

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

STUDENT,¹)
By and through PARENTS,)
)
 Petitioners,)
v.)
)
DISTRICT OF COLUMBIA)
PUBLIC SCHOOLS,)
)
 Respondent.)

Case No.

Bruce Ryan, Hearing Officer

Issued: October 16, 2010

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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 August 2, 2010, against Respondent District of Columbia Public School (“DCPS”).

The Complaint concerns a -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. The Student has a primary disability of Emotional Disturbance (“ED”) and a full-time individualized education program (“IEP”). Through the end of the 2009-10 School Year, the Student attended a non-public day school located in suburban Maryland (“Private School A”), at which point he “aged out” of its middle school program. Petitioners now propose that the Student obtain a full-time therapeutic placement at Private School B, a non-public day school located in suburban Virginia serving students in grades 7 through 12.

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

Petitioners allege that DCPS has denied the Student a free appropriate public education (“FAPE”) in two ways: (a) by not implementing the Student’s 02/23/10 IEP by failing to provide Extended School Year (“ESY”) services during the 2010 summer; and (b) by failing to provide an appropriate educational placement for the 2010-11 School Year by the beginning of that SY.

DCPS filed a Response on August 11, 2010, which asserts that DCPS has proposed an appropriate placement for the 2010-11 SY by issuing a Prior Written Notice dated July 6, 2010, proposing that the Student attend his neighborhood DCPS senior high school (“DCPS School”), which has a full-time, self-contained program for ED students.

A resolution meeting was held on August 16, 2010, which was not successful, and the 30-day resolution period ended without resolution. A Prehearing Conference (“PHC”) was then held on August 31, 2010, at which the parties discussed and clarified the issues and requested relief. *See* ¶ 3 (Prehearing Order, issued Sept. 13, 2010), ¶ 5.

Five-day disclosures were filed by both parties as directed on September 13, 2010, and DCPS filed a supplemental disclosure on September 14, 2010. The Due Process Hearing was held on September 20, 2010, and Petitioners elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence:

Petitioners’ Exhibits: ¶ 1 through ¶ 15.

DCPS’ Exhibits: R-1 through R-6; R-8; R-9.²

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

Petitioners’ Witnesses: (1) Mother (Petitioner); (2) Father (Petitioner); (3) Special Education Teacher, Private School A; and (4) Program Director, Private School B.

DCPS’ Witnesses: (1) Special Education Coordinator (“SEC”), Private School A; (2) SEC, DCPS School; and (3) Dr. Maxine Gayle, LEA Representative.

² DCPS’ Exhibit R-7 (an unsworn letter dated 09/14/2000 from a person not on DCPS’ witness list) was not admitted into evidence.

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 PHC of the issues and requested relief raised by Petitioners resulted in the following issues being presented for determination at hearing:

- (1) **IEP Implementation/Summer 2010 ESY Services.** — Did DCPS deny the Student a FAPE by failing to implement the Student's 02/23/10 IEP with respect to Extended School Year ("ESY") Services during the 2010 Summer? Specifically, Petitioners claim that the IEP required ESY in the amount of 19.5 hours per week of specialized instruction and 30 minutes per week of behavioral support services in an out-of-general-education setting, and that DCPS did not provide such services.
- (2) **Failure to Provide Appropriate Placement/2010-11 SY** — Did DCPS deny the Student a FAPE by failing to provide an appropriate educational placement for the 2010-11 School Year?

As relief for the alleged denials of FAPE, Petitioners seek: (a) appropriate findings of FAPE denial; (b) immediate DCPS funding and placement of the Student at Private School B, a non-public school located in suburban Virginia that Petitioners contend offers a full-time therapeutic program designed to meet the Student's unique needs; and (c) an MDT meeting within 30 days of placement to (i) review all current evaluations, (ii) review and revise the IEP as appropriate, and (iii) discuss and determine appropriate compensatory education.

