

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

1150 5th Street, SE
Washington, DC 20003
Tel: 202-698-3819
Fax: 202-478-2956

Confidential

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p style="text-align: right;">2010 JAN 13 PM 4:30 OFFICE OF REVIEW AND COMPLIANCE</p> <p>HEARING OFFICER'S DETERMINATION</p> <p>January 13, 2010</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Zachary Nahass, Esq.</p> <p>Counsel for DCPS: Laura George, Esq.</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</p>
---	--

¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

II. PROCEDURAL BACKGROUND

Petitioner filed its Complaint on November 13, 2009, alleging that DCPS failed to develop an appropriate IEP and failed to provide an appropriate placement. DCPS filed its Response on November 23, 2009, asserting, *inter alia*, that (1) Student's current school was not notified of Student's history of receiving special education until Student had been attending the school for two months; and (2) that Student was receiving educational benefit and making academic progress.

The prehearing conference for this matter was held on December 10, 2009, and the hearing officer also issued the Pre-Hearing Order on December 10, 2009.

The parties submitted their Five-Day disclosures by cover letters dated December 29, 2009, with Petitioner submitting 12 documents (Petitioner's Exhibits 1 - 12) and DCPS submitting twenty-three documents (DCPS-1 through DCPS-23).

The due process hearing for this matter was held on January 5, 2010, and the parties' disclosed documents were admitted into the record without objection. After the parties presented their opening statements, witness testimony, and closing statements, the hearing officer brought the hearing to a close.

III. ISSUE(S)

1. Did DCPS fail to develop an appropriate IEP for Student?
2. Did DCPS fail to provide an appropriate school site for Student?

IV. FINDINGS OF FACT

1. Parent enrolled Student at a charter school for Summer 2008, and Student continued to attend the school when the 2008/09 school year ("SY") began. Student was removed from Parent's custody in the fall of 2008, and thereafter, she was transferred to another campus of the charter school. Although Student had received full-time IEP services at the DCPS public school she attended prior to attending the charter school, the charter

school was not made aware of Student's special education status until December 2008.²

2. On January 9, 2009, the charter school convened an MDT meeting for Student. At this meeting, Parent explained more fully that Student had previously been tested for and was previously receiving special education services. Parent also stated that Student had previously been diagnosed with ADHD and bipolar disorder, and that she was at that time taking medications for those conditions. Student's general education teacher informed the team that Student was significantly below grade level and demonstrated a low confidence level, but Student's behavior was not a problem and she was being provided with small group instruction in reading and math. The team requested medical disclosure regarding Student, as well as a social history and a clinical and comprehensive psychological with a rule out for ADHD. The team determined that an FBA was not warranted at the time but would be considered at a later date if behavior issues began to surface.³
3. On January 30, 2009, the charter school convened another MDT meeting for Student to review her standardized test score reports and educational records, and to develop an IEP for Student. The team agreed to provide Student with 16 hours of specialized instruction, with 8 hours in the general education setting and 8 hours in the special education setting, as well as 1 hour of counseling per week. Parent stated that Student was doing well at the charter school, and she did not want a new placement and did not think a full-time setting was warranted. Student's guardian *ad litem* agreed with Parent's position regarding placement and location of services.⁴
4. Student's March 24, 2009 comprehensive psychological evaluation report revealed that Student's performance on the Wechsler Intelligence Scale for Children – 4th Edition resulted in a full scale IQ score of 91, which is in the Average range. Student also scored in the Average range on the Verbal Comprehension Index and the Perceptual Reasoning Index, but her scores in the areas of Working Memory and Processing Speed were in the Low Average range. The report indicated that Student was not available for academic achievement testing. However, the evaluator administered several behavior/personality assessments and ultimately determined that Student needed guidance to manage Inattention, Aggression, Peer Relationships and Oppositional behaviors. The report also noted Student's ADHD and Bipolar diagnoses.⁵
5. Student's performance on the Woodcock Johnson III Tests of Achievement ("WJ-III") on April 14, 2009 resulted in the following grade equivalencies ("GE"): Broad Reading – 3.3 GE; Broad Math – 4.9 GE; and Broad Written Language – 5.0. By contrast, Student's performance on the WJ-III when it was administered to her on January 9, 2007 resulted in the following grade equivalencies: Broad Reading – 2.4; Broad Math – 2.2;

² Testimony of Parent; See Petitioner's Exhibit 3, DCPS-1.

³ DCPS-9A.

⁴ DCPS-10, DCPS-4; Petitioner's Exhibit 4.

