DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent], on behalf of
[Student],[1]

Petitioner,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: January 11, 2013

Hearing Officer: Jim Mortenson

Case No: 2012-0756

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on November 1, 2012. A resolution meeting was held on November 9, 2012, and did not result in any agreements. The 30 day resolution period was not adjusted and the 45 day hearing timeline began on December 2, 2012. An untimely response to the complaint was filed on November 15, 2012.

A prehearing conference was held, via telephone, on November 20, 2012, and a prehearing order was issued on that date. Only the Petitioner participated in the prehearing conference.

The Petitioner moved to permit one of her witnesses to testify by telephone on December 27, 2012. The Undersigned advised the Petitioner's Counsel that the filed motion was not supported

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[1] Personal identification information is provided in Appendix A which is to be removed prior to public dissemination.

by any evidence, in the event there was a clerical error. Petitioner then filed an amended motion for telephone testimony which continued to lack any evidence in support, on December 31, 2012. The motion was denied in a written order on January 3, 2013.[2]

The Petitioner provided her disclosures to the Respondent and filed her trial brief five business days prior to the hearing on December 28, 2012. The Respondent provided its disclosures and filed its trial brief on December 31, 2012. The Petitioner moved to exclude the Respondent's documents and any witness testimony as a result of the untimely disclosure. The motion was denied at the hearing because the Respondent only disclosed three documents, two of which were also disclosed by the Petitioner, and so would have been duplicates in the record, and there was no convincing basis to prohibit the witnesses from testifying because they were the staff involved in the situation the Petitioner was complaining about and the proffered testimony from them would reasonably be expected by the Petitioner. (The third of the Respondent's three documents, a curriculum vitae for one of its witnesses, was never offered into evidence.) Counsels did not meet to determine and prepare a list of undisputed facts as ordered.

The hearing was convened at 9:00 a.m. on January 7, 2013, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The Petitioner was represented by Stacey Boehm-Russell, Esq., and the Respondent was represented by William Jaffe, Esq. The hearing concluded approximately 2:20 p.m. The due date for this HOD is January 15, 2013. This HOD is issued on January 11, 2013.

[2] The witness testified in person as required.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5E, Chap. 30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

(1) Whether the Respondent failed to place the Student based on her individualized education program (IEP) and the determination of her IEP team?

(2) Whether the Respondent denied the Student a free appropriate public education (FAPE) by significantly impeding her mother's involvement in the decision making process concerning FAPE for the Student by unilaterally making a placement determination to move the Student to [redacted]

The substantive requested relief at the time of hearing was prospective placement at the [redacted] a non-public special education day school.

The Student was receiving special education services at a public school in Maryland when the IEP team, consisting largely of the Maryland District's staff, determined none of the Maryland District's public schools could meet the Student's needs, and so specified a more restrictive placement in the IEP, including that the placement be a non-public school. The Respondent then advised the Petitioner that it had a public school that could meet the Student's needs, as stated by the IEP team. While it is not clear why this was not discussed at the IEP team, or why a new IEP team was not convened, it cannot be concluded that the placement was not based on the IEP. Likewise, since the placement was based on the IEP, despite being a public school, the Petitioner was not significantly impeded from participating in the decision-making

process concerning the provision of FAPE for the Student, and so FAPE was not denied the Student.

IV. EVIDENCE

Six witnesses testified at the hearing, four for the Petitioner and two for the Respondent. The Petitioner's witnesses were:

1) The Petitioner, Student's Mother (P)
2) [redacted], Social Worker (L.L.)
3) [redacted], School Psychologist (S.B.)
4) [redacted], Assistant Principal (B.D.)

Respondent's witnesses were:

1) [redacted], Coordinator (N.G.)
2) [redacted], Program Manager (M.B.)

All witnesses testified credibly. It was proffered by the Petitioner that L.L. was to provide an expert opinion about whether the proposed placement at [redacted] was appropriate based on its crisis room. [redacted] ever provided such an opinion, probably because she never visited the program at [redacted]s and had no first-hand knowledge of the crisis room or the program in general.

