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

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STUDENT HEARING OFFICE
2012 DEC 12 AM 8: 57

STUDENT,[1]	)	
	)	
Petitioner,	)	**Case No. 2012-0660**
v.	)	
	)	**Bruce Ryan, Hearing Officer**
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,	)	
	)	**Issued: December 11, 2012**
Respondent.	)	
	)	

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 20, 2012, by a [redacted] (the "Student" or "Petitioner") 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 him 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 proposed to move him from Private School A to Private School B as the new school year was beginning. Both schools operate full-time, non-public, special education programs located in the District of Columbia.

DCPS filed a timely response to the complaint on September 26, 2012, denying the allegations that it failed to provide a FAPE. DCPS asserts (*inter alia*) that it has not changed the

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

Student's placement but only the "location of services," which it argues is within the discretion of the LEA; and that Private School A is not appropriate for the Student because the school cannot provide FAPE.

On October 2, 2012, DCPS convened a resolution meeting, which did not result in an agreement to resolve the complaint. The parties also did not agree to end the 30-day resolution period early. Accordingly, the resolution period ended on October 20, 2012, and the 45-day timeline for issuance of the Hearing Officer Determination ("HOD") expires on December 11, 2012. [2]

On October 25, 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 to file their five-day disclosures by November 16, 2012.

On November 8, 2012, the Hearing Officer granted Petitioner's motion to compel compliance with the "stay-put" provisions of the IDEA. *See Order* (Nov. 8, 2012). 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 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-11.

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

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[2] The Hearing Officer granted DCPS' consent motion for a 7-day continuance and extension of the HOD timeline in order for the parties to submit written post-hearing closing arguments by December 4, 2012. *See Interim Order on Continuance Motion* (Dec. 4, 2012).

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: (1) [redacted], DCPS Progress Monitor; and (2) Admissions Director, Private School B.

Written closing arguments were submitted by both parties by 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*").

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 allow him to remain at Private School A for the 2012-13 school year to finish his eligibility for services. [3]

[3] The fact that stay-put relief has been granted in this case pursuant to 20 U.S.C. § 1415 (j) does not necessarily 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). *See also Lunceford v. D. C. Board of Education,* 745 F. 2d 1577 (D.C. Cir. 1984) (stay-put provision triggered when change in placement is proposed in form of "fundamental change in, or elimination of, a basic element of the educational program"); *N.T. v. District of Columbia,* 58 IDELR 69 (D.D.C. Jan. 11, 2012), slip op. at 5.

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).

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* (05/17/2012 IEP).
3. Petitioner's eligibility for special education and related services ends at the conclusion of the 2012-13 school year, as he will have reached [redacted]. *See Pet. Test.; Pet's Closing Argument,* p. 1.
4. Petitioner's current IEP was developed at the last annual review held on May 17, 2012. *See P1.* The IEP provides 26 hours per week of specialized instruction and one hour per week of behavioral support services, both to be delivered in an Outside General Education setting. *P1-7* (Special Education & Related Services). The IEP states that "Student requires educational support outside of the general educational setting" for specialized instruction, and "Student requires the privacy of an out of general education setting to make progress in therapy." *P1-8* (LRE justifications).
5. Petitioner's May 17, 2012 IEP also includes a Post-Secondary Transition Plan that identifies specific transition services for post-secondary education, training and employment to be delivered from 05/17/2012 to 05/16/2013, based on the results of a Career Exploratory Level II Vocational Evaluation. *P1-11.* These services include: (1) 18 hours per week of "support completing portfolio modules"; (2) two hours per week of "vocational training support"; (3) nine hours per year of "job fair attendance"; (4) 10 hours per year of "mock job interviews"; (5) 24 hours per year of "job shadowing"; (6) five hours per year of "career lecture series"; (7) 30 minutes per week of "job opening awareness"; and (8) three hours per month of "job placement assistance." *P1-12 – P1-13.* The setting specified for the transition services covered by categories (1), (4), (6) and (7) is Private School A. *Id.* The

setting listed for the remaining services is the "community." *Id.* Petitioner's long-range goals include full-time employment as a chef and/or carpenter. *P1-12.*[4]

