DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER, on behalf of STUDENT,[1] Petitioner, v. DISTRICT OF COLUMBIA PUBLIC SCHOOLS, Respondent.	Date Issued: September 12, 2013 Hearing Officer: Peter B. Vaden Case No: Hearing Date: September 6, 2013 Student Hearing Office, Room 2006 Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the "Petitioner" or "MOTHER"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("DCMR"). In Due Process Complaint, Petitioner alleges that Respondent District of Columbia Public Schools ("DCPS") has denied Student a free appropriate public education ("FAPE") by changing the educational setting in Student's Individualized Education Program ("IEP") from SPECIAL SCHOOL to a regular DCPS public high school.

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on , named DCPS as respondent. The parties met for a resolution session on July 23, 2013 and were unable to reach an agreement. On August 5, 2013, the Hearing Officer convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

On August 16, 2013, Petitioner filed a motion under the "stay-put" provision of IDEA, 20 U.S.C. § 1415(j), for an order that DCPS continue to fund Student's placement at Special School during the pendency of this due process proceeding. I granted Petitioner's motion by order entered August 23, 2013. On August 29, 2013, DCPS filed a motion for reconsideration of my stay-put order. Because DCPS did not file, with the Hearing Officer, a response in opposition to Petitioner's stay-put motion, I decline to consider DCPS' motion for reconsideration.[2]

The due process hearing was convened before the undersigned Impartial Hearing Officer on September 6, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS COUNSEL.

Petitioner testified and called as witness Special School ADMINISTRATOR. DCPS called as witnesses, SPECIAL EDUCATION COORDINATOR, COMPLIANCE CASE

[2] It appears that on September 22, 2013, DCPS did file in the Student Hearing Office a pleading styled Response to the Due Process Complaint. This pleading was, apparently, intended as a response in opposition to Petitioner's stay-put motion. However, because DCPS did not transmit a copy of the pleading to the Hearing Officer, it did not come to my attention until the due process hearing convened. My Notice of Prehearing Conference and my Prehearing Order required that the filing of any papers, after the original due process complaint, must be filed concurrently with the Student Hearing Office and, electronically, with the Hearing Officer.

MANAGER and PROGRESS MONITOR. Petitioner's Exhibits P-1 and P-2 were admitted without objection. Exhibit P-3 was admitted over DCPS' objection. DCPS' Exhibits R-1 through R-7, R-9 and R-10 were admitted into evidence without objection. Exhibit R-8 was admitted over Petitioner's objection. Counsel for Petitioner made an opening Statement. At the conclusion of Petitioner's case in chief, DCPS made a motion for a directed finding against Petitioner, which, I denied in part and took under advisement in part. Counsel for both parties made closing statements. Neither party requested leave to file a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case are:

– Whether Student has been denied a FAPE by DCPS' June 6, 2013 IEP which changes Student's placement from Special School to an outside of general education setting at a regular public school; and

– Whether DCPS denied Student a FAPE by not involving Petitioner in the decision to place Student at City High School.

For relief, Petitioner seeks an order for DCPS to continue to fund Student's placement at Special School for the 2013-2014 school year.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE young woman, resides with Mother in the District of Columbia. Testimony of Mother.

2. Student is a child with a disability, eligible for special education and related

services under the primary disability, Specific Learning Disability ("SLD"). Exhibit R-7.

3. For the 2012-2013 school year, Student was enrolled in the GRADE at Special School. Student has been enrolled in Special School since was in 4th grade. Testimony of Mother.

4. Student's October 10, 2012 Special School IEP provided that would receive 31 hours per week of Specialized Instruction and 60 minutes per week of Speech-Language Pathology. The IEP team determined that Student required Specialized Instruction in a small group setting with integrated therapy in an out of general education, nonpublic setting. Exhibit P-1. At the October 10, 2012 IEP meeting, the IEP team determined that Student had made sufficient progress to be identified as a candidate for transitioning to a less restrictive environment for the 2013-2014 school year. At that meeting, Mother and Student expressed concern over the possibility of Student's having to attend NEIGHBORHOOD HIGH SCHOOL. Exhibit R-2. Everyone agreed at the October 10, 2012 meeting that Student could be a prime candidate for a less restrictive school environment. Testimony of Administrator.

