

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

On behalf of, Parents,

(DOB Student,
STARS

Petitioner,

Case No.

Bruce Ryan, Hearing Officer

v.

Hearing: June 23, 2009

Decided: July 3, 2009

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

2009 JUL -6 AM 9:06
STUDENT SERVICES OFFICE

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed against District of Columbia Public Schools ("DCPS") on May 1, 2009, on behalf of a -year old student or the "Student") who resides in the District of Columbia and attends

The complaint was brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations. The complaint alleges that DCPS has denied the Student a free appropriate public education ("FAPE") under the IDEA by (a) failing to appropriately evaluate the Student, (b) failing to develop an appropriate individualized educational program ("IEP"), and (c) failing to provide an appropriate placement.

On May 6, 2009, DCPS agreed to waive the resolution session and requested that this case proceed to a due process hearing on the merits. DCPS filed a response on May 12, 2009, which generally denies the allegations that it denied the Student a FAPE with respect to evaluations, the IEP and placement. DCPS further asserts, *inter alia*, that (a) it has been unable to obtain parental consent for evaluations, (b) a current IEP was developed on or about April 6, 2009, and (c) is able to implement the IEP and is an appropriate location for delivery of services to the Student.

¹ The parties were represented at hearing by Charles Moran, Esq. (for Petitioners), and Laura George, Esq., Assistant Attorney General for the District of Columbia (for Respondent DCPS).

Prehearing Conferences were held on May 27 and June 2, 2009 to discuss and clarify the issues and address other pre-hearing procedural matters. The due process hearing was initially scheduled to take place on June 12, 2009. However, at the June 2 PHC, it was agreed that Petitioners would file a motion for continuance of the hearing to allow the parties to participate in a meeting of the Student's Multi-disciplinary Team ("MDT") scheduled for June 11, 2009, including appropriate follow-up prior to the hearing. The purpose of the meeting was to review evaluations and to review and revise the Student's IEP, as warranted.

Accordingly, on June 9, Petitioners filed a continuance motion, and on June 10, 2009, the Hearing Officer granted the motion based on the above showing of good cause. A Prehearing Order was issued on June 11, 2009; five-day disclosures were filed by both parties on or about June 16, 2009; and the Due Process Hearing convened on June 23, 2009. The parents elected for the hearing to be closed.

At the Due Process Hearing, 19 documentary exhibits were submitted by Petitioners (identified as "1" through "19") and 11 documentary exhibits were submitted by DCPS (identified as "DCPS-01" through "DCPS-11"). All exhibits were admitted into evidence without objection. Petitioners presented three witnesses: Ms. Sharon Millis (independent educational advocate); [redacted] (parent-Petitioner); and [redacted] (Admissions Specialist, DCPS presented no witnesses and elected to rest on the record following Petitioners' case in chief.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and SOP Section 1003.

II. ISSUE(S) AND REQUESTED RELIEF

As summarized in the Prehearing Order and at the outset of the Due Process Hearing, the following issues involving alleged denials of FAPE were presented for determination:

- A. ***Failure to conduct evaluations*** — Whether DCPS has failed appropriately to evaluate the Student under the IDEA;
- B. ***Failure to develop an appropriate IEP*** — Whether DCPS has failed to develop an appropriate IEP for the Student because his IEPs, *inter alia*: (1) reflect disability classifications based on faulty and/or incomplete information; (2) fail to state current levels of performance; and (3) repeat, with minor variations, the same inappropriate goals and objectives year after year;
- C. ***Failure to provide an appropriate placement*** — Whether DCPS has failed to provide the Student with an appropriate educational placement.

In connection with these claims, Petitioners also allege certain procedural violations, including improper notice and opportunity for parental participation in the IEP and placement decisions.