6. Petitioner's May 17, 2012 IEP provides for a "Projected Exit Category" of "H.S. Diploma," with a date of projected graduation of 06/12/2013. *P1-15.*
7. Petitioner currently attends Private School A, a non-public special education program located in the District of Columbia, where he is focusing on vocational development, internships and job readiness. He also receives academic support, including one-to-one assistance where needed. Petitioner has attended Private School A for the past several years, pursuant to DCPS' placement. *See Pet. Test.; Priv. Sch. A Test.; Walters Test.*
8. The Private School A program was started in 2009 with the support of [redacted] DCPS' former Director of Special Education. *See Priv. Sch. A Test.* It was designed to enable a targeted group of under-credited students aged 17-21 to achieve their post-secondary goals in job training, employment, and independent living. *Id.*
9. Private School A has four basic instructional components: (1) academic remediation in reading, math, and writing; (2) vocational training; (3) transitional planning and life skills; and (4) career development and exploration. *Id.; Pet's Closing Argument,* p. 1*; DCPS' Closing Argument,* p. 4. Students are introduced to a variety of career opportunities through internships, job placements, and other vocational projects. *Pet. Test.; Priv. Sch. A Test.*
10. On August 2, 2012, DCPS issued a Prior Written Notice ("PWN") signed by [redacted] (an outside contractor), in which it "proposed a change of location from [Private School A] to [Private School B]." *P3-1.* The complete explanation of reasons that DCPS gave for the proposed change 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 needs." *Id.* The PWN stated that "no other options" were considered and "no other factors" related to the proposal. *P3-2.*

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[4] Petitioner testified that he is also interested in working with animals and plans to undertake an internship through Private School A in January 2013 with a local veterinarian hospital near the school, as he continues to explore his vocational interests and opportunities. *See Pet. Test.*

11. The next day, August 3, 2012, the OSSE issued a provisional COA to Private School A. *See P9; R6.* The provisional COA requires Private School A to meet certain conditions for full approval status by 02/04/2013. *Id.; see also R4–R5* (08/17/2012 OSSE letter & provisional exit plan).
12. On August 23, 2012, two business days before the start of the 2012-13 school year, DCPS issued a second PWN signed by [redacted] in which it now "proposed a location of services at [Private School A]." *P4-1.* The complete explanation of reasons that DCPS gave for this new proposal was as follows: "Student continues to need support in all academic areas. [Private School A] is committed to meeting the student's academic needs." *Id.* This time, the PWN stated that Private School B and a neighborhood DCPS high school were considered as other options. *P4-2.*
13. Then on August 27, 2012, the first day of school, DCPS issued a third PWN, again signed by [redacted] The 08/27/2012 PWN once again "proposed a location of services at [Private School B]." *P5-1.* Since Private School A now had a provisional COA from OSSE, the 08/27/2012 PWN contained a different explanation of reasons for returning to the original 08/02/2012 proposal, as follows: "Student was previously placed at [Private School A] and on track for their EDP [*i.e.*, external degree program]. [Private School A] no longer has an NEDP. At this time, student's academic needs can be met at [Private School B]." *Id.* This time, the PWN indicated "none" in response both to whether other options were considered by the IEP Team and whether any other factors related to the proposal. *P5-2.* In addition, the PWN stated that "LEA is reseending [sic] previous PWN issued on 8/23/2012 to [Private School A]. It was issued in error." *Id.* [5]
14. Private School A can implement the requirements of Petitioner's 05/17/2012 IEP, except for the projected exit category of high school diploma.[6] The school provides academic

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[5] As described in *DCPS' Closing Argument* (p. 5), [redacted] "testified that she issued the second PWN in haste … she believed that the student would be able to stay at [Private School A]. However, after she spoke with her supervisors they were still concerned with the educational services that were being provided by [Private School A], as such she was instructed to issue the third PWN, dated August 27, 2012." *See also* [redacted] *Test.* [redacted] supervisor was listed as a proposed witness in DCPS' five-day disclosures, but was not presented at hearing to explain these instructions.

