DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE STUDENT HEARING OFFICE
2012 JUL 23 PM 8:51

On behalf of, , Parents,[1] Student,
Petitioner,

Date Issued: July 22, 2012

Hearing Officer: Melanie Byrd Chisholm

v.

District of Columbia Public Schools,
Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

The student is a year old male, who is currently an grade student attending School A. The student's current individualized education program (IEP) lists Autism[2] as his primary disability and provides for him to receive twenty-six and one half (26.5) hours per week of specialized instruction outside of the general education setting, and ninety (90) minutes per week of behavioral support services outside of the general education setting.

On May 10, 2012, Petitioner filed a Due Process Complaint against Respondent District of Columbia Public Schools (DCPS), alleging that DCPS denied the student a free appropriate public education (FAPE) by failing to place the student in an appropriate school/setting/location; and failing to provide the parents a copy of the IEP and other documents from the IEP Team meeting convened on March 9, 2012. As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, placement in a private special education day school or an appropriate public school which would meet the student's needs; transportation as a related service; and compensatory education.

On May 18, 2012, Respondent filed its Response to the Complaint. In its Response, Respondent asserted that the student is placed in an appropriate placement/location of services; and the Petitioner is not entitled to relief beyond the services being provided to the student.

[1] Personal identification information is provided in Appendix A.
[2] Although the student's March 9, 2012 IEP list Autism as his primary disability, the Hearing Officer concludes that "Autism" was listed in error and the student's primary disability is Multiple Disabilities (MD).

On May 23, 2012, the parties participated in a Resolution Meeting. The parties concluded the Resolution Meeting process by failing to reach an agreement however the parties agreed to continue to attempt to resolve the matter during the 30-day resolution period. Accordingly, the parties agreed that the 45-day timeline started to run on June 10, 2012, following the conclusion of the 30-day resolution period, and ends on July 24, 2012.

On June 11, 2012, Hearing Officer Melanie Chisholm convened a prehearing conference and led the parties through a discussion of the issue, relief sought and related matters. During the Prehearing Conference, the parties stipulated that the goals in the student's January 27, 2012 IEP are appropriate for the student. The Hearing Officer issued the Prehearing Order on June 14, 2012. The Prehearing Order clearly outlined the issue to be decided in this matter. Both parties were given three (3) business days to review the Order to advise the hearing officer if the Order overlooked or misstated any item. Neither party disputed the issue as outlined in the Order.

On July 5, 2012, Petitioner filed Disclosures including twenty-two (22) exhibits and ten (10) witnesses.[3] On July 5, 2012, Respondent filed Disclosures including five (5) exhibits and one (1) witness.

The due process hearing commenced at approximately 10:01 a.m.[4] on July 12, 2012 at the OSSE Student Hearing Office, 810 First Street, NE, Washington, DC 20002, in Hearing Room 2003. The Petitioner elected for the hearing to be closed. Petitioner's exhibits 1-22 were admitted without objection. Respondent's exhibits 1-5 were admitted without objection.

The Respondent rested on the record at the close of the Petitioner's case. During the Respondent's closing argument, the Respondent's attorney requested that the record be reopened in order for the Respondent to present a witness. The Hearing Officer denied the Respondent's request based on the fact that the witness that the Respondent intended to present was not included in the Respondent's Disclosures and the Respondent intended to solicit testimony from the witness regarding a location of services that had not been previously provided to the Petitioner. The Hearing Officer concluded that allowing the reopening of the Respondent's case and testimony by a witness not listed in the Respondent's Disclosures would be highly prejudicial to the Petitioner.

The hearing concluded at approximately 2:12 p.m. following closing statements by both parties. Following closing statements, the parties agreed to continue to attempt to resolve the matter until July 18, 2012. The parties did not inform the Hearing Officer by July 18, 2012 that the matter had been resolved.

Jurisdiction

The hearing was conducted and this decision was written pursuant to the Individuals with Disabilities Education Act (IDEA), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Chapter E-30.

[3] A list of exhibits is attached as Appendix B. A list of witnesses who provided testimony is included in Appendix A.
[4] The parties were present at 9:30 a.m., the scheduled time for the hearing, however requested time to engage in settlement negotiations prior to the commencement of the hearing.

