

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
May 2, 2014

PETITIONER,
on behalf of STUDENT,¹

Date Issued: May 1, 2014

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office,
Washington, D.C.

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (DCMR). Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) has denied Student a free appropriate public education (FAPE) by not providing him a placement at a full-time therapeutic special education school.

¹ Personal identification information is provided in Appendix A.

Student, an AGE youth, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on February 28, 2014, named DCPS and PUBLIC CHARTER SCHOOL as respondents. The parties met for a resolution session on March 13, 2014 and were unable to reach an agreement. On March 14, 2014, Public Charter School was dismissed as a respondent pursuant to a settlement agreement with Petitioner. The 45-day time period for issuance of my Hearing Officer Determination began on March 30, 2014. On April 2, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was convened before the undersigned Impartial Hearing Officer on April 30, 2014 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. DCPS was represented by DCPS' COUNSEL.

Petitioner testified, and called as witnesses, ASSISTANT PRINCIPAL and NONPUBLIC SCHOOL PROGRAM DIRECTOR. DCPS called no witnesses. Petitioner's Exhibits P-1 through P-6 and DCPS' Exhibits R-1 and R-2 were admitted into evidence without objection. Counsel for Petitioner made opening and closing statements. Neither party requested leave to file a post-hearing brief.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUE AND RELIEF SOUGHT

The issue to be determined in this case is:

- Whether DCPS has failed to provide a suitable placement/location of services to implement Student's December 17, 2013 Individualized Education Program (IEP).

For relief, Petitioner seeks an order for DCPS to fund Student's placement at Nonpublic School.

FINDINGS OF FACT

After considering all of the evidence², as well as the arguments of counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student, an AGE youth, resides with Petitioner in the District of Columbia. Testimony of Mother.
2. Student is a child with a disability in need of special education and related services. His Primary Disability classification is Emotional Disability (ED). Exhibit P-1.
3. This school year, Student is enrolled in the GRADE at CITY MIDDLE SCHOOL. Exhibit P-1. During part of the 2012-2013 school year, Student was enrolled at Public Charter School. Exhibit P-4.
4. Student was recently suspended from City Middle School for the remainder of the 2013-2014 school year for violating City Middle School's prohibition against gambling. Since April 28, 2014, Student has been assigned to ALTERNATIVE SCHOOL SETTING, an alternative educational setting for DCPS students who are in a long-term suspension or expulsion status. Testimony of Mother, Testimony of Assistant Principal. (Petitioner has not appealed Student's suspension from City Middle School.)
5. DCPS conducted a psychological reevaluation of Student in January 2012. SCHOOL PSYCHOLOGIST reported that Student received a Full Scale IQ score of 72, in

² DCPS opted not to offer any evidence except for Student's 2012 psychological reevaluation and a December 16, 2013 Behavior Intervention Plan.

the Borderline range, on the Wechsler Intelligence Scale for Children - 4th Edition (WISC-IV). On the Woodcock Johnson Tests of Achievement - 3rd Edition (WJ-III), Student scored in the Very Low range on Broad Reading and Broad Written Language and in the Low Average Range on Broad Math. On behavior rating scales completed by Mother and a teacher, Student was reported to exhibit aggressive, oppositional and defiant behaviors in both home and classroom settings, which may have a significant impact on his educational performance. School Psychologist determined that Student continued to meet the IDEA criteria for ED. Exhibit P-2.

6. Student's IEP team at City Middle School met for the annual review of Student's IEP on December 17, 2013. For Present Levels of Performance under Emotional, Social and Behavioral Development, the IEP team reported that Student has issues calming down and focusing on his assignments; that when he is frustrated, Student has difficulties expressing his anger; that many days, he runs the hallways and refuses directives from the support staff; that on the Ohio Mental Health Scale, Student rated severe in his level of severity in this area and scored in the severe/impaired level of functioning; that on the Ohio Mental Health Scales, Student has difficulties with externalizing his behaviors, which includes refusing to do things teachers or the parents ask, fits of anger, and causing trouble for no reason; that Student is easily influenced by his peers and causes classroom disruptions, has poor self control and seeks ways to frustrate his classmates; and that Student's disruptive behaviors are preventing him from successfully accessing the general education curriculum. The IEP team reported that Student's behavior impacts his educational progress in all areas and that Student needs a small structured classroom with clear behavioral expectations. Exhibit P-1.

7. The December 17, 2013 IEP provides Student full time, 27 hours per week,

of Specialized Instruction outside the General Education Setting and 120 minutes per month of behavioral support services. Exhibit P-1. At City Middle School, Student was placed in a full-time self-contained program for children with emotional disabilities and other disabilities. The classroom is staffed by a special education teacher, an educational aide and a behavior technician. The student-to-teacher ratio is 10:3.