5. Student's IEP team reconvened at Special School on June 6, 2013 for annual IEP review. At this meeting, IEP services hours were reduced to 26.5 hours per week of Specialized Instruction and 60 minutes per week of Speech-Language Pathology, all outside of the general education setting. The June 6, 2013 IEP stated that Student requires Specialized Instruction in a small group setting, and integrated supports throughout the school day, to access the general education curriculum. Exhibit R-7.

6. Special School's FORMER IEP COORDINATOR made notes of the June 6, 2013 IEP meeting. wrote in those notes that the IEP team agreed with Student that, at least in science, did need special education support and that Student would succeed in a

"combination setting." Exhibit P-3.

7. In a Prior Written Notice dated June 20, 2013, drafted by Progress Monitor, it was reported that the MDT team determined that Student could be successful in a 61 to 100% out of general education setting and that the team determined that Student was ready for a move to a lesser restrictive environment. Exhibit R-8. Mother denied that received this prior written notice. Testimony of Mother.

8. According to the meeting notes taken by Former IEP Coordinator, Progress Monitor stated at the June 6, 2013 meeting that DCPS would not send Student to Neighborhood High School and also that City High School did not meet the requirements Student needed for high school program. Exhibit P-3. Former IEP Coordinator did not testify at the due process hearing. Mother believed that had received an assurance from Progress Monitor that Student would not be assigned to Neighborhood High School or to City High School. Testimony of Mother. Progress Monitor testified that it was not accurate that stated there were certain high schools to which student would not be assigned. stated that at the June 6, 2013 IEP meeting, the IEP team was discussing Student's IEP placement, not the site selection. Progress Monitor took notes at the June 6, 2013 IEP meeting, but those note were not introduced into evidence. Progress Monitor's employment with DCPS ended on August 23, 2013. Testimony of Progress Monitor. In consideration of the witnesses' contradictory testimony and the absence of basis for a credibility determination, I decline to make a finding as to whether Progress Monitor made a commitment that Student would not be assigned to Neighborhood High School or to City High School.

9. About two weeks after the June 6, 2013 IEP meeting, someone from City High School telephoned Mother to ask when would be coming in to register Student. On one

occasion over the summer, Mother went to City High School with the parent of another child. On that occasion, did not initiate any contact with the school staff regarding Student's program or enrollment. has not obtained any information about the City High School program. Testimony of Mother.

10. By notice dated July 12, 2013, DCPS' Office of Special Education informed Mother that the location of services for implementation of Student's IEP for the 2013-2014 school year would be City High School. Exhibit R-9.

11. Special School Administrator contacted a DCPS program manager to inquire whether he could assure that Student would be placed at DC HIGH SCHOOL 3. He responded that nothing could be done. Testimony of Administrator.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is normally the responsibility of the party seeking relief – the Petitioner in this case. See DCMR tit. 5-E, § 3030.3. *See, also, Hinson ex rel. N.H. v. Merritt Educational Center*, 579 F.Supp.2d 89, 95 (D.D.C.2008) (Plaintiff, as the party challenging the IEP, had the burden of proof to show that the plan was inappropriate, citing *Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005).)

Analysis

The following issues are asserted by Petitioner in this case:

i. HAS STUDENT BEEN DENIED A FAPE BY DCPS' JUNE 6, 2013 IEP WHICH CHANGED STUDENT'S PLACEMENT FROM SPECIAL SCHOOL TO AN OUTSIDE OF GENERAL EDUCATION SETTING AT A REGULAR PUBLIC SCHOOL? and

ii. DID DCPS DENY STUDENT A FAPE BY NOT INVOLVING PETITIONER IN THE DECISION TO PLACE STUDENT AT CITY HIGH SCHOOL?