ISSUE

The issue to be determined is as follows:

1. Whether DCPS failed to provide the student a FAPE by failing to determine an appropriate placement/location of services for the student during the student's March 9, 2012 IEP Team meeting?

FINDINGS OF FACT

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

1. The student is a student with disabilities as defined by 34 CFR §300.8. (Petitioner's Exhibits 2, 3, 4, 5, 8, and 9; Respondent's Exhibits 1, 2, and 4)
2. The student is diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), intellectual disability (ID), Pervasive Developmental Disorder Not Otherwise Specified (PDD-NOS)[5] and has a seizure disorder. The student is a student with multiple disabilities (MD). (Petitioner's Exhibits 2, 6, 8, 9, 11 and 21; Respondent's Exhibits 1, 3 and 4; Advocate's Testimony; Father's Testimony)
3. The student's March 9, 2012 IEP Team changed his disability category from ID to MD. (Petitioner's Exhibits 2 and 3; Respondent's Exhibits 1, 3 and 4; Advocate's Testimony)
4. The student has a full scale IQ of 57. His overall reading ability is at the 2.9 grade level. His math skills range from kindergarten to fourth grade. His written language performance is at the early second grade level. (Petitioner's Exhibits 2, 8 and 9)
5. The student's community living skills are similar to those of a nine year two month old. (Petitioner's Exhibits 9 and 10)
6. The student is in an ungraded program and is on track to receive a certificate of high school completion. (Petitioner's Exhibits 2, 3 and 8; Respondent's Exhibits 1; Father's Testimony)
7. The student is articulate, pleasant, friendly and cooperative. (Petitioner's Exhibits 7, 9, 10 and 11; Advocate's Testimony)
8. During the student's tenure at School A, the student has exhibited inappropriate behaviors such as verbal altercations with peers, disrespect toward teachers, throwing paper at a teacher, stealing and inappropriate touching which have resulted in the student being suspended from school. (Petitioner's Exhibits 2, 8, 9, 10, 11 and 19; Respondent's Exhibits 1; Advocate's Testimony; Father's Testimony)

[5] Upon learning of the student's PDD-NOS diagnosis, the student's parents incorrectly concluded that the student is no longer ADHD. Based on this conclusion, the parents discontinued the student's medication for impulse control. The Hearing Officer strongly urges the parents to speak with the student's medical doctor regarding the continuation of the student's medication.

9. The student is easily distracted, has difficulty staying on task, is impulsive, is disorganized and does not consistently complete classwork or homework. (Petitioner's Exhibits 2, 4, 7, 8, 9, 10, 11, 12 and 14; Respondent's Exhibits 1; Advocate's Testimony)
10. At times, the student is teased by his peers and has had mostly negative interactions with peers. He has yet to develop the appropriate social skills to develop the relationships he desires with his peers which, combined with poor academic achievement, has resulted in low self-esteem. (Petitioner's Exhibits 8, 9, 10 and 11; Father's Testimony; Student's Testimony)
11. From the age of five until March 2012, the student took medication to treat his ADHD. The student is agitated and disruptive when he has not taken his medication. (Petitioner's Exhibits 8, 9 and 11; Advocate's Testimony; Father's Testimony)
12. The student needs behavior support in a small group setting. (Petitioner's Exhibits 2, 3, 4, 7, 8 and 11; Respondent's Exhibit 1)
13. School A is a public school within DCPS. School A offers self-contained special education programs, not including a self-contained program geared toward students with Autism. (Advocate's Testimony)
14. The student has opportunities interact with non-disabled peers during lunch and physical education. (Student's Testimony)
15. The student needs a classroom with a small student population and a structured environment. (Petitioner's Exhibits 2, 7, 8, 11 and 21; Advocate's Testimony; Father's Testimony; Mother's Testimony)
16. During March 2012, the student left the campus of School A, at least three times, without the knowledge of the school and without permission, and traveled to Maryland. (Father's Testimony; Student's Testimony; Mother's Testimony)
17. The student's March 9, 2012 IEP Team agreed that School A is an inappropriate location of services for the student because of the change in the student's primary disability category. The IEP Team forwarded information to the DCPS Least Restrictive Environment (LRE) Team however up to the date of the due process hearing, the LRE Team had not provided the student's IEP Team with a placement/location recommendation. (Petitioner's Exhibit 6; Respondent's Exhibit 3; Advocate's Testimony; Father's Testimony)
18. There is a minimal difference in the student's March 9, 2012 IEP goals and present levels of performance from the student's March 17, 2010 IEP goals and present levels of performance. (Petitioner's Exhibits 2 and 5)
19. School B is a private special education day school which educates students with emotional disturbances (ED), ID and autism. The school has a current enrollment of 85 students, 55 of which are high school students. School B offers a class size of 8-10 students with a certified teacher and a teacher's assistant. School B has a school-wide behavior management program and a plan to address students who are out of the proper location. (Father's Testimony; Student's Testimony; School B Program Director's Testimony)
20. School B has a Certificate of Approval (COA) from the Office of the State Superintendent of Education (OSSE). (School B Program Director's Testimony)
21. The student has been accepted to School B. (School B Program Director's Testimony)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments 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 special education due process hearing is on the party seeking relief. 5 DCMR §E-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). 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. 5 DCMR §E-3030.3. The recognized standard is the preponderance of the evidence. *See 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).

