed for the Student for the 2010-11 School Year by no later than August 12, 2010, and would include such information in its five-day disclosures. Petitioner would then be entitled to supplement its five-day disclosure to address such proposal by August 16, 2010 (unless DCPS identified such proposed school placement and/or location by 8/10/10).

² On July 12, counsel for Petitioner confirmed via email that, in light of DCPS’ response, Petitioner did not intend to pursue any claim against the Office of the State Superintendent of Education (“OSSE”), which had been originally named as an additional respondent. Petitioner orally withdrew all claims against OSSE at the July 13, 2010 prehearing conference. *See P-2*, p. 2.

Five-day disclosures were thereafter filed by both parties as directed on August 12, 2010; Petitioner elected not to file any supplemental disclosure; and the Due Process Hearing was held on August 19, 2010. Petitioner elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence:

Petitioner's Exhibits: P-1 through P-25.

DCPS' Exhibits: DCPS-1 through DCPS-7.³

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

Petitioner's Witnesses: (1) Parent-Petitioner; (2) Educational Advocate; and (3) Admissions Director of School B, a private school located in Northern Virginia.

DCPS' Witnesses: (1) Special Education Coordinator ("SEC"),
and (2) Program Director.

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

II. **ISSUES AND REQUESTED RELIEF**

A discussion at the prehearing conferences of the issues and requested relief raised by Petitioner resulted in the following issues being presented for determination at hearing:

- (1) **ESY Services** — Did DCPS deny the Student a FAPE by failing to provide an appropriate placement and/or location for Extended School Year ("ESY") Services for the 2010 Summer?
- (2) **Placement for 2010-11 School Year** — Did DCPS deny the Student a FAPE by failing to provide an appropriate educational placement for the 2010-11 School Year?

³ DCPS Exhibits 4 and 6 were admitted over Petitioner's objections. All other exhibits were admitted without objection.

School Year, because the school's certificate of approval had not been renewed. *P-8*. Thus, the need for an alternate placement and/or location of services was addressed.

7. The IEP developed at the June 15, 2010 meeting continues to provide for a full-time special education program. The IEP provides for 25.75 hours per week of specialized instruction, 30 minutes per week of occupational therapy ("OT") services, and 1.25 hours per week of behavioral support services, all in a setting Outside General Education. *P-13-p. 11*.
8. The 6/15/10 IEP includes a post-secondary transition plan aimed primarily at vocational training and functional life skills. *P-13-pp. 17-18*. The annual goals set forth in the agreed transition plan include that the Student will identify specific sites for post-secondary vocational training, and "will explore his interest in nursing care by completing at least three internships or volunteer opportunities at a hospital or clinic." *Id.* The plan also provides that the Student will engage in "case management" transition activities and services with the Rehabilitation Services Administration ("RSA"), and will continue to work toward a H.S. Certificate by Age 21. *Id., pp. 18-19; see also P-15 (5/13/10 meeting notes); EA Testimony.*
9. As part of the 6/15/10 IEP, it was also agreed that the Student required ESY services for the 2010 summer. *P-13-p. 15*. The beginning and end dates and the number of minutes of ESY services were left blank (*P-13-p. 16*), but the testimony indicated that DCPS' ESY services are typically provided for approximately one-half day for four weeks of the summer. *See EA Testimony; SEC Testimony; Testimony.* DCPS offered to provide ESY services at _____ the Student's neighborhood school. *DCPS-1, p. 2; SEC Testimony.* Petitioner disagreed with DCPS' proposal, although she and the Student's educational advocate testified that they did not visit and were not familiar with the specific ESY program offered at the school. *EA Testimony (cross examination).*
10. The ESY program at _____ during the 2010 summer included approximately 15 students with various disabilities. ESY services were provided in a setting that was physically separate from the regular summer school program, in a different wing of the same building. No regular summer school classes were held in classrooms used

for ESY. Services offered included academic instruction, counseling to address social/emotional/behavioral needs, and other related services such as OT. The ESY program ran from approximately 8:00 AM until 12:30 daily from late June through the end of July. *See SEC Testimony.*