Six of the Petitioner's 14 disclosures were admitted into the record as exhibits. The Petitioner's exhibits are:

Ex. No.	Date	Document
P 1	October 4, 2012	IEP
P 2	February 17, 2012	Psychological Assessment Report
P 3	May 25, 2011	Psychoeducational Evaluation
P 4	October 4, 2012	Letter from [redacted] to [redacted]
P 8	November 30, 2012	Letter from [redacted] to [redacted]

Ex. No.	Date	Document
P 10	Undated	[List of positive behavior supports for Student]

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. 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. Student is an [redacted] learner with disabilities living in foster care in Maryland.[3] She is attending a public school in Maryland.[4]
2. The Student suffers from: Mood Disorder, NOS; Reactive Attachment Disorder; and Attention Deficit Hyperactivity Disorder (ADHD), Combined Type.[5] She has been determined eligible for special education and related services under the definition of emotional disturbance.[6]
3. In September and October 2012 the Student's IEP team met, consisting primarily of staff from the Maryland public school she attends, the Petitioner, the Petitioner's Counsel, the foster parent, and a representative from the Respondent, and determined the Student's

[3] Testimony (T) of P, P 1.
[4] P 1, T of P.
[5] P 4.
[6] P 1.

placement needed to be changed.[7] The team determined, and recorded in the IEP, the Student required "a full time special education program within a therapeutic setting with 28 hours of special education instruction weekly."[8] The team considered the general education setting, general education with supports, a separate class, and a private separate day school.[9] The Student was (and is currently) in a separate special education classroom in the Maryland school.[10] The team determined a therapeutic setting was necessary "to address social/emotional needs as well as academics."[11] She needs behavioral support throughout the day, with pull out sessions for occupational therapy and counseling.[12] The IEP team also documented that the setting in which the Student's IEP needed to be implemented was not her "neighborhood school" in Maryland, and that it would have to be a "PRIVATE SEPARATE DAY SCHOOL" because such a setting was "not available at her boundary school" nor within the Maryland public school district.[13] Finally the team determined that while the Student would not participate with non-disabled peers during the instructional day she "may return to her neighborhood school to participate in extracurricular activities with her non-disabled peers, as appropriate."[14]

4. It was not until after the IEP team meetings that the Respondent informed the Petitioner that another school could be considered, a self-contained program within a public school in the District of Columbia (The Behavioral & Emotional Support (BES) program at [redacted] Elementary School).[15] The BES program consists of two classrooms at the elementary

[7] T of P, P 1.
[8] P 1.
[9] P 1.
[10] P 1.
[11] P 1.
[12] P 1.
[13] P 1.
[14] P 1.
[15] T of P, T of N.G.

school, one for kindergarten through second graders and one for third through fifth graders.[16] The classes may have up to eight children, each, and there is a two to one student to staff ratio.[17] There is a special room for de-escalation of problem behaviors.[18] There is a social worker available to work with children and program-wide positive behavior interventions utilized, as well as individualized interventions, such as the use of breaks when needed by a particular child.[19] BES staff members are all trained in de-escalation techniques, and partner with the school social worker and school psychologist to work with students in the program.[20] The hallways of the school are quiet and are kept darker than the classrooms to aid in transition periods.[21] The students in the BES program are only with non-disabled peers during entry to the school and dismissal time, in the bathrooms, and the Principal's office.[22] They have lunch separately from non-disabled peers.[23]

5. The Petitioner only heard details about the BES program at the resolution meeting following the filing of the complaint, has "Googled" it, and has never visited the school or program.[24] The Petitioner did visit the [redacted] a non-public segregated special education day school in Maryland.[25]

6. The Student's disability, resulting in significant behavior problems, including while being transported, requires as short of a commute as possible.[26] [redacted] Elementary School is

[16] T of N.G.
[17] T of N.G.
[18] T of N.G.
[19] T of N.G.
[20] T of N.G.
[21] T of N.G.
[22] T of N.G.
[23] T of N.G.
[24] T of P, T of N.G.
[25] T of P, T of B.D.
[26] P 1, P 4, T of L.L., T of S.B.

the closest education placement to the Student's foster home that is appropriate based on her IEP.[27]