In *Board of Education v. Rowley,* 458 U.S. 176 (1982), the Supreme Court of the United States held that the term "free appropriate public education" means "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped." The Court in *Rowley* stated that the Act does not require that the special education services 'be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" Instead, the Act requires no more than a "basic floor of opportunity" which is met with the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 200-203. The United States Supreme Court has established a two-part test for determining whether a school district has provided a FAPE to a student with a disability. There must be a determination as to whether the schools have complied with the procedural safeguards as set forth in the IDEA, 20 U.S.C. §§1400 et seg., and an analysis of whether the IEP is reasonably calculated to enable a child to receive some educational benefit. *Id.*; *Kerkam v. Superintendent D.C. Public Schools*, 931 F.2d 84, 17 IDELR 808 (D.C. Cir. April 26, 1991).

The IEP is the primary vehicle for ensuring that a disabled child's educational program is individually tailored based on the child's unique abilities and needs. *See* 20 U.S.C. §1414(d); 34 CFR §§300.320-300.324. The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. *Seattle Sch. Dist. No. 1 v. B.S.,* 82 F.3d 1493, 1500 (9th Cir. 1996).

In the present case, the student has significant academic, behavioral and social needs. The student has a full scale IQ of 57 and although the student is in the 11th grade, the student is reading at the 2.9 grade level. His math skills range from kindergarten to fourth grade and his written language performance is at the early second grade level. He is in an ungraded program and is on track to receive a certificate of high school completion.

Behaviorally, while the student is articulate, pleasant, friendly and cooperative, he engages in inappropriate behaviors such as verbal altercations with peers, disrespect toward teachers, stealing and inappropriate touching. The student's inappropriate behaviors have resulted in the

student being suspended from school. The student also is easily distracted, has difficulty staying on task, is impulsive, is disorganized and does not consistently complete classwork or homework. The student is currently not taking medication for his ADHD therefore is agitated and disruptive.

Socially, the student has mostly negative interactions with his peers. He has yet to develop the appropriate social skills to develop the relationships he desires with his peers which, combined with poor academic achievement, has resulted in low self-esteem. He is teased by his peers and testified that he does not like other kids. The student's community living skills are similar to those of a nine year two month old.

Based on the student's academic and behavioral needs, the student's March 9, 2012 IEP Team determined that the student needs 26.5 hours per week of specialized instruction outside of the general education setting, and 90 minutes per week of behavioral support services outside of the general education setting. Both parties agree that the goals and objectives and amount of specialized instruction and related services included in the student's March 9, 2012 IEP are appropriate for the student.

Designing an appropriate IEP is necessary but not sufficient. The public agency must also implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP. *See O.O. v. District of Columbia*, 573 F. Supp. 2d 41 (D.D.C. 2008). Placement decisions must be determined individually based on each child's abilities, unique needs and IEP, not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. *See Analysis and Comments to the Regulations*, 71 Federal Register 46540:46588 (14 August 2006); *see also Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (clarifying that the LEA does not have a "main goal" which it must achieve when making a placement decision and that what is pertinent in making the placement decision will vary based upon the child's unique and individual needs.)