III. FINDINGS OF FACT

1. The Student is a -year old student who resides with Petitioners in the District of Columbia. He has been determined to be eligible for special education and related services as a child with a primary disability of Emotional Disturbance ("ED") under the IDEA. *See -4; Parents' Testimony.*
2. The Student has a current IEP dated February 23, 2010, which provides for 28.5 hours per week of specialized instruction, 30 minutes per week of speech-language pathology services, and one (1) hour per week of behavioral support services, all in a setting Outside General Education. *-4, p. 7; see also R-2.*

3. Under the Least Restrictive Environment (“LRE”) section of the IEP, the justification for the Student’s need to be removed from general education to receive his specialized instruction and behavioral support services states that the Student’s disability “manifests itself in a lack of impulse control, hyperactivity to the point of disruption, and poor social skills affecting his ability to access the general education curriculum” without these supports. -4, p. 8. As a result, a separate day school was accepted as the LRE because its “behavior modification program, small structured class size, [and] on staff therapists provide support to enable [the Student] to progress academically, socially and behaviorally.” *Id.*
4. The 02/23/2010 IEP also provides for ESY services for Summer 2010 in the amount of 19.5 hours/week of specialized instruction and 30 minutes/week of behavioral support services, both in a setting Outside General Education. -4, p. 12. The rationale for ESY was that the Student “needs to maintain the behavioral and academic supports found in ESY program in order to receive some of educational benefit from during the school year due to the possibility of behavioral and academic regression.” *Id.*, p. 11. *See also* -5 (IEP meeting notes), p. 3.
5. The 02/23/2010 IEP also provides the Student with the full-time support of a dedicated aide through 02/23/2011. -4, p. 7. To date, the IEP has never been revised to remove this requirement. *See LEA Rep Testimony*. DCPS witnesses further testified that this required support would be provided under the IEP to be implemented at DCPS School. *SEC Testimony*.
6. In conducting the annual review of the IEP at the 02/23/2010 MDT meeting, the Team noted (*inter alia*) that the Student was (a) “currently on a phase out plan” for his one-to-one dedicated aide; and (b) “continues to need a small structured class size, behavior modification, and on-staff therapists to support [him] academically, socially and behaviorally.” -5, pp. 2-3. The Team stated that it would reconvene later in the school year to discuss school placement/location for the 2010-11 SY due to the fact that the Student was in grade. *Id.*, p. 3.
7. Through the end of the 2009-10 School Year, the Student attended Private School A, a private day school located in suburban Maryland, which offers a behavior

modification program, small structured classes, and on-staff therapists. At the end of the 2009-10 SY, the Student graduated from the grade at Private School A and “aged out” of the program there. -1; *Parents’ Testimony*; *LEA Testimony*.

8. On or about May 26, 2010, DCPS convened another MDT/IEP Team meeting (with the Parent participating) to discuss the Student’s progress and placement for the 2010-11 School Year, when the Student would be advancing to grade. *See* -6; *R-8*. The Team’s review found that the Student was generally performing at the 5th grade level academically -14; *R-9*), and that his “behaviors seem to have improved in the fall but at the start of the calendar year there has been a decline.” *Id.*, p.2.³ Despite this, the Team indicated that the Student “will not have a 1:1 aide in the grade.” *Id.* With respect to placement, DCPS proposed the ED Cluster program at the Student’s neighborhood public high school (“DCPS School”), where it indicated that “his IEP can be met.” *Id.* Parent mentioned the possibility of the Student’s attending a charter school or a private general education school in D.C. *Id.*, pp. 2-3. Parent also stated that “he would like [the Student] to attend a school where he is not continuously exposed to students who are acting out, and he would like for him to attend a school where he would have the opportunity to play football & basketball and be involved with other extra-curricular activities.” *Id.*, p.3. The meeting ended with the understanding that “DCPS will follow up with the parent and lend any assistance during this process.” *Id.*
9. On June 11, 2010, the Student graduated from Private School A, having completed the grade. At graduation, Dr. Gayle discussed the proposed DCPS School placement further with the Parent and stated that she believed it would meet the Student’s needs. *See Parent Testimony*.