Petitioners request the following relief: (1) independent evaluations covering occupational therapy, adaptive measures, and functional behavioral assessment;² (2) immediate placement of the Student at an appropriate private school that can meet his special education needs (identified in the five-day disclosures and at hearing as _____ and (3) MDT/IEP meetings to (*inter alia*) complete and update the Student's IEP and discuss compensatory education.³

III. FINDINGS OF FACT

1. The Student is a _____-year old resident of the District of Columbia whose date of birth is _____. The Student attends _____.
See Parent Testimony; -1.

2. The Student has been determined to be eligible for special education and related services, with a primary disability classification of Autism. *See -1; -1A; -5.*

3. From approximately 2002 to 2005, the Student received special education and related services as a child with mental retardation ("MR"). *See -12; Due Process Complaint Notice, pp. 2-3.*

4. Beginning in 2006, the Student's IEP changed his disability classification from MR to Multiply Disabled, Autism. *-5 (4/21/06 IEP); Due Process Complaint Notice, p. 3. See also -4 (6/1/07 IEP); -3 (4/6/08 IEP).*

5. On or about April 6, 2008, the Student's MDT/IEP team (not including the parent) met to review and update his IEP. The 4/6/08 IEP provided 24.5 hours per week of specialized instruction, one hour per week of occupational therapy ("OT"), one hour per week of speech/language therapy, and one hour per week of social work services, all in a setting out of the general education classroom. *See -3.* The IEP stated that the Student required a low student-teacher ratio and a setting with reduced, minimized distractions. *Id.*, p. 4.

6. In early October 2008, _____ staff wrote the parents expressing "some concerns about whether this is the appropriate placement for _____ DCPS-11-2. At the same time, on multiple occasions between October 2008 and January 2009, _____ school officials refused to allow _____ educational advocate to observe his classroom instruction. *Testimony; see also -16.*

7. On or about April 1, 2009, DCPS sent a letter of invitation to the parents inviting them to attend a meeting on April 6, 2009, to discuss the educational needs of _____ and to revise his IEP. DCPS-03. With such short notice, the parents were unable to attend and did not participate in the 4/6/09 meeting. *Parent Testimony; -2; DCPS-11-5.*

² At hearing, Petitioners withdrew requests for clinical, psycho-educational, speech/language, and autism screening evaluations. Petitioners also stated that they would be willing to accept relief either in the form of independent evaluations or directives that DCPS complete its own testing by a reasonable date certain.

³ The complaint originally sought compensatory education in the form of vocational programs and activities with a one-on-one mentor for 200 hours, at a cost not to exceed _____. However, at hearing, Petitioners' counsel elected not to present a case for compensatory education under *Reid v. District of Columbia*, 401 F. 3d 516, 521-24 (D.C. Cir. 2005), stating that Petitioners instead wanted to discuss compensatory education at an MDT/IEP meeting.

8. At the April 6, 2009 meeting, the MDT/IEP team (without the parents participating) determined that [redacted] should continue to receive special education services, but that “the Autism Program [at [redacted] is not the appropriate placement for [redacted] DCPS-05-1 (emphasis added). However, DCPS did not propose any alternative placement at that time. The team also changed the Student’s disability classification from Autism back to MR, without explanation and without the benefit of any new evaluations. See [redacted]-2; DCPS-04; Testimony. Additionally, it provided extended school year (“ESY”) services for the Student because the team determined that [redacted] would lose some skills if he does not participate in ESY. *Id.*

9. On or about April 11, 2009, the parent consented to an updated comprehensive OT assessment. DCPS-06-1; [redacted]-1A, p. 10. DCPS does not appear to have taken steps to complete this evaluation over the following 60 days, leading up to the next MDT meeting. The evaluation was eventually scheduled to take place on or about June 15, 2009, but as of the date of hearing, it still had not been conducted. See *Parent Testimony*.

