

asserts (*inter alia*) that the School can continue to provide the Student with the services indicated on her current IEP.

The 30-day resolution meeting ended without resolution on February 12, 2011. The 45-day IDEA timeline therefore expires on March 29, 2011.

A Prehearing Conference (“PHC”) was held on February 22, 2011, at which the parties discussed and clarified the issues and requested relief. *See Prehearing Order*, issued March 1, 2011), ¶¶ 7-8.

Disclosures were filed by both parties, as directed, by March 14, 2011, and the Due Process Hearing was held in Room 2006 on March 21, 2011. 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-17.²

Respondent’s Exhibits: DCPS-1 through DCPS-8.

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

Petitioner’s Witnesses: (1) Parent; (2) Psychologist; (3) Special Education Coordinator (“SEC”); and (4) Private School Representative.

Respondent’s Witnesses: None. DCPS rested on the written record following Petitioner’s case.

² Exhibits P-15 and P-17 were admitted over DCPS’ objections, for the reasons stated on the record.

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* DCMR §§ 5-E3029, E3030. 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 HOD deadline is March 29, 2011.

III. ISSUES AND REQUESTED RELIEF

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

- (1) **Inappropriate Educational Setting/Placement** — Did DCPS deny the Student a FAPE by failing to provide the Student with an appropriate educational setting and/or placement at the December 2010 and January 2011 IEP team meetings?

Specifically, Petitioner claims that the Student is currently failing her classes and would benefit from a "more supportive and less chaotic learning environment" than can be afforded to the Student at the School.

- (2) **IEP Team Members (Procedural)** — Did DCPS fail to follow required procedures in determining the Student's educational program by failing to provide the Student's IEP teams with an individual knowledgeable about the child, the meaning of the evaluation data, and placement options at the 12/17/2010 and 1/5/2011 meetings?

Specifically, Petitioner claims that such failure violated 34 C.F.R. 300.116(a)(1) and 300.321 (a)(4)(iii), and that such procedural violation resulted in a denial of FAPE in accordance with 34 C.F.R. 300.513 (a) (2).

Petitioner requests that DCPS be ordered to: (a) issue a prior notice of placement to a non-public, special education day school selected by Petitioner (the "Private School") located in suburban Maryland, with transportation; and (b) provide compensatory education relief in the form of one-to-one tutoring for each day of services that the Student attended the School.

IV. STIPULATIONS

At the beginning of the Due Process Hearing, the parties reported that they had agreed to the following stipulations of fact:

1. That the Student's current IEP is dated January 5, 2011, and calls for full-time specialized instruction in an out-of-general-education setting;
2. That the MDT/IEP team meeting notes of October 5, 2010 (*P-5; DCPS-6*) are a fair and accurate representation of what occurred at that meeting;
3. That the MDT/IEP team meeting notes of February 4, 2011 (*P-14; DCPS-2*) are a fair and accurate representation of what occurred at that meeting;
4. That the safety plan set forth at Exhibit P-3 was developed on or about September 16, 2010, and its contents are as set forth in Exhibit P-3; and
5. That MDT/IEP team meetings took place on December 17, 2010, and January 5, 2011.

V. FINDINGS OF FACT

1. The Student is a year old student who resides in the District of Columbia. She has been determined to be eligible for special education and related services under the IDEA as a child with an Emotional Disturbance ("ED"). See *P-2* (01/05/2011 IEP); *DCPS-4* (same). The Student currently attends a DCPS school for special education students (the "School").
2. The Student's current IEP is dated January 5, 2011. It provides for 31 hours per week of specialized instruction and 60 minutes per week of behavioral support services, in a setting outside general education. See *DCPS-4*, p. 7.
3. In August 2010, before agreeing to enroll the Student for the 2010-11 School Year, Petitioner met with School officials to discuss his concerns regarding the Student's safety. Petitioner was informed that his concerns would be addressed through a safety plan. *Parent Testimony; P-1*, pp. 2-3.
4. On or about September 16, 2010, DCPS developed an "individual safety plan" for the Student. *P-3*. The plan provides that upon arrival at the School each day, the Student will be escorted into and out of the building by her dedicated aide and a security guard. *Id.* The plan further provides (*inter alia*) for the dedicated aide to remain with the Student for the duration

of the day; for the dedicated aide to transition with her from class to class; for the Student to be closely monitored by security and behavior technicians; and for a female behavior technician to be assigned exclusively to the Student during her dedicated aide's lunch break.