⁵ DCPS-7; Petitioner's Exhibit 8.

and Broad Written Language – 2.8.⁶

6. Student's scores on the Stanford 10 standardized test in September 2008 placed her primarily in the 10 – 30 percentile range. By contrast, Student's scores on the Stanford 10 standardized test in May 2009 placed her primarily in the 10 – 70 percentile range. However, Student received some accommodations on the May 2009 test.⁷
7. By June of 2009, Student's behavior had escalated to the point that it was interfering with her academic progress. Hence, on June 9, 2009, the charter convened another MDT meeting for Student. Parent noted that Student's medication had changed since the previous meeting. Student's math teacher reported that Student's behavior was erratic and her behavior was taking her away from learning, but there was an improvement in Student's ability to use strategies to calm down. The social worker reported that Student had been very open and willing to discuss her feelings. However, the team also noted that Student had 24 absences and 50 tardies, although many of the absences were medical. The team noted that Student tended to do well when she was at school and ready to learn. Student's June 9, 2009 IEP continued to require her to receive 16 hours of specialized instruction, with 8 hours in general education and 8 hours outside general education, and 1 hour of behavioral support services.⁸
8. Student received the following grades for SY 2008/09: Math -- F, C-, I, D+; Reading -- C, B, I, C-; Writing -- C+, C, B+, B+; Science/Social Studies -- C=, C, I, D+; Chess -- S, DNA (did not attend), DNA, DNA; PE -- N, N, N, S; Saturday School – P, P, DNA, DNA.⁹
9. Student's behavior has continued to present a problem during SY 2009/10. As a result, Student has been suspended five times for a total of 6 days thus far during SY 2009/10. Student has also received numerous in-house suspensions, and the charter school calls Parent at least once per week about Student's poor behavior.¹⁰
10. Student's Progress Report for the first advisory of 2009/10 reveals that she was earning Cs in math and reading, Ds in reading and science/social studies, Ns in PE and Orchestra and a P in Saturday school.¹¹
11. On November 13, 2009, Parent's attorney filed the Complaint that initiated the instant action.
12. On November 17, 2009, a functional behavior assessment ("FBA") was created for Student. The FBA indicates that Student displays explosive types of behavior that

⁶ DCPS-20, DCPS-21.

⁷ DCPS-18, DCPS-19; DCPS-16.

⁸ Testimony of Parent; DCPS- 9, DCPS-5; Petitioner's Exhibit 5.

⁹ DCPS-12; Petitioner's Exhibit 10.

¹⁰ Testimony of special education teacher; Testimony of Parent; DCPS-15.

¹¹ DCPS-12; Petitioner's Exhibit 11.

includes hollering, threats, outbursts, use of profanity, and oppositional and defiant acts that affect her functional performance and academic achievement. The FBA also indicates that the behavior is very intense and lasts for most of the school day.¹²

13. On November 18, 2009, the charter school convened another MDT meeting to review the November 17, 2009 FBA and a proposed behavior intervention plan (“BIP”) that had been created for Student. Parent stated her concerns that Student did not seem to be making appropriate academic progress, as reflected by her poor grades and daily struggles with homework, and that Student’s disruptive behavior at school was increasing in frequency. The team agreed to and signed the proposed BIP. In response to Parent’s assertion that Student needed a change in placement, the team decided to weigh the results of the implementation of the BIP before making a decision concerning location of services. The team agreed to reconvene the meeting on December 1, 2009.¹³
14. On December 1, 2009, the charter school convened another MDT meeting for Student. The primary topic of discussion at the meeting was Student’s behavior. Petitioner’s counsel expressed his concern that Student’s behavior is preventing her from meeting her potential at the charter school, especially since she misses instruction every time she is sent out of class, given a timeout, or suspended. Parent also stated her belief that Student needs a different school that can provide more therapy and address Student’s academic needs, as well as her emotional needs, because Parent has not seen progress in Student’s grades and homework. The vice principal reported that Student’s problem behaviors include talking out, yelling at teachers, and refusing to follow directions, with the behaviors becoming less controllable in afternoon classes. The vice principal also reported that time-outs had become less effective with Student over time. Student’s general education teacher noted that Student misses class quite often because of behavior issues, but also reported that Student does well when she is in class and having a good day. The social worker reported that many of Student’s behaviors are reflective of her diagnoses of ADHD and a mood disorder. The team decided to shorten Student’s school day by 1½ hours beginning the next day. The team also agreed to request a site visit from DCPS and to schedule another MDT meeting after the site visit to discuss possible changes to the IEP and the possibility of a change in location of services. The site visit has since taken place, but the charter school and Parent have since failed to hold an additional meeting because of the instant administrative due process action.¹⁴
15. The charter school is one of the highest performing schools in the District of Columbia. The charter school cannot provide full-time special education services to its students; however, it can provide 20 to 23 hours with a combination of inclusion and pullout services. The charter school will try everything it can before determining that it is not an appropriate location of services for a student. Indeed, even though the charter school is a college preparatory school, it will try to provide a therapeutic environment if that is what a student needs. Sometimes, the highly structured environment, longer school day and

¹² Petitioner’s Exhibit 9; DCPS-22.