10. On or about May 7, 2009, after the due process complaint was filed in this case, a psychological re-evaluation of the Student was conducted by DCPS School Psychologist Cheryl Summers. [redacted]-6. The evaluation concluded that [redacted] continues to qualify for special education services as a student with an Autistic Spectrum Disorder and continues to need a full-time special education program. *Id.*, pp. 6-7. According to the psychologist’s report issued June 8, 2009, [redacted] “program should include specialized instruction, prevocational skills, functional academics and independent living skills in a structure[d] setting with a small student-teacher ratio. Improving social skills and social interactions should be an integral part of his program.” *Id.*, p. 7.

11. On or about May 8, 2009, a speech and language re-evaluation of the Student was conducted. [redacted] 7. According to the speech/language pathologist’s report issued June 8, 2009, the “results obtained through the standardized testing revealed that [redacted] receptive and expressive vocabulary skills as well as his expressive and receptive language skills are within the very low range when compared to his peers.” *Id.*, p. 5.

12. On June 11, 2009, while this case was pending (and the hearing continued), a further MDT meeting was held to review the updated assessments. [redacted] 1A; DCPS-08. The team found that “the current test results indicate that [redacted] is functioning cognitively within the deficient range” and that his “achievement skills are within the very low range.” DCPS-08-5. The team determined that [redacted] “continues to qualify for special education services as a student with an Autistic Spectrum Disorder” and “continues to need a full-time education program for students with Autistic Spectrum Disorder.” *Id.*

13. At the 6/11/09 meeting, the parent indicated that “she felt that [redacted] has not made any progress in the last four years...[and] that [redacted] is capable of doing a lot more than what he has been getting.” DCPS-08-6. The parent further “indicated that she is looking for a program that would be able to help [redacted] learn more vocational skills than academic.” *Id.* There is no indication that DCPS addressed these concerns. Despite that, and contrary to the team’s determination at the 4/6/09 meeting, DCPS then indicated that [redacted] can provide the services that [redacted] needs.” *Id.* The meeting notes include no further explanation, and no DCPS witness testified at hearing to explain this changed assessment.

14. Also at the 6/11/09 meeting, the team began to develop an updated, revised IEP in light of the parent's disagreement with the goals and objectives set forth in the 4/6/09 IEP. See -1A, at MDT meeting notes, pp. 6-7; *Parent Testimony*. However, the team did not complete the revised IEP before the meeting was concluded, and it remains in draft form. See -1; *DCPS-09-5; Parent Testimony; Millis Testimony*. The 6/11/09 draft IEP reinstates the Student's primary disability category as Autism, consistent with the MDT meeting discussion and the DCPS psychologist's report. -1, p. 1; -6. The draft IEP also continues to provide a full-time special education program in a setting outside general education, along with ESY services; and it proposes a post-secondary transition plan focused on vocational training and development of pre-vocational skills. *Id.*, pp. 7, 10-12.

15. Test results reviewed at the 6/11/09 MDT meeting show a lack of academic progress for while at particularly in math. For example, between January 2008 and May 2009, academic testing showed only minimal increases in Broad Reading (1.7 to 2.0) and Broad Math (1.6 to 2.2), and actually regressed in Math Fluency (3.0 to 1.9) and in Math Calculation (3.4 to 2.9). See *Millis Testimony; compare -3A with -6*.

16. Petitioners' main desire for education at this point is to prepare him for employment and independent living. *Parent Testimony*. They have not seen much progress in this area during the past several years of DCPS schooling and do not believe DCPS can get ready to function independently in the community over the next three years. They do not want DCPS to just "push him through" the school system without providing the necessary special education help to meet his unique needs. *Id.*; *DCPS-08-6*.

17. The evidence shows that has not been receiving adequate instruction in functional life skills or vocational training while at See *Millis Testimony; Parent Testimony*. DCPS presented no evidence to contradict Petitioners' testimony on this subject.

18. The evidence shows that cannot provide a full-time special education program to meet unique needs, and DCPS has not identified or offered any other school placement for the Student.