Testimony of Assistant Principal.

8. The City Middle School staff had made many program adjustments for Student, but they have not seen any overarching, long standing success. Student's in-school behavior runs the gamut of cursing, hitting, spitting, verbal aggression, physical aggression toward staff and other students. He is extremely physically aggressive toward female students. He does not respond well to authority. Testimony of Assistant Principal.

9. Despite many interventions attempted by City Middle School, the staff has not seen any level of significant progress. Student's multidisciplinary team (MDT) believes that Student is a safety concern to himself and others. City Middle School is implementing Student's IEP, but has been unsuccessful in curtailing Student's problem behaviors and the MDT team does not believe they are able to help Student achieve academic growth. Testimony of Assistant Principal.

10. As of the end of the 2013-2014 school year second term, Student was failing all of his core courses. He will not be allowed to matriculate to high school unless he passes his English and science classes. Testimony of Assistant Principal.

11. Student's IEP team made a referral to DCPS to request a more appropriate school setting for Student. In the referral statement, the City Middle School special education coordinator wrote,

This is an urgent request that the student receive a [Least Restrictive Environment] appropriate for his ongoing behaviors and academic difficulties. His behaviors are extremely dangerous to himself and to his peers and to the staff members at [City Middle School]. He is a safety risk to himself and to others. The student is continuously using profanity toward the staff; he starts fights with other students, and refuses to stay in class. He has threatened staff members by saying he will shoot them or/and destroy their cars. He recently opened a window to punch a student in the face. He runs out of the classroom the entire week and sometimes it is difficult to find him. He has run outside the school building.

Exhibit P-4, Testimony of Assistant Principal.

12. On February 27 and 28, 2014, a DCPS observer made a classroom observation of Student at City Middle School. The observer did not observe the level of oppositional behaviors reported by the City Middle School staff. Testimony of Assistant Principal. Although the DCPS observer noted it was evident that Student was displaying oppositional and other behaviors that are characteristic of a student with an emotional disturbance, she did not recommend moving Student to a more restrictive placement.

Exhibit P-4.

13. Nonpublic School is a full time therapeutic special education day school in suburban Maryland. It has an enrollment of approximately 70 students in grades three through 12. The school provides wrap-around services to its students with a focus on behavioral support. Testimony of Program Director.

14. Student and Mother have visited Nonpublic School and have been interviewed by the admissions staff. Nonpublic School regularly serves children with ED profiles and oppositional, defiant behaviors similar to that of Student. All of the Nonpublic School staff is trained to work with children with ED disabilities. At Nonpublic School, Student would be assigned a counselor and supported by a behavior

specialist. Nonpublic School is able to provide medication management and has three medical technicians on the premises. Testimony of Behavior Specialist.

15. Nonpublic School has a Certificate of Approval from the D.C. Office of the State Superintendent of Education (OSSE). The tuition is around \$38,000 per year. At Nonpublic School, Student would not have interaction with nondisabled peers.

Testimony of Behavior Specialist.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda 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 due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Analysis

Has DCPS failed to provide a suitable placement/location of services to implement Student's December 17, 2013 IEP?

“Under the IDEA, DCPS is obligated to devise IEPs for each child with disabilities, ‘mapping out specific educational goals and requirements in light of the child’s disabilities and matching the child with a school capable of fulfilling those needs.’ *See Jenkins v. Squillacote*, 935 F.2d 303, 304–305 (D.C.Cir.1991). The appropriateness of the location of services depends upon ‘the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and

the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment.” *See N.G. v. D.C.*, 556 F.Supp.2d 11, 37 (D.D.C.2008) (citing *Branham v. D.C.*, 427 F.3d 7, 12 (D.C.Cir.2005)). *Jalloh v. District of Columbia*, 968 F.Supp.2d 203, 214 (D.D.C.2013). “A local government meets its federal and local statutory obligations to implement a student's IEP – and thus provide a FAPE – where public placement is ‘reasonably calculated to enable the child to receive educational benefits.’” *T.T. v. District of Columbia* 2007 WL 2111032, 9 (D.D.C. 2007), quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982). *See, also, G. ex rel. Ssgt RG v. Fort Bragg Dependent Schools*, 324 F.3d 240, 252 (4th Cir. 2003) (proper standard is whether public agency is able to provide student educational benefit under the IEP).