Id. The Student's class schedule has also been modified to ensure that she is not in any classes with peers who have threatened her in the past. *Id.* See also *SEC Testimony*.

5. On or about October 5, 2010, DCPS convened a meeting of the Student's MDT/IEP team to address the Student's academic progress and update her evaluations. *P-5*. The Student's teachers noted that the Student was making academic progress, but that her behavior needed to improve to allow her to transition to a less restrictive environment. *Id.*; see also *P-1* (Due Process Complaint), p. 3; *DCPS-6*. The team agreed that additional clinical and psycho-educational assessments of the Student were warranted, *P-5*, and independent evaluations were then authorized on October 15, 2010. *P-7*.
6. On or about October 13, 2010, the Student was involved in a fight in the School cafeteria. See *P-6* (Office Discipline Referral Form, dated 10/13/2010).
7. In late October and early November 2010, independent psycho-educational and clinical evaluations were conducted, and a written report was issued on November 26, 2010. *P-8*. The report assessed the Student's cognitive ability as within the Low Average range of intellectual functioning (FSIQ = 83), but also found a significant difference between her verbal and non-verbal reasoning abilities (with non-verbal reasoning being much better developed). *P-8*, p. 12. Current academic achievement testing showed that the Student is performing within the Below Average range in Broad Reading and Broad Written Expression, and within the Borderline range in Broad Math. *Id.*, pp. 12-13. Her overall achievement abilities appeared to fall between the 5th and 6th grade levels, and the evaluator believed that she therefore would likely benefit from continued specialized instruction in all academic areas. *Id.*, p. 13.
8. From a behavioral and emotional standpoint, the independent evaluator diagnosed the Student as having Attention Deficit/Hyperactivity Disorder ("ADHD"), Predominately Combined Type, and Adjustment Disorder with Mixed Disturbance of Emotions and Conduct. *P-8*, p. 13. The evaluator found that the Student displays many symptoms of ADHD, Combined Type, "including impulsivity, hyperactivity, inattention, and oppositionality," in addition to "harboring some underlying feelings of sadness and anxiety."

Id. The evaluator also concluded that “many of [the Student’s] externalizing and/or aggressive behaviors appear to be a reaction to environmental stressors,” including bullying and other abuse from her classmates.” *Id.* The evaluator thus believed that the Student “would benefit and likely prosper in a more supportive and less chaotic learning environment.” *Id.* The evaluator recommended a “highly structured academic setting with low student/teacher ratio and limited distractions in order [for her] to succeed academically.” *Id.*, p. 14. *See also Psychologist Testimony.*

9. On or about December 6, 2010, Petitioner provided a copy of the independent evaluation report to DCPS and requested an IEP team meeting. *P-9.*
10. On or about December 16, 2010, the Student was involved in an incident with another student, which had carried over from a fight on the bus the previous day. As a result of this incident, she was suspended for four days. *P-11.*
11. On or about December 17, 2010, DCPS convened a meeting of the Student’s MDT/IEP team to review the independent evaluation and to discuss the Student’s progress. *P-12; DCPS-5.* A change in the Student’s performance was noted, including a refusal to complete classroom assignments since the end of October. *Id.*, pp. 3-4. The special education teacher stated that “the changes include [Student’s] reaction and the impact of these incidents particularly during lunch – causing [Student] to not settle down when she comes into 6th period.” *Id.*, p. 4. The independent evaluator reiterated her concern that the anxiety problems exhibited by the Student will impact her classroom performance. *Id.* The team felt that she was capable of performing the work, but was not ready for a general education setting due to her emotional concerns. *Id.* Petitioner requested that the Student be placed at Private School; however, the team indicated that the School could continue to implement the services on her IEP. *Id.*, pp. 3-4. The team agreed to re-convene after the winter break to review and revise, as appropriate, the Student’s IEP based on the evaluation results. *Id.*
12. The IEP team at the December 17, 2010 meeting included a DCPS School Psychologist, who reviewed the results of the independent evaluation and participated in the discussion along with the independent evaluator. *DCPS-5.* The team also included the SEC, social worker, special education teachers, and Petitioner. *Id.*
13. On or about January 5, 2011, DCPS re-convened the IEP team meeting. *P-2; DCPS-3.* The team updated the Student’s IEP as noted in paragraph 2 above. Petitioner again requested

that the Student be placed at Private School; however, DCPS declined to move the Student to another school. *Id.*