19. On or about June 16, 2009, was accepted into a proposed placement at -19. The evidence shows that can provide an appropriate, full-time special education program for the Student.⁴

20. Petitioners considered other schools that specialize in autistic students, such as and but concluded that they were "too low-functioning" for *Millis Testimony*. is functioning at a fairly high level for students with Autistic Spectrum Disorder; he is very verbal and responsive, and can be effectively redirected in a classroom

⁴ Uncontroverted testimony shows that is able to provide the required and appropriate services for including academic instruction, functional/daily life skills, and behavioral issues. *Testimony; Millis Testimony; see also -19*. can provide the small setting and individual instruction needs, as well as a "built-in behavioral program" that would benefit the Student. *Testimony*. His proposed classroom would include four other students with a certified special education teacher. *Id.* While the class presently would not include other autistic students, the teacher would be able to employ "teach model" techniques related to IEP goals that are recognized by the Council for Exceptional Children and have proven successful with many autistic students. *Id.*

setting. *Id.* Thus, Petitioners and educational advocate concluded that the programs at such schools would not be appropriate for the Student.⁵

21. DCPS' failures to conduct appropriate evaluations, to develop appropriate IEPs, and/or to provide an appropriate placement for through the 2008-2009 school year have harmed the Student and negatively impacted his academic and behavioral progress.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see also Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to evaluate, to develop an appropriate IEP, and/or to provide an appropriate placement.

2. 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 5-3030.3. The standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *see also* 20 U.S.C. §1415(i)(2)(C)(iii).

B. Issues/Alleged Violations by DCPS

3. For the reasons discussed below, the Hearing Officer concludes that Petitioners have carried their burden of proof on each issue, as to the violations and denials of FAPE alleged in the complaint. DCPS presented no testimony to contradict Petitioners' testimony at hearing on these issues. DCPS also has not offered any school placement for the Student other than Roosevelt, which the MDT agreed in April 2009 was not appropriate to meet his needs.

(1) *Failure to Conduct Evaluations*

4. Under its "child find" mandate, DCPS has an affirmative duty to identify, locate and evaluate a potentially disabled child. 20 U.S.C. §1412(a) (3) (A); DCMR 5-3002.1(d). In conducting such evaluations, DCPS must ensure that the child "is assessed in all areas related to the suspected disability," and that the evaluations are "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child [is] classified." 34 C.F.R. §300.304(c) (4), (6).

5. Petitioners contend that DCPS has failed timely to perform (*inter alia*) an OT evaluation, an FBA, and an adaptive measures assessment, all of which are necessary to identify the Student's special education and related services needs. The record supports this claim, as follows:

⁵ The Student's independent educational advocate (Ms. Millis) has a Masters' degree in special education with a concentration in autism, and she is experienced in the education and training of autistic children. Without objection by DCPS, she testified as an expert regarding the development of IEPs, including appropriate placements, for such students. In addition, the witness (Dr. Lindsey), who testified concerning the appropriateness of the proposed private placement for has a PhD in special education and familiarity with autistic children.

(a) **FBA.** Despite evidence of continued behavioral concerns (*see, e.g., DCPS-5; Millis Testimony*), DCPS has never conducted an FBA. Under IDEA, the “IEP Team must – in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 34 C.F.R. §300.324(a)(2)(i). That is the purpose of an FBA; it is “essential to addressing a child’s behavioral difficulties, and, as such it plays an integral role in the development of an IEP.” *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 68 (D.D.C. 2008). DCPS should have conducted an FBA and then developed a behavior intervention plan (“BIP”) to be incorporated into the IEP. The failure to conduct an FBA is more than a procedural violation; it is a denial of FAPE. *See Harris, supra.*

(b) **Adaptive measures.** Uncontroverted evidence presented by Petitioners indicates that the Student would benefit from an assessment of adaptive measures, which has not been performed. *See Millis Testimony* (cross examination) (adaptive evaluation not used only as screen for MR, but also for assessing functional life skills, etc.).