Given the IDEA's strong emphasis on identifying a disabled child's specific needs and addressing them, a particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs. *Fort Osage R-1 Sch. Dist. v. Sims ex rel B.S.*, 641 F.3d 996 (8th Cir. 2011). A child's educational placement must be based upon the child's educational needs as described in his or her IEP, and the placement cannot be a categorical placement that is determined by the child's disability category. *Letter to Fascell*, 18 IDELR 218 (OSEP 1991).

The student's IEP Team met on March 9, 2012 to review the January 31, 2012 and February 5, 2012 evaluations of the student. Based on the results of the evaluations, the student's IEP Team changed his disability category from ID to MD. Consequently, based on the student's new diagnosis of PDD-NOS, the IEP Team determined that School A was inappropriate for the student because School A does not offer an Autism program. All members of the student's March 9, 2012 IEP Team agreed that the goals and objectives, specialized instruction and related services included in the student's IEP are appropriate for the student. The IEP Team's determination that School A is inappropriate for the student, based solely on a change in disability category, was in error.

Notwithstanding this error, DCPS had an obligation to offer a placement in a school which could implement the student's IEP. DCPS did not offer the student a placement in a particular school. The student's IEP Team forwarded information to the DCPS LRE Team however up to the date of the due process hearing, the LRE Team had not provided the student's IEP Team with a placement/location recommendation.

The failure to provide specificity in the formal, written offer of placement may amount to a denial of FAPE. *See Mill Valley Elem. Sch. Dist. V. Eastin*, No 98-03812 CW, 32 IDELR 140 (N.D. Ca. 1999) (an LEA's mere skeletal outline of a proposed plan that informed the parent's that the LEA was "looking at" three schools did not constitute the formal, written offer of placement required by IDEA and resulted in a reimbursement award to the parents). However, identifying a particular location of at which the special education services are expected to be provided is not always required, and a fact specific inquiry is necessary to determine whether a FAPE has been offered. *See, A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 47 IDELR 245 (4th Cir. 2007), *cert. denied*, 552 U.S. 1170, 110 LRP 19412 (2008) (holding that, because the parents expressed doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP described, the failure of the LEA to identify a particular location on the IEP denied the student a FAPE).

In the present matter, on March 9, 2012, DCPS indicated to the student's parents that information would be forwarded to its LRE Team to determine an appropriate placement/location of services for the student. While it is reasonable for DCPS to engage in a process to determine what resources the LEA has to adequately meet the needs of the student, it is not reasonable for DCPS to delay its location offer for more than four months. In fact, on the date of the due process hearing, DCPS still had not provided a location offer to the parents. While DCPS accurately argued in its closing argument that the Petitioner has the burden of persuasion in the case, DCPS also conceded in its closing argument that School A is an inappropriate location of services for the student however presented no evidence that it has identified or made a location offer to the parent or has an appropriate location available to serve the student. The Hearing Officer concludes that DCPS' failure to offer a location of services, in this case, rises to a denial of FAPE.

While the student's IEP Team did not specifically state whether School A was an inappropriate placement or location of services for the student, the Hearing Officer concludes that the student's IEP Team determined that School A was an inappropriate location of services for the student.

"Educational placement," as used in IDEA, means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board,* 343 F.3d 373, 379 (5th Cir. 2003) (citations omitted); *see also, A.K. v. Alexandria City School Board,* 484 F.3d 672, 680 (4th Cir. 2007) *(citing AW v. Fairfax County School Board,* 372 F.3d 674, 676 (4th Cir. 2004)). The Comments to the Federal Regulations note that "placement" refers to points along the continuum of placement options available for a child with a disability and "location" refers to the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. 71 Federal Register 46540:46588 (14 August 2006).

The IEP Team agreed that School A is an inappropriate location of services for the student. While DCPS argued in its Response to the Due Process Complaint that School A is able to implement the student's IEP, in its closing argument DCPS conceded that School A is an inappropriate location of services for the student. While the analysis that the student's IEP Team used to determine that School A is an inappropriate location of services (i.e. the student has a diagnosis of PDD-NOS and School A does not have an Autism classroom), the Hearing Officer agrees that School A is an inappropriate location of services for the student. School A has not effectively managed the student's behaviors, once suspending the student for throwing paper at a teacher, and has been unable to ensure the safety of the student, evidenced by the student being able to elope from the School A campus to Maryland on at least three separate occasions.