[6] It is undisputed that Petitioner cannot receive a high school diploma at Private School B either because (a) he has only earned 3.5 credits through the end of the 2011-12 school year; (b) his eligibility ends this school year; and (c) he would be placed into a pre-GED/adult basic education program if he were to attend Private School B. *See R7; Priv. Sch. B Test.*

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 with "hands-on" experience. *Pet. Test.* He wants to stay at Private School A and has experienced zero behavior problems there. *Id.; Priv. Sch. A Test.* The school has also been providing significant support to Petitioner in his efforts to complete NEDP portfolio modules pursuant to the 05/17/2012 IEP. *Id.*

15. If Petitioner were to attend Private School B, he would be placed into the Pre-General Education Equivalency Diploma ("GED")/Adult Basic Education Program. 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. *See R7; Priv. Sch. B Test.* Petitioner has no interest in entering a GED program. *Pet. Test.* Private School B also has a vocational component called "DC PACT," which includes both in-house and outside partnership offerings. *Priv. Sch. B Test.*
16. 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.; Priv. Sch. B Test.*
17. As of October 26, 2012, Private School B's COA has been placed into probationary status by the OSSE. *P10.* OSSE has directed that while its COA is in probationary status, Private School B may not enroll any additional students from the District of Columbia. *P10-2.*
18. Private School A is closer than Private School B to Petitioner's home. *P11-2; Pet. 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.

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).[7]

"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 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.

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[7] *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.").

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").

Based on the evidence presented at hearing, DCPS has failed to place Petitioner in an "appropriate special education school or program" in accordance with D.C. Code § 38-2561.02 (b) and the IDEA. In proposing to change Petitioner's placement from Private School A to Private School B, DCPS has proposed a school/program that is not reasonably calculated to meet his unique special education needs, particularly at this late juncture in his secondary education career.

In *Holmes v. District of Columbia*, 680 F. Supp. 40, 42 (D.D.C. 1988), the United States District Court for the District of Columbia had occasion to address a comparable situation in which DCPS sought to transfer a disabled student to a new school program that was "virtually in a start-up posture" so that he could "complete the last semester of his schooling" after doing well for several years at his present school. The court found that DCPS' new proposed school placement

> "under the circumstances of this case, would not be the appropriate school to send this student at this time in his career. *It would be the most inappropriate thing to do.* The appropriate place for this youngster is to permit him to finish the remaining seven months of his high school education in the environment that he has been accustomed to over the past three years. *I conclude as a matter of law that it would be inappropriate to transfer this youngster at this time and that the [new school] is not an appropriate place for him at this time.*" [8]

The facts here are strikingly similar. Petitioner has attended Private School A for the past several years, where he has focused on fulfilling the vocational and other post-secondary goals in his IEP's transition plan. He has also benefited academically and socially/emotionally. His IEP Team decided that the Public School A program was appropriate for Petitioner at his May 2012

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[8] 680 F. Supp. at 41-42 (emphasis in original). *See also Block v. District of Columbia*, 748 F. Supp. 891, 895 (D.D.C. 1990) ("while a school may be appropriate for a student if he begins the school year there, it is not necessarily appropriate to inject the student into that school part-way through the school year").

annual review meeting, and again on August 23, 2012, just prior to the start of the current school year. Successful implementation of this program, without unnecessary disruption, is critically important for Petitioner, who is nearly 22 years old and has only one semester of special education eligibility remaining to be completed. [9]