11. At the time of the 6/15/10 MDT meeting, DCPS did not have a full-time placement and/or location of services available for the Student for the 2010-11 School Year. DCPS suggested that the Student consider enrolling in readiness program or *DCPS-1*. Petitioner was not in agreement with such proposals because she believed neither could provide the full-time therapeutic placement that the Student required. *Id.*; *EA Testimony*; *Parent Testimony.*
12. Also on June 15, 2010, the MDT developed a Student Evaluation Plan calling for updated educational and OT testing as part of a three-year re-evaluation. *DCPS-2*. Petitioner consented to this re-evaluation. *Id.*
13. During the 2010 summer, the Student was again hospitalized on several occasions. Specifically, he was admitted for psychiatric treatment at *6/26-6/28/10* and *6/29-7/1/10*, at *7/13-7/20/10* and *7/28-8/12/10*, and at *7/24-7/28/10*. *Parent Testimony.*
14. On or about July 30, 2010, in response to Petitioner's request, the Student was accepted into School B for the 2010-11 School Year. *P-25*.
15. On or about August 12, 2010, the date of the five-day disclosures in this case, DCPS issued a Prior to Action Notice proposing a "change in placement" and "change in location of service Interim" for the Student going forward. *DCPS-6*. The Notice specified School C as the "interim" placement and/or location of services. School C is a private school located in the District of Columbia that offers a full-time special education program in an out-of-general-education setting. *Testimony.*
16. On or about August 16, 2010, shortly before the due process hearing was held, DCPS convened an MDT meeting (with the parent and educational advocate participating) to discuss placement and/or location of services for the Student beginning fall 2010.

Petitioner requested School B “because it offers more vocational and transition services.” *DCPS-7* (8/16/10 MDT meeting notes). The “Educational Advocate stated that he needs a lot of support before completion of high school.” *Id.* The DCPS Case Manager “supported [the EA’s] statement and added that he needed additional support with acquiring skills on an adult level.” *Id.* DCPS suggested that School C could meet the Student’s needs, including with respect to vocational and transitional programs. However, Petitioner stated her concern that School C had no vocational program addressing the medical/health care field. *Id.*, *Advocate’s Notes* (included in *DCPS-7*). Petitioner then agreed to visit School C, as well as one other program, and report back to DCPS regarding placement. *Id.* See also *EA Testimony*; *DCPS Testimony*.

17. Following the June 15, 2010 MDT meeting, Petitioner visited School C. Petitioner found that School C did not offer a specific vocational program in the medical/health care field, and concluded that the school would not meet the Student’s IEP goals and needs. *Parent Testimony*. Petitioner also visited the _____ and concluded that it would not be appropriate for the Student because it lacked vocational training. *Id.* Petitioner informed DCPS that she preferred School B due to its larger vocational program that includes medical/health care programs. *Id.*

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; see *Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to provide an appropriate IEP and/or placement, as well as failures to implement an IEP.

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-E3030.3. The normal standard is preponderance of the evidence. See, e.g., *NG. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

time in nature (for approximately half the normal school day), and are designed to carry out the limited purpose of preventing severe regression of skills and educational benefits. Petitioner has not shown that the IDEA requires anything more.

Nor has Petitioner demonstrated that _____ was unable to provide the ESY services needed by the Student. To the contrary, the undisputed evidence shows that _____ offered academic instruction, counseling to address social/emotional/behavioral needs, and other related services such as OT, all in a setting physically separate from the regular summer school program. Services were provided for approximately four hours daily for four weeks, from late June through the end of July. The evidence also shows that the specific ESY goals listed in the IEP (*P-13-p.15*) could have been implemented at

Finally, Petitioner concedes that the Student likely would have missed a substantial portion of ESY services due to his hospitalizations during the 2010 summer. *See Petitioner Testimony* (cross examination). While Petitioner argues that some of these hospitalizations might have been avoided if DCPS had offered a different ESY program in a full-time therapeutic setting, no evidence was provided to support this speculation.

Thus, Petitioner has not met her burden of proving that DCPS denied the Student a FAPE with respect to ESY services for the 2010 summer.

2. 2010-11 School Year Placement

Petitioner next claims that DCPS denied the Student a FAPE by failing to provide an appropriate educational placement for the 2010-11 School Year, either at the June 15 or August 16, 2010 MDT meetings. In response, DCPS asserts that it has offered an appropriate, full-time special education placement at School C, prior to the beginning of the current school year, and thus has not denied the Student a FAPE.

The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

[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)...*"

20 U.S.C. § 1401(9) (emphasis added); 34 C.F.R. § 300.17; DCMR 5-E3001.1. An IEP, in turn, “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).

To prove that a placement is inappropriate, a petitioner generally must show that the proposed school is unable to implement the IEP as written. See, e.g., *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 104 (D.D.C. 2008); *O.O. v. District of Columbia*, 573 F. Supp. 2d 41, 53 (D.D.C. 2008) (“DCPS must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP”); see also *Branham v. District of Columbia*, 427 F. 3d 7, 12 (D.C. Cir. 2005) (affirming “placement based on match between a student’s needs and the services offered at a particular school”); D.C. Code 38-2561.02 (“DCPS shall place a student with a disability in an appropriate special education school or program in accordance with this chapter and the IDEA”).