(c) **OT re-evaluation.** The MDT determined at its 4/6/09 meeting that needed an updated OT evaluation, and parental consent was obtained on 4/11/09. *DCPS-05-2; DCPS-06.* However, DCPS did not appear to take steps to complete this evaluation over the next 60 days.

Accordingly, appropriate relief will be included in the Order below to address these outstanding evaluations.

(2) **Failure to develop an appropriate IEP**

6. The evidence presented by Petitioner, and not contradicted by DCPS, also demonstrates that both the April 6, 2008 and April 6, 2009 IEPs were inappropriate and not reasonably calculated to enable the Student to receive meaningful educational benefit during the 2008-2009 school year. *See Board of Education v. Rowley*, 458 U.S. 176, 204 (1982); *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988). The failure to provide an appropriate IEP is a denial of FAPE.

7. **April 6, 2008 IEP.** As Petitioner’s expert/educational advocate testified, the goals and objectives provided in the 4/6/08 IEP did not track abilities, as measured by his educational evaluations.⁶ In addition, the team that developed this IEP did not include the parent or related services providers or any representative of the receiving school and no 30-day follow-up review was conducted. Moreover, according to Ms. undisputed testimony, DCPS stated at the 6/11/09 meeting that the April 2008 IEP was not appropriate for and was not followed by Roosevelt during the 2008-2009 school year.

8. **April 6, 2009 IEP.** The April 6, 2009 IEP erroneously reclassified the Student as MR, without explanation or support of any new or updated evaluations. This classification failed to reflect the appropriate academic and behavioral concerns relating to Autistic Spectrum Disorder that prevented from accessing his education, which had been documented and

⁶ For example, the Reading area included an objective that “will identify sight words to the 3d grade level with 80% accuracy,” even though he was then reading at only a 1st grade level. Similarly, the Math area included an objective that “will solve 2-step linear equations with 80% accuracy,” even though he was testing at only a 1st grade level in Broad Math. -3, IEP page 3 of 4. These objectives were inappropriate, according to Petitioners’ expert. *Millis Testimony.*

discussed at prior MDT/IEP meetings. It was then contradicted by DCPS' own school psychologist 6). In addition, the IEP was again developed without parental participation due to inadequate notice.⁷ The failure to conduct an FBA also resulted in not having a BIP in place to address behavioral problems that impacted education at

9. The above inadequacies constituted a denial of FAPE because the Student could not and did not progress academically with these inappropriate IEPs.⁸ DCPS did not present any evidence that disputes this lack of progress. Moreover, the procedural violations noted above impeded the Student's right to FAPE and significantly impeded the parents' ability to effectively participate in the decision-making process regarding provision of a FAPE. See 20 U.S.C. §1415(f)(3)(E)(ii); 34 C.F.R. §300.513(a)(2).

10. Finally, the June 11, 2009 "draft" IEP has not been completed and thus cannot satisfy DCPS' obligation to provide FAPE in conformity with an appropriate IEP, 34 C.F.R. §300.17. The undisputed evidence shows that this draft IEP was initiated by Petitioners in an effort to remedy the inadequacies of the prior IEPs, and was proposed for discussion at the 6/11/09 MDT meeting. But DCPS failed to complete it, and it was never adopted by the MDT to govern educational program. See *Mullis Testimony*. DCPS should complete work on this draft IEP at the 30-day follow-up meeting provided for in the Order below.

(3) *Failure to provide an appropriate placement*

11. The record shows that DCPS has failed to provide an appropriate educational placement for the Student for the 2008-2009 school year. As reflected in the 4/6/09 MDT meeting notes and the uncontroverted testimony presented by Petitioners, the program provided at is not appropriate or reasonably calculated to meet unique needs.