The June 6, 2013 IEP

The first issue identified in the Prehearing Order is whether Student has been denied a FAPE by DCPS' June 6, 2013 IEP. To determine whether a FAPE has been provided in an IEP offered to a child, a hearing officer "must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits." *See N.T. v. District of Columbia*, 839 F.Supp.2d 29, 33 (D.D.C.2012) (citation omitted.) The IDEA requires that to provide a FAPE, "[t]he IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir.2005), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). The measure and adequacy of an IEP is determined as of the time it was offered. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56 (D.D.C. 2008).

Here Petitioner offered no evidence that, when DCPS' June 6, 2013 IEP was offered, it was not reasonably calculated to enable Student to receive educational benefits or that DCPS did not comply with the IDEA's procedures in developing the IEP. The June 6, 2013 IEP provides that Student will receive 26.5 hours per week of Specialized Instruction and 60 minutes per week of Speech-Language Pathology, all outside of the general education setting, and that Student requires Specialized Instruction in a small group setting and integrated supports, throughout the school day, to access the general education curriculum. The IEP team's decision to change

Student's placement from Special School to an outside of general education setting at a regular public school did not deny Student a FAPE. Petitioner's witness, Special School Administrator, testified that there was mutual agreement, as early as October 2012, that Student was a candidate for a setting less restrictive than Special School. Former IEP Coordinator wrote in June 6, 2013 IEP meeting notes that at the meeting, the IEP team agreed with Student that, at least in science, did need special education support and that Student would succeed in a "combination setting." As discussed below, Petitioner's concern in this case was not the IEP team's decision to change Student's placement from Special School to an outside of general education setting at regular high school, but rather the particular school selected by DCPS to implement the IEP. I find that Petitioner has failed to show that when the June 6, 2013 IEP was developed, it was not reasonably calculated to enable Student to receive educational benefits.

DCPS' Failure to Involve the Parent in Choice of Location Assignment

It became evident from the argument of Petitioner's Counsel at the due process hearing that Petitioner's concern in this case was not the IEP team's decision to change Student's placement from Special School to a less restrictive setting at a regular public high school, but rather DCPS' unilateral decision that the location of services would be City High School. Mother attended the June 6, 2013 IEP meeting at which Student's educational placement – 26.5 hours per week outside of general education – was determined. There was consensus at the meeting that Student was ready to transition to a less restrictive environment in a DCPS public high school. Mother and Special School Administrator wanted Student to be assigned to DC High School 3. At the IEP meeting, Mother stated objections both to Neighborhood High School and to City High School. Mother believed that had received assurances from Progress Monitor that Student would not be assigned to either school.

The U.S. District Court for the District of Columbia recently made clear that "[w]hile the IDEA requires a student's parents to be part of the team that creates the IEP and determines the educational placement of the child, it does not 'explicitly require parental participation in site selection.'" *James v. District of Columbia* 2013 WL 2650091, 3 (D.D.C. Jun. 9, 2013), quoting *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir.2003); *See, also, Roher v. District of Columbia*, Civ. A. Nos. 89–2425, 89–2503, 1989 WL 330800, at 3 (D.D.C. Oct.11, 1989) ("'[P]lacement' refers to the overall educational program offered, not the mere location of the program."). DCPS is obligated to match each child with a disability with a school capable of fulfilling the child's IEP needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991).

I find that DCPS' decision to provide City High School as the location to implement Student's IEP was a site selection, for which the IDEA does not require parental involvement. Therefore, to establish a denial of FAPE, Petitioner's burden was to provide evidence that City High School did not match the placement requirements of the June 6, 2013 IEP. However, Petitioner made no attempt to show that City High School is not capable of implementing the June 6, 2013 IEP. (In his closing argument, Petitioner's counsel stated that he did not know whether City High School was an appropriate location.) I conclude, therefore, that Petitioner has failed to establish that DCPS denied Student a FAPE by not involving the parent in its selection of City High School as the site to implement the June 6, 2013 IEP.

ORDER

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

1. All relief requested by the Petitioner in this matter is denied;

2. In light of the findings of fact and conclusions of law herein, I deny DCPS' motion for a directed finding; and

3. DCPS' motion for reconsideration of the Hearing Officer's August 23, 2013 Stay-Put Order is denied.

Date: September 12, 2013 s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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