In this case, Petitioner has not shown that School C is unable to implement all material requirements of the IEP. It is undisputed that School C offers a full-time, out of general education, therapeutic setting, with appropriate clinicians and service providers on staff. It is also undisputed that School C can provide all of the specialized instruction and related services required under the June 15, 2010 IEP. Moreover, School C’s Northeast Washington, D.C. location is closer to the Student’s home (see 34 CFR 300.116(a)(3); DCMR 5- E3013.1(f)), and also appears consistent with the statutory placement priorities contained in D.C. Code § 38-2561.02(c) (prioritizing D.C. private schools over facilities located outside the District). See *Adon Testimony*; *Roark v. District of Columbia*, 460 F. Supp. 2d 32, n. 11 (D.D.C. 2006).

At most, Petitioner has shown that the Student could better meet one of the annual goals included in his Transition Plan (i.e., to “explore his interest in nursing care by completing at least three internships or volunteer opportunities at a hospital or clinic”) if he attended School B rather than School C. This is because School B offers specific vocational opportunities during the school year at two local nursing home/rehabilitation health care facilities in Northern Virginia. See *School B Testimony*. While this is an important area of interest for the Student that deserves

attention in his IEP, *see* 20 U.S.C. §§ 1401(34), 1414 (d)(1)(A)(i)(VII); 34 C.F.R. §300.320(b), the Hearing Officer cannot conclude on the basis of this factor alone that DCPS has failed to offer a school placement that is at least reasonably calculated to confer a meaningful educational benefit to the Student. *See, e.g., Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009) (IDEA “guarantees a free appropriate education, [but] it does not ... provide that this education will be designed according to the parent’s desires”) (quoting *Shaw v. District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002); *Holdslaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007) (plaintiffs failed to demonstrate that school selected by DCPS is an inappropriate placement where placement was “reasonably calculated to enable [student] to receive educational benefits”); *Rowley*, 458 U.S. at 207. ⁴

Nor can the Hearing Officer properly second-guess the judgment of school officials regarding the most appropriate placement, as long as the particular school selected can implement the IEP and DCPS’ determination satisfies the minimum requirements of the IDEA. *Cf. Anderson v. District of Columbia, supra* (affording “deference to the expertise of the ... school officials responsible for the child’s education,” in connection with determinations of appropriate placement) (quoting *Lyons v. Smith*, 829 F. Supp. 414, 418 (D.D.C. 1993). Such deference would seem especially warranted where, as here, school officials are attempting to address the unique needs of a student with severe emotional disabilities and other health concerns, who requires repeated psychiatric hospitalizations and engages in dangerous behaviors posing risks to himself and others. *See P-18; P-19.*

Accordingly, the Hearing Officer concludes that Petitioner has failed to carry her burden of proving that DCPS has denied a FAPE through its offer of a non-public placement at School C. As Petitioner has failed to prove any denial of FAPE, there is no basis to grant compensatory education or the other remedies requested by Petitioner or to fashion any other equitable relief.

The Hearing Officer notes, however, that DCPS appears to have thus far determined only an “interim” placement for fall 2010, pending completion of updated evaluations and further MDT review. *DCPS-2; DCPS-6.* This was done as part of DCPS’ effort over this past summer

⁴ DCPS’ Program Manager also testified that DCPS regularly refers students to case managers in the Rehabilitation Service Administration (“RSA”) as a “link” to specific vocational or life skill goals contained in a transition plan, as is contemplated under the Student’s IEP in this case. *See Testimony; P-13-p. 18.* DCPS may reasonably find that this service/activity in these circumstances can serve as an adequate substitute for the other “on-the-job-training” opportunities available at School B.

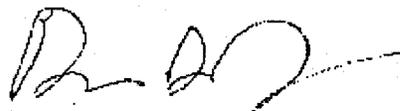
to ensure that all students who had been attending School A prior to its closing were timely placed in another suitable school by the start of the 2010-11 School Year. *See Adon Testimony.* Thus, the Hearing Officer expects that DCPS will convene another MDT meeting to discuss and determine final placement of the Student for the 2010-11 School Year. Such meeting should include participation by a representative of School C (see 34 CFR 300.325(a)(2)) and an interim (e.g., 30-day) review of School C's ability to implement the IEP, including providing adequate vocational training opportunities consistent with the Student's individualized transition plan.

V. **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 her Due Process Complaint are **DENIED**.
2. The Complaint is **DISMISSED, With Prejudice**; and
3. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.



Dated: August 27, 2010

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).