12. According to the June 8, 2009 DCPS psychologist's report, the Student's "program should include specialized instruction, prevocational skills, functional academics and independent living skills in a structure[d] setting with a small student-teacher ratio." -6, p. 7. Moreover, courts have recognized that "providing a 'meaningful educational benefit' under the IDEA requires programs and results which reflect the Act's emphasis on preparation for self-sufficiency." *J.L. v. Mercer Island School District*, 46 IDELR 273 (W.D. Wa. 2006); see also 20 U.S.C. §1400 (c)(1) (expressing "national policy of ensuring equality of opportunity, full participation, *independent living, and economic self-sufficiency* for individuals with disabilities") (emphasis added).

13. The educational program provided to at does not conform to these recommendations and requirements. The evidence presented by Petitioners, and not contradicted by DCPS, shows that has not received adequate instruction in functional life skills or

⁷ The IDEA provides that each public agency "must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including - notifying parents of the meeting *early enough to ensure that they will have an opportunity to attend*" 34 C.F.R. §300.322 (a)(1) (emphasis added). See also 34 C.F.R. §300.501(b).

⁸ Academic progress is one factor that can be considered in determining whether an IEP as originally constructed was appropriate and reasonably calculated to confer educational benefit. See, e.g., *Simchick v. Virginia Dept. of Education*, US App. LEXIS 565 (4th Cir. 2009); *Lyons v. Smith*, 829 F. Supp. 414, 418 (D.D.C. 1993).

vocational training while at _____ Nor has _____ otherwise been able to provide a full-time special education program to meet _____ unique needs, as described by the DCPS psychologist. See _____-6; *Millis Testimony*; *Parent Testimony*. Finally, at the April 6, 2009 MDT/IEP meeting, the team agreed that “the Autism Program _____ is not the appropriate placement for _____ *DCPS-05-1*.”

14. As noted above, DCPS has not identified or offered any other public or private school placement for the Student.

C. Appropriate Relief

15. The IDEA authorizes district courts and hearing officers to fashion “appropriate” relief, e.g., 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, 521-23 (D.C. Cir. 2005). See also *Forest Grove School Dist. v. T.A.*, No. 08-305, 557 U.S. ____ (June 22, 2009), slip op. at 13 n. 11 (discussing hearing officer authority to award reimbursement for private-school tuition).

16. As the U.S. Court of Appeals for the D.C. Circuit has explained, “an award of private-school placement is not...retroactive relief designed to compensate for *yesterday’s* IDEA violations, but rather prospective relief aimed at ensuring that the child receives *tomorrow* the education required by IDEA.” *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005). Thus, placement awards “must be tailored to meet the child’s specific needs” through a fact-intensive inquiry. *Id.* at 11-12. “To inform this individualized assessment, ‘[c]ourts [and hearing officers] fashioning [such] discretionary equitable relief under IDEA must consider all relevant factors.’” *Id.* at 12, quoting *Florence County School District Four v. Carter*, 510 U.S. 7, 16 (1993); see also *Reid v. District of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).

17. The relevant considerations in determining whether a particular placement is appropriate for a particular student include the following:

“the nature and severity of the student’s disability, the student’s specialized educational needs, the link between these needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment.”

Branham, 427 F.3d at 12, citing *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982).

18. As indicated in the Findings above (see ¶¶ 17-18 & n. 5), the only educational placement shown on this record that can meet the Student’s needs is Petitioner’s proposed placement at _____ in Washington, DC. The evidence shows that _____ can provide an appropriate program for the Student, that it can meet all of the Student’s specialized educational needs, and that it can provide all services required under both the April 2009 IEP and the June 11, 2009 draft IEP. The proposed placement to _____ otherwise meets the criteria for private placement determinations and appears to be appropriately “tailored to meet the child’s specific needs.” *Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005); *Roark v. District of Columbia*, 460 F. Supp. 2d 32, 35 (D.D.C. 2006).