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 Supp. 2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. §1412(a)(5)); 5 DCMR §3011 (2006). The IDEA creates a strong preference in favor of "mainstreaming" or insuring that handicapped children are educated with non-handicapped children to the extent possible. *Bd. of Educ. of LaGrange Sch. Dist. No. 105 v. Ill. State Bd. of Educ.*, 184 F.3d 912, 915 (7th Cir. 1999). Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act." *DeVries by DeBlaay v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). The IDEA specifically requires assessing "harmful effects" when selecting the LRE. *See* 34 CFR §300.116(d).

In the present matter, the student needs a classroom with a small student population and a structured environment and requires behavior support in a small group setting. There was evidence presented that suggests that the student is progressing toward his IEP goals in the self-contained setting in a DCPS public school however there is only minimal difference in the student's March 9, 2012 IEP goals and present levels of performance from the student's March 17, 2010 IEP goals and present levels of performance. Presently, the student's IEP provides opportunities for the student to interact with non-disabled peers during lunch and physical education. However during these interactions, the student is "picked on" by other students. The student has had mostly negative interactions with peers and has yet to develop the appropriate social skills to develop the relationships he desires with his peers which, combined with poor academic achievement, has resulted in low self-esteem. Additionally, the open environment and size of School A allows the student to be able to elope during the school day.

The Hearing Officer concludes that the harmful effects of the student remaining in his current placement in a self-contained class in a public school outweigh the benefit the student may be receiving from interaction with nondisabled peers during lunch and physical education. Three times during the 2011-2012 school year the student was able to leave the campus of School A and travel to Maryland. For a student with a 57 IQ, elopement from the school campus poses a great safety risk.

The Petitioner met its burden of proving that DCPS denied the student a FAPE by failing to offer an appropriate placement/location of services during the student's March 9, 2012 IEP

Team meeting. If an IDEA violation results in denial of a FAPE, a district court has discretion to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). Such relief could include reimbursement for a private placement. See 20 U.S.C. § 1412(a)(10)(C)(ii); *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 370 (1985). The parent or guardian, however, must also establish that the particular private placement is itself appropriate. *See, e.g., Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 1183 (9th Cir. 2009).

While the parents are not requesting reimbursement for a private school since the parents did not unilaterally place the student in a private school, the parents are requesting funding for a placement in a private school for the 2012-2013 school year. The student has been accepted to School B. School B is approved as a nonpublic special education day school to serve District of Columbia students with disabilities. School B educates students with ED, ID and autism. The school offers classrooms with a class size of 8-10 students with a certified teacher and a teacher's assistant and an overall structured environment. School B has a school-wide behavior management program, is able to provide the student with behavioral support services in a small group setting and has a plan to address students who are out of the proper location. The Hearing Officer concludes that School B is an appropriate placement for the student and that placement in a private school is appropriate relief for the Respondent's denial of FAPE.

IDEA remedies are equitable remedies requiring flexibility based on the facts in the specific case rather than a formulaic approach. Under *Reid* ". . .the inquiry must be fact-specific and . . . the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F. 3d 516 at 524, 365 U.S. App. D.C. 234 (D.C. Cir 2005).

The Respondent also requested 156 hours of one-on-one academic tutoring in math, reading and writing; and 88 hours of one-on-one behavioral support services as compensatory education. The Independent Consultant testified that he arrived at this award by calculating the amount of specialized instruction and related services prescribed by the student's IEP from March 9, 2012 through the end of the 2011-2012 school year. While DCPS denied the student a FAPE by failing to offer an appropriate placement/location of services during the student's March 9, 2012 IEP Team meeting, the student received specialized instruction and related services according to his IEP following the March 9, 2012 IEP Team meeting through the end of the 2011-2012 school year. Therefore, the Hearing Officer finds that the Petitioner's compensatory education request is unwarranted based on the facts of this case. An equitable remedy is placement in a private school, at the expense of the LEA, for the 2012-2013 school year.

ORDER

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

1. That within ten (10) days of the date of this decision, DCPS issue a Prior Notice of Placement placing the student in School B for the 2012-2013 school year. DCPS shall fund the student's tuition to School B for the 2012-2013 school year.

2. All other relief sought by Petitioner herein is **denied.**

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 USC §1415(i).

Date: July 22, 2012

Melanie Byrd Chisholm
Hearing Officer