VI. 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:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. *Schaffer v. Weast,* 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof." D.C. Mun. Regs. 5-E3030.14. 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); 34 C.F.R. § 300.516(c)(3).
2. Federal law requires that a child's placement: "(1) Is determined at least annually; (2) Is based on the child's IEP; and (3) Is as close as possible to the child's home; (c) Unless the IEP of a child with a disability requires some other arrangement, the child be educated in the school that he or she would attend if nondisabled; (d) In selecting the [least restrictive environment], consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs[.]" 34 C.F.R. § 300.116, *See also* D.C. Mun. Regs. 5-E3013. Furthermore, D.C. law provides that "[t]he LEA shall place each child in need of special education who requires a non-public day school in a program within the District if a suitable program is available therein. Only if there is no appropriate program within the

[27] T of M.B., P 1.

District shall a child be placed in a program outside of the District." D.C. Mun. Regs. 5-E3013.6. "In consultation with the parent, the LEA shall place each child with a disability-requiring placement outside the LEA in the program that meets the requirements of the LEA and the child's IEP that is closest to the child's residence." D.C. Mun. Regs. 5-E3013.7.

3. In this case, the LEA was serving the Student in another State and that State's local school district could no longer serve the Student in a public school within that local school district because it did not have a public school with a therapeutic setting. The IEP team determined that non-public school would have to be found, and it did not identify the specific non-public school. The Respondent, for unknown reasons, did not address this at the IEP team meeting, but subsequently advised the Petitioner that it had a placement that met the requirements dictated by the IEP team, only it was within a public school. The placement, the BES program at [redacted] Elementary School, was also the closest educational program to the Student's foster home which was consistent with the IEP's requirements (a small therapeutic setting with sufficient behavioral supports for the Student). There is no magic in the IEP pronouncement that the Student requires a "private separate day school," as that was merely based on the lack of a small therapeutic setting with sufficient behavioral supports for the Student within the Maryland public school district serving the Student. While the Respondent's handling of the specific identification of the Student's placement was slipshod because it was not specifically discussed at the IEP team meeting, or any meeting until the resolution meeting following the filing of the complaint in this matter, the BES program at [redacted] is consistent with the substance of the IEP. Specifically, it is a small therapeutic setting with sufficient behavioral supports for the Student.

4. A denial of FAPE must be based on substantive grounds. 34 C.F.R. § 300.513(a)(1). A procedural violation may result in a denial of FAPE when, among other things, "the procedural inadequacies- . . . (ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child[.]" 34 C.F.R. § 300.513(a)(2).
5. In this case, the Petitioner was involved in the IEP team meetings where the substance of the Student's placement were discussed and determined. Since the Respondent failed to identify the specific placement at an IEP team meeting to discuss, particularly when it proposed a public school placement following the IEP team's discussion and determination of a non-public placement, there was a procedural violation. However, since the placement proposed by the Respondent was, in substance, what the IEP team had determined, the procedural failure to include the Petitioner in that discussion was not a significant impediment to her involvement in the process. Indeed, once the Petitioner was informed of the Respondent's proposed placement, she could have either visited the school, requested another team meeting to discuss the proposal, or both. She did not do either. These would have been reasonable approaches to dealing with the Respondent's surprise proposal of a public placement following the IEP team discussion of a non-public placement. Again, the critical element here is that public versus non-public is not the substance of the team's determination, but rather the small therapeutic setting with sufficient behavioral supports for the Student. Thus, there was no denial of a FAPE for the Student.

VII. DECISION

The Respondent did not fail to place the Student based on her IEP and the determination of her IEP team.

The Respondent did not deny the Student a FAPE because it did not significantly impede her Mother's involvement in the decision making process concerning FAPE when it determined to place the Student in a self-contained program within [redacted] Elementary School, despite the fact [redacted]s not a non-public school and the Respondent should have reconvened the IEP team to discuss its public school placement as opposed to a non-public school placement.

VIII. ORDER

Student's educational placement for the 2012-2013 school year, while she is in her current foster home, is at the BES program at [redacted]

IT IS SO ORDERED.

Date: January 11, 2013

Jim Mortenson, Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

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