19. One possible concern addressed at hearing related to the fact that [redacted] has only a few other autistic students in its school, and none in the classroom proposed for [redacted]. However, testimony presented by Petitioners indicated that [redacted] is still likely to be a good fit – and more appropriate than other schools primarily focused on educating autistic students – in light of the specific nature of [redacted] Autistic Spectrum Disorder disability and his generally higher level of functioning. *See Millis Testimony; Parent Testimony; Lindsey Testimony*. Uncontroverted evidence further shows that RCA is able to provide the required and appropriate services for [redacted] including academic instruction, functional/daily life skills, and behavioral issues. *Findings ¶¶19-20*. “[T]he test for the parents’ private placement is that it is appropriate, and not that it is perfect.” *Warren G. v. Cumberland County Sch. Dist.*, 190 F. 3d 80, 84 (3d Cir. 1999).

20. The other potential concern (mentioned more as an afterthought by DCPS counsel in closing) relates to least restrictive environment (“LRE”) considerations. *See* 34 C.F.R. §300.114; DCMR §5-3013.1(b). [redacted] opportunity for interactions with non-disabled peers will admittedly be limited at [redacted] a private full-time special education facility. However, the placement there appears to be consistent with LRE findings by DCPS over the course of the past several MDT meetings, which rejected combination general education/resource settings as inappropriate for his needs. *See, e.g.,* [redacted]-3 (4/6/08 IEP), at IEP Page 4 of 4; [redacted]-4 (4/12/07 IEP), at IEP Page 4 of 4; [redacted]-1 (6/11/09 draft IEP).

21. Finally, DCPS counsel argued in closing that since additional evaluations were being conducted and the June 2009 IEP was still “in the process of being finished,” that a placement decision should await completion of that process. However, the Hearing Officer concludes that enough is known about [redacted] needs and [redacted] services that a placement order now would be “an informed and reasonable exercise of discretion.” *Branham*, 427 F. 3d at 12; *Reid*, 401 F. 3d at 527. Moreover, DCPS has “offered no authority which permits a school system a second opportunity to conduct evaluations and propose an alternative placement where its failure to do so in the first instance violated the requirements of the Act.” *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994).⁹

22. Accordingly, given the absence of an alternative appropriate placement by DCPS, the Hearing Officer will order an immediate placement to [redacted] for summer 2009 ESY and the start of the 2009-2010 school year, as set forth below.

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 immediately issue a notice of placement and provide funding for and transportation for the Student to [redacted] in Washington, D.C, for current extended school year (“ESY”) services and for the 2009-2010 school year. Notice of placement shall be issued within five (5) business days of this Order, and transportation shall be provided beginning the week of July 13, 2009.

⁹ DCPS will still have the opportunity to review the appropriateness of both the IEP and placement at future MDT/IEP meetings, by a team including the parents, pursuant to 34 C.F.R. §300.116 and DCMR §5-3013.1.

2. Within 30 calendar days of this Order, DCPS shall either complete evaluations or provide funding for independent evaluations of the Student in the following areas: (a) Functional Behavioral Assessment ("FBA"); (b) adaptive measures; and (c) occupational therapy ("OT"). The independent evaluations may be conducted by qualified evaluators of Petitioners' choosing at market rates.
3. Within 30 calendar days of placement at _____ the Student's MDT/IEP team shall meet to review and revise, as appropriate, the Student's IEP to govern the provision of specialized instruction and related services in the program in which he becomes enrolled. At that meeting, the team should also discuss and determine whether any compensatory education services may be warranted as part of an educational program designed to meet the Student's unique needs.
4. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioners, Charles Moran, Esq., via facsimile (703-261-6571), or via email (moranlaw211@aol.com).
5. Any delay in meeting deadlines in this Order that are caused by Petitioners shall extend the deadlines by the number of days attributable to such delay.
6. This case shall be, and hereby is, **CLOSED**.

Dated: July 3, 2009



/s/

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 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).