DCPS nevertheless proposes to move Petitioner to an entirely new start-up program that currently has no enrolled students and no track record of delivering the transition services specified in his IEP. DCPS also proposes to do so at a time when the school's COA has been placed in probationary status by the OSSE, thereby prohibiting acceptance or enrollment of any additional D.C. students. Moreover, Private School A is located closer to Petitioner's home than Private School B. *See* 34 C.F.R. § 300.116 (b) (3). And Private School B's proposed pre-GED program cannot implement the high school diploma requirement in the 05/17/2012 IEP. [10]

DCPS has offered shifting rationales for wanting (or not) to transfer Petitioner to this new start-up program during his last year of eligibility. Originally, it said the problem was Private School A's lack of a COA – until OSSE issued it a provisional COA a day later, and OSSE later put Private School B's COA into probationary status. DCPS then said Private School A was appropriate, claiming the school "is committed to meeting the student's academic needs" – before saying a few days later that it was not appropriate due to the absence of an NED program, which its own preferred placement (Private School B) also does not have. Finally, at hearing, DCPS' Progress Monitor testified about other educational concerns that were never expressed in any PWN. [redacted] *Test.* [11]

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[9] Petitioner is also scheduled to do an internship through Private School A this semester at a local veterinarian hospital located directly across the street. This location enables the school to easily monitor and ensure that Petitioner is benefiting from both his academic and vocational internship experience. *See Pet. Test.; Priv. Sch. A Test.*

[10] While Petitioner also cannot earn Carnegie credits at Private School A, DCPS previously placed him there, and such placement is not being challenged in this case.

[11] In analyzing [redacted] testimony, DCPS argues that the agency had "many concerns" regarding the "quality of service" and that "the academic portion was her biggest concern." *DCPS' Closing Argument,* p. 6. But the final 08/27/2012 PWN cites only the lack of a NEDP, whose omission does not appear to undermine either the vocational or academic remediation components of the Private School A program, and which would not be cured at Private School B anyway. *See Pet. Test.; Priv. Sch. A Test.; Priv. Sch. B Test.; Walters Test.* To the extent [redacted] supervisors had other concerns about Private School A's "educational services," such unexpressed concerns cannot serve to support the PWN.

These inconsistent actions and explanations are confusing, at best. And none serves to justify the LEA's 11th-hour effort to remove a student on the cusp of completing his eligibility from an educational environment he has been accustomed to for several years, and where he is experiencing success and progressing toward his vocational and other post-secondary goals. *See Pet. Test.; Priv. Sch. A Test.; P11-2 – P11-3; Holmes, supra.* Accordingly, the Hearing Officer concludes that DCPS' latest PWN does not propose to place Petitioner in an appropriate school or program, and that DCPS' proposal would not provide a FAPE to Petitioner under the circumstances. On the other hand, Private School A appears to be a good fit for Petitioner and is providing him with significant educational benefit. *See Branham, supra,* 427 F. 3d at 12..

The IDEA authorizes courts and hearing officers to fashion such relief as they determine is "appropriate," 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia,* 401 F.3d 516, 521-24 (D.C. Cir. 2005); *McKenzie v. Smith,* 771 F.2d 1527, 1535 (D.C. Cir. 1985); *Holmes, supra,* 680 F. Supp. at 43. The Hearing Officer concludes that the relief Petitioner requests – *i.e.,* that he be allowed to complete his eligibility for services at Private School A over the remainder of the 2012-13 school year – is appropriate and equitable under all the facts and circumstances of this case.

VI. ORDER

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

1. DCPS shall continue to fund the placement and attendance of Petitioner at **Private School A**,[12] with transportation, through the end of the 2012-13 school year.
2. Any other requests for relief in Petitioner's Due Process Complaint filed September 26, 2012, are hereby **DENIED;** and
3. The case is **CLOSED.**

Dated: December 11, 2012

Impartial Hearing Officer

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