³ The school counselor’s June 2010 progress report similarly observed that “[t]his quarter [the Student]’s behavior seem[s] to have deteriorated somewhat, which is believed to be due to him graduating from the grade.” -12, p. 3. The report continued: “[The Student] was making significant progress in regards to his behavior in the be[gin]ning of the fall; however, since mid third quarter, [his] behavior seems to have regressed. He is lying more, having temper tantrums, and being disrespectful to staff. [The Student] may be having challenges with the realization that he will be transitioning into a new setting after being at the [Private School A] for several years.” *Id.*

10. On or about July 6, 2010, DCPS issued a Prior Written Notice proposing DCPS School as the Student's educational placement. The Notice stated that DCPS School "has a special program for students with emotional disturbance and can meet [the Student's] educational and social/emotional needs." *R-1; -7.*
11. ESY services and related transportation were funded and provided by DCPS for the Student during the 2010 Summer, with a beginning date of 07/01/2010 and an ending date of 07/30/2010. ESY services were provided at Private School A. The evidence shows that the Student took the DCPS bus and attended the ESY program for a few days during the first and second weeks of July, but did not attend the rest of the program sessions due in part to other commitments, despite telephone follow-up from the Private School A staff. *See R-4 (transportation forms for ESY); R-5 (service tracking forms); R-6 (ESY attendance record); Testimony of LEA, SEC, and Parent.*
12. On or about July 28, 2010, the Student and his father visited and interviewed at Private School B. On August 2, 2010, the same date the Complaint was filed, Private School issued an acceptance letter for the Student. Private School B offers a program that could meet the Student's educational needs. *See -15; Parent Testimony; Admissions Director Testimony.*
13. On or about August 23, 2010, the first day of the 2010-11 SY, Parent attempted to register the Student at DCPS School. However, the Student was not enrolled at DCPS School because DCPS officials at registration indicated that they lacked the necessary records on the Student. As a result, the Student has received no special education and related services from DCPS since the beginning of the 2010-11 SY, and has missed a significant amount of academic instruction. *See Parents' Testimony; SEC Testimony.*

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).

B. Issues/Alleged Denials of FAPE

For the reasons discussed below, the Hearing Officer concludes that Petitioners have failed to meet their burden of proof on Issue 1 (ESY), and that Petitioners have met their burden of proof only to a limited extent on Issue 2 (failure to provide an appropriate placement).

1. IEP Implementation - 2010 Summer ESY Services

Individualized determinations about ESY services are made through the IEP process. ESY services “must be provided only if a child’s IEP Team determines, on an individual basis...that the services are necessary for the provision of FAPE to the child.” 34 CFR 300.106(a)(2); *see also* DCMR 5-E3017.2; 71 *Fed. Reg.* 46,582 (Aug. 14, 2006). ESY services typically are provided during the summer months (*id.*), for four weeks of July in D.C. The purpose of ESY services is to prevent severe or substantial regression of skills that would jeopardize the benefits gained over the school year, such that a student would fail to recoup those lost skills within a reasonable period of time. *See, e.g., Alamo Heights Independent School Dist. v. State Board of Education*, 790 F. 2d 1153, 1158 (5th Cir. 1986); *J.P. ex rel. Popson v. West Clark Community Schools*, 230 F. Supp. 2d 910, 940 (S.D. Ind. 2002).

In this case, there is no dispute that the MDT/IEP Team determined that the Student needed ESY services for the 2010 Summer, and included these services in the 02/23/2010 IEP. The dispute is over whether that IEP requirement was properly implemented. The Hearing Officer concludes that it was. DCPS funded and provided ESY services and related transportation for the Student at Private School A (with a beginning date of 07/01/2010 and an ending date of 07/30/2010), but the Student chose not to avail himself of the educational benefit of these services. As noted above (*Findings*, ¶ 11), the evidence shows that the Student took the DCPS bus and attended the ESY program for a few days during the first and second weeks of July, but did not attend the rest of the program sessions due in part to other commitments, despite

telephone follow-up from the Private School A staff. See R-4 (transportation forms for ESY); R-5 (service tracking forms); R-6 (ESY attendance record); *Testimony of LEA, SEC, and Parent*.

Thus, Petitioners have not met their burden of proving that DCPS failed to implement the 02/23/2010 IEP and denied the Student a FAPE by failing to provide required ESY services during 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.

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). "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).⁴

In this case, Petitioner has not shown that DCPS School is unable to implement the requirements of the IEP. It appears that the DCPS School ED Cluster offers a full-time, self-

⁴ 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"); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 104 (D.D.C. 2008) (to prove that a placement is inappropriate, a petitioner generally must show that the proposed school is unable to implement the IEP as written).

contained, special education program for students with emotional disturbance that is capable of meeting the Student's educational and social/emotional needs. It has small structured classes of no more than 10-12 students (with a certified special education teacher and classroom assistant), appropriate behavioral interventions, and on-staff behavior specialists to support the Student academically, socially and behaviorally. It is also undisputed that DCPS School can provide all of the specialized instruction and related services (including speech/language therapy) that are required under the February 23, 2010 IEP. The SEC of DCPS School observed the Student at Private School A in May 2010 and concluded that he would be able to transition to the new setting (*SEC Testimony*); the DCPS School placement was discussed at the 05/26/2010 Team meeting with the Parent participating; and it was formally noticed on July 6, 2010. Although the Parents disagree with this placement, they testified that they have not even visited the program.