14. The IEP team at the January 5, 2011 meeting included a case manager, general education teachers, special education teachers, speech/language pathologist, assistant principal, social worker, and Petitioner. *DCPS-3.*
15. On February 4, 2011, after filing of the Complaint, DCPS convened another IEP team meeting. The team reviewed the results of a speech/language assessment and decided to add 30 minutes per week of speech/language consultation to the Student's IEP. *P-14; DCPS-2.*

VI. DISCUSSION AND CONCLUSIONS OF LAW

A. Summary

The Hearing Officer concludes that Petitioner did not meet his burden of proving that DCPS denied the Student a FAPE by failing to provide her with an appropriate educational setting and/or placement at the December 2010 and January 2011 IEP team meetings. The evidence shows (*inter alia*) that the Student's IEP is reasonably calculated to confer educational benefits on the Student, and that the School can fully implement the IEP. Nor did DCPS violate the IDEA in connection with the membership of the IEP teams. Moreover, even assuming *arguendo* that a procedural violation occurred, such violation did not cause educational harm to the Student or result in a denial of FAPE.

B. 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 educational placement. 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 recognized standard is preponderance of the evidence. *See, e.g., N.G. 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).

C. Issue/Alleged Denial of FAPE

1. Inappropriate Placement

Petitioner claims that DCPS failed to provide the Student with an appropriate educational setting and/or placement at the December 2010 and January 2011 IEP team meetings. Petitioner argues that the Student is currently failing her classes and would benefit from a “more supportive and less chaotic learning environment” than can be afforded to the Student at the School. For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to meet his burden of proof on this issue.

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); 34 C.F.R. § 300.17; DCMR 5-E3001.1.

To be sufficient to provide FAPE under the IDEA, an “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.” *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).³ 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

As the D.C. Circuit has explained, “[i]f no suitable public school is available, the District must pay the costs of sending the child to an appropriate private school; however, if there is an ‘appropriate’ public school program available, *i.e.*, one ‘reasonably calculated to enable the child

³ See also *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 (“while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit.”).

⁴ See also *T.T. v. District of Columbia*, 48 IDELR 127 (D.D.C. 2007) (“Once developed, the IEP is then implemented through appropriate placement in an educational setting suited to the student’s needs”).

to receive educational benefits,' the District need not consider private placement, even though a private school might be *more appropriate* or *better able* to serve the child." *Jenkins v. Squillacote*, 935 F. 2d 303, 305 (D.C. Cir. 1991) (emphasis in original). *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"); *Kerkam v. McKenzie*, 862 F. 2d 884, 887 (D.C. Cir. 1988) ("proof that loving parents can craft a better program than the state offers does not, standing alone, entitle them to prevail under the Act"); 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, the evidence shows that the Student's IEP is reasonably calculated to confer educational benefits on the Student; that the School can fully implement the IEP, *see O.O. v. District of Columbia, supra*; and that all members of the IEP team agree that the Student can do well at the School if her peers are not allowed to bother or harass her.⁵ While Petitioner's desire to place the Student in a "more supportive and less chaotic learning environment" is understandable – and she may well perform better in such environment – DCPS is not required to place the Student in the best possible program.

In short, Petitioner has not proved by a preponderance of the evidence that DCPS failed to provide the Student with an appropriate educational setting and/or placement at the December 2010 and January 2011 IEP team meetings, based on the information then available. The Private School "may well be a better environment for [the Student], but DCPS has made available a free appropriate public education to this child, and, in such circumstances, DCPS cannot be required to pay for the education his parents would prefer." *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at pp. 7-8.