In the present case, the appropriateness of Student's December 17, 2013 IEP has not been challenged. However, Petitioner contends that due to the severity of Student's oppositional conduct resulting from his ED disorder, City Middle School is not capable of providing Student educational benefit under the IEP. I agree. Assistant Principal, who was called as a witness for the parent, testified that the City Middle School MDT team does not feel that they are able to help Student make academic growth because the school has not been able to curtail Student's oppositional behaviors. Despite making frequent adjustments to Student's behavior plan, the team has not seen any level of significant progress for Student and Student is considered a safety risk to himself and others. At City Middle School, Student was failing all of his core courses, prior to his recent long-term suspension for a conduct violation. (Since April 28, 2014, Student has been assigned to an alternative interim educational placement. *See* 34 CFR § 300.530(d)(i).)

City Middle School has made a “referral” to DCPS to move Student to a more restrictive environment because of his “extremely dangerous” behaviors and ongoing academic difficulties. However, after sending a staff person to observe Student in his classroom, DCPS declined to change Student’s school assignment. I conclude that at City Middle School, Student has not received educational benefit and that the school is not capable of fulfilling his educational needs. By refusing to change Student’s location of services from City Middle School, DCPS has denied Student a FAPE.

Remedy

In this case, Petitioner requests an order for DCPS to fund Student’s ongoing placement at Nonpublic School. “Where a public school system has defaulted on its obligations under the IDEA, a private school placement is ‘proper under the Act’ if the education provided by said school is ‘reasonably calculated to enable the child to receive educational benefits.’” *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Rowley, supra*, 458 U.S. at 176, 102 S.Ct. at 3034. *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). An award of private-school placement is “prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA.” *Branham v. Gov’t of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005) (citations omitted).

Placement awards, must be tailored to meet the child’s specific needs. *Branham, supra*. To inform this individualized assessment, courts have identified a set of considerations “relevant” to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those 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. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student's Disability

The evidence in this case establishes that Student has a severe ED disability and is struggling in every area. Student's IEP team reports that Student's behaviors are extremely dangerous to himself and to other students and staff at City Middle School. The staff's behavior strategies and interventions have not been successful in managing Student's oppositional behavior or enabling him to make academic progress.

b. Student's Specialized Educational Needs

Student's IEP team reported that Student's behavior impacts his educational progress in all areas and that he needs a small structured classroom with clear behavioral expectations. According to Assistant Principal, who is certified in special education, because Student is struggling in every area, he needs a comprehensive, therapeutic special education program. I found Assistant Principal, who is a DCPS administrative employee, to be a credible witness.

c. Link between Student's Needs and the Services Offered by Nonpublic School

Nonpublic School is a full-time, therapeutic, special education day program. It serves students with ED disabilities and provides every student "wrap-around" behavioral services. All of the Nonpublic School staff are trained to work with ED students. At Nonpublic School, Student would have a counselor assigned to him as well as a behavior specialist to provide support. Nonpublic School has experience working with Students who have ED profiles similar to that of Student.

d. Cost of Placement at Nonpublic School

The cost of tuition at Nonpublic School is around \$38,000 per year. The private school holds a current OSSE certificate of approval. DCPS offered no evidence that tuition expenses at Nonpublic School are higher than costs at other local private schools serving students with disabilities.

e. Least Restrictive Environment

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. § 1412(a)(5); 34 C.F.R. 300.550; D.C. Mun. Regs. tit. 5, § 3011 (2006)). “In determining the least restrictive environment, consideration is given to the types of services that the child requires.” *Id.* (citing 34 C.F.R. § 300.552(d)). Student’s IEP provides that he requires a full-time out of general education setting to address his academic and social-emotional deficits. At City Middle School, Student has been placed in a self-contained special education classroom within a regular public middle school. The City Middle School MDT team has determined that Student now requires a more restrictive environment. Nonpublic School is a “special school” which is the next least restrictive placement on the continuum of placements required to be offered by the IDEA. *See* 34 CFR § 300.115.

Considering all of the above factors, I conclude that Petitioner has shown that the education which Nonpublic School is able to provide Student school is reasonably calculated to enable him to receive educational benefits and that Student’s placement there would be proper under the IDEA. *See Wirta, supra.*

ORDER

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

1. DCPS shall fund Student's enrollment at Nonpublic School for the remainder of the 2013-2014 school year, and shall provide school transportation for Student in accordance with the school transportation policies of OSSE and the LEA. DCPS shall effect Student's enrollment at Nonpublic School as soon as the private school is prepared to receive him;
2. Within ten school days of entry of this Order, DCPS shall ensure that Student's IEP team is convened to revise his IEP in accordance with the findings of this determination and with 34 CFR §§ 300.320 and 300.324. The agency shall ensure that a representative of Nonpublic School participates in the meeting; and
3. All other relief requested by the parties herein is denied.

Date: May 1, 2014

s/ Peter B. Vaden
Peter B. Vaden, 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 U.S.C. §1415(i).