Thus, the Hearing Officer concludes that DCPS has offered 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. Moreover, DCPS School 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. public and private schools over facilities located outside the District). *See, e.g., Roark v. District of Columbia*, 460 F. Supp. 2d 32, n. 11 (D.D.C. 2006).

While the proposed DCPS placement may be appropriate, however, it appears that DCPS failed to ensure that this school placement was made available to the Student at the beginning of the 2010-11 SY. The undisputed testimony shows that the Student was unable to register at DCPS School on the first day of school, due at least in part to DCPS' own actions and

recordkeeping as of that date,⁵ and that the Student has missed a significant amount of services as a result. *See Findings*, ¶ 13. The Hearing Officer concludes that this has resulted in a denial of FAPE for the period of August 23, 2010, until September 20, 2010, the date of the due process hearing (when Petitioners were clearly on notice that the Student should be attending DCPS School pursuant to the July 7 placement notice).

In addition, the DCPS placement must be able to fulfill *all* of the service requirements set forth in the IEP, including the existing IEP requirement of a full-time, dedicated aide through 02/23/2011, absent any procedurally proper revision to the IEP. Despite the team's apparent intention to phase-out this requirement, it appears that it has never been removed from the Student's written program, on which parents are entitled to rely. *See, e.g., N.S. v. District of Columbia*, 110 LRP 26678 (D.D.C. May 4, 2010), slip op. at 12 ("One of the purposes of the IEP is to ensure that the services provided are formalized in a written document that can be assessed by parents and challenged if necessary."); *Alfono v. District of Columbia*, 422 F. Supp. 2d 1, 6 (D.D.C. 2006) (same). The evidence also suggests that implementation of the dedicated-aide requirement may be particularly important as the Student transitions to grade at a new school offering a different ED program in a less restrictive environment. *See, e.g., Testimony of Special Ed. Teacher, LEA Rep.*

Finally, the DCPS witnesses conceded that a further MDT/IEP Team meeting will be required in approximately 30 days to review DCPS School's ability to implement the Student's IEP and meet the educational and social/emotional needs of the Student. At this meeting, the team will also be able to review the continued need for the dedicated aide requirement in the new setting, as well as to discuss and determine whether compensatory education or other plans are warranted to address the period of missed services. *See SEC Testimony.*

Accordingly, to the limited extent set forth above, the Hearing Officer concludes that Petitioners have carried their burden of proof on Issue 2, but have failed to meet their burden of proof in all other respects. The Hearing Officer has exercised his discretion to order appropriate equitable relief, as specified in the Order issued below. *See* 20 U.S.C. §1415(i)(2)(C)(iii);

⁵ Other testimony indicated that there may have been miscommunication among DCPS and Private School A regarding the Student's assignment to another school for the 2010-11 SY. *See Admissions Director Testimony.*

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005).

V. **ORDER**

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

1. DCPS shall take immediate steps to register the Student at DCPS School and place the Student into the self-contained ED Cluster program for the purpose of implementing his February 23, 2010 IEP, including the requirement of a **full-time dedicated aide**.
2. Within **30 calendar days** of this Order (*i.e.*, **by November 16, 2010**), DCPS shall convene a meeting of the Student's MDT/IEP Team at DCPS School, with all necessary members (including Parent).
3. At the meeting held pursuant to paragraph 2 above, the Team shall: (a) review the Student's progress and performance at DCPS School; (b) review and revise, as appropriate, the Student's IEP based on all updated information; and (c) discuss and determine whether any compensatory education or other plan of services is deemed warranted to address the period of missed services from 08/23/2010 to 09/20/2010 and to otherwise meet the unique needs of the Student at this time.
4. Petitioners' other requests for relief in their Due Process Complaint are **DENIED**.
5. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.



Dated: October 16, 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).