⁵ While Petitioner argues that the School constitutes a "hostile school setting" that interferes with the Student's ability to access her education (*P-1*, p. 7, citing *Shore Regional High School Board of Education v. P.S.*, 381 F.3d 194, 195 (3d Cir. 2004)), the Hearing Officer concludes that information available to the IEP team at its December 2010 and January 2011 meetings concerning various incidents involving the Student (as well as the independent evaluator's report) fall well short of such standard. In some cases, the Student actively participated in the misbehavior that was the subject of the incident (*see, e.g., P-6, P-11*), and she also engaged in her own disruptive and uncooperative behavior in the classroom, *see P-7*. *Cf. Shore Regional High School, supra* (student was "victim of relentless physical and verbal harassment as well as social isolation by his classmates" continuing for many years; all witnesses agreed that student had been subjected to "unusual levels of harassment" and "devastating bullying"; and harassment "became so intense that P.S. attempted suicide").

Moreover, Petitioner has not shown that his proposed placement would necessarily provide a better match with the Student's current needs. Indeed, the Private School witness testified that the parent and Student have not been interviewed since May 2010, well before the Student even began attending the School, and that the only IEP he has reviewed is an earlier version from March 2010. *See Private School Testimony.* Thus, Private School appears to lack knowledge of the very behaviors, incidents, and evaluations of the Student during the 2010-11 school year that Petitioner cites as critical to determining an appropriate educational placement.

To the extent Petitioner has continued safety concerns at the School,⁶ Petitioner does have a right to insist on DCPS' compliance with the individual safety plan, which (*inter alia*) dictates certain actions by the dedicated aide required under the Student's IEP. A consistent failure to follow this plan may well give rise to a denial of FAPE (in the form of an inappropriate educational environment and/or a failure to implement the dedicated-aide provisions of the IEP), which could be presented in a future due process complaint. Thus, DCPS would be well advised to investigate any and all circumstances suggesting any departure from the safety plan, and to enforce strictly the terms of such plan, for the remainder of this school year.

2. Procedural Violation – IEP Team Members

Petitioner next claims that DCPS failed to follow required procedures by failing to provide the Student's IEP teams with an individual knowledgeable about the child, the meaning of the evaluation data, and placement options at the 12/17/2010 and 1/5/2011 meetings, as required by 34 C.F.R. 300.116(a)(1). (Petitioner's counsel also argued at the PHC that this violated 34 C.F.R. 300.321 (a) (4) (iii).) The Hearing Officer concludes that Petitioner has failed to meet his burden of proof on this issue as well.

At the December 17, 2010 meeting the IEP team included a DCPS School Psychologist, who reviewed the results of the independent evaluation and participated in the discussion along with the independent evaluator. *DCPS-5.* The team also included the SEC, social worker, and special education teachers with knowledge of the Student. *Id.* And at the January 5, 2011

⁶ It appears that another serious incident involving the Student occurred in late February (following the PHC), in which the Student was physically and verbally harassed by two older, 12th grade students in a stairway. *See P-15* (Incident Information Report, dated Feb. 24, 2011); *Parent Testimony.*

meeting, the IEP team included a case manager, general education teachers, special education teachers, speech/language pathologist, assistant principal, social worker, and Petitioner. *DCPS-3*.

The Hearing Officer concludes that these participants more than satisfied the procedural requirements of the IDEA. DCPS admittedly did not have an official in attendance who could authorize a non-public placement because the IEP team had not collectively decided that the current public school placement was not working. In addition, neither of the meetings had the stated purpose of determining placement. Thus, inclusion of a DCPS official with authority to authorize a non-public placement would have been premature and/or unnecessary at that point. *See SEC Testimony.*

Even assuming *arguendo* that DCPS was required to include a person knowledgeable about non-public placement options at either the December or January IEP team meetings, Petitioner has not shown that such procedural violation caused a deprivation of educational benefit, or otherwise resulted in a substantive denial of FAPE, in accordance with 34 C.F.R. 300.513 (a) (2). *See Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006).

Because Petitioner has not established a denial of FAPE to the Student, there is no basis on which to grant the Student prospective private placement, compensatory education, or any other form of relief.

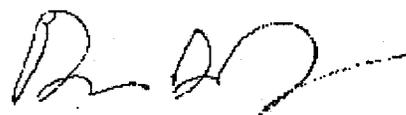
VII. ORDER

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 his Due Process Complaint filed January 13, 2011 are hereby **DENIED**;
2. The Complaint is **DISMISSED, With Prejudice**; and
3. This case shall be, and hereby is, **CLOSED**.

IT IS SO ORDERED.

Dated: March 29, 2011



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).