¹³ Testimony of advocate; DCPS-16.

¹⁴ DCPS-7; testimony of director of special education.

commitment of the teachers at the charter school permit students who were not succeeding in other schools to succeed in the charter school.¹⁵

16. The charter school has implemented the following interventions for Student: Student meets with her social worker at the beginning of every school day to create behavior goals and receives rewards at the end of the day if the goals are met; time-outs are used; nonverbal redirections and refraining from redirecting Student in front of the class are employed because Student construes every redirection as a personal attack; and a paycheck behavior management system is used, which includes writing notes and giving them to Parent every week. The charter school has had several unofficial meetings with Parent, in addition to the two official IEP meetings it has convened during SY 2009/10, and a BIP was implemented for Student after the November 18, 2009 IEP meeting. Moreover, the charter school shortened Student's school day at the December 1, 2009 meeting, with the result that Student no longer participates in the extended school day the charter provides to other students. It appears that Student is the only student at the charter school with a shortened school day.¹⁶
17. Although Student's behavior did not improve immediately after the implementation of her BIP, she has made progress behaviorally since her school day was shortened in that she has had fewer outbursts. Nevertheless, student's case manager at the charter school, who is also her inclusion and resource teacher and her homeroom teacher, is of the opinion that Student would be a good candidate for a change in placement to a more restrictive environment because of her outbursts, some of which are more severe than he has seen with any of his other students. Her case manager is also concerned that Student's behaviors have been so extreme and she needs such a large number of interventions from the case manager, her social worker and the assistant principal. Moreover, in light of the way Student challenges her teachers in front of the class, her case manager wonders whether she requires a more therapeutic placement, especially since she is behaving better now that she has been provided with a more restrictive environment. The case manager and the charter school's director of special education are both under the impression that the charter school would not be opposed to Student receiving a change in placement. The case manager also thinks that Student's social worker is of the opinion that Student needs a change in placement, but the case manager acknowledges that he cannot speak for another person. On the other hand, the case manager acknowledges that Student has grown academically while she has been at the charter school.¹⁷
18. Student's current IEP requires her to receive 8 hours of specialized instruction in general education ("inclusion services") and 8 hours of specialized instruction outside-of-general education, but Student is actually receiving 10 hours per week of inclusion and 6.25 hours per week of specialized instruction outside of general education.¹⁸

¹⁵ Testimony of director of special education; testimony of special education teacher.

¹⁶ Testimony of special education teacher.

¹⁷ Testimony of special education teacher; testimony of director of special education.

¹⁸ Testimony of special education teacher.

19. A local private school has accepted Student for admission into its program. The private school offers a full-time therapeutic setting for disabled students ranging in age from 12 to 15 years old, who have emotional disability (“ED”) as their primary disability, as well as ADHD and issues related to behavior. The school is 100 percent out-of-general education. The school utilizes a behavior management plan for all students, which consists of a point/token economy system, and the plan has been successful for more than 90 percent of the students at the school. All of the students at the school are former public and charter school students, and the private school tries to re-instill a love of school in the students and teach them that they will be successful if they do what they are supposed to do. The school has small class sizes, it places each student at a cubicle to minimize distractions, and each student is assigned his own social worker. The school offers 1-to-1 attention and has the ability to respond quickly to crises.

The school has a total of 35 coed students. There are 4 classrooms with 1 certified teacher, 1 teacher’s assistant and approximately 8 students per classroom. The students are grouped according to age and academic level in reading and math. The school also has licensed clinical social workers and a reading teacher. Student would be placed in a class with 10 other students, a certified special education teacher who has been with the private school for only 1 year, and 2 assistants. There are 4 computers with internet access in the room. The Admissions Director of the private school is of the opinion that the school can offer educational benefit to Student.¹⁹

V. CONCLUSIONS OF LAW

As the party seeking relief in this case, Petitioner bears the burden of proof. *See* 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

Appropriateness of Current IEP and School Site

Special education means “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.” 34 C.F.R. § 300.39. Hence, a child’s “individualized education program,” or IEP, must be based upon the strengths, academic, developmental and functional needs, and evaluation results of the particular child, as well as a consideration of the parents’ concerns for the child’s education, and *inter alia*, whether the child’s behavior impedes the child’s learning or that of others. *See* 34 C.F.R. § 300.324(a). To this end, the United States Supreme Court has held that the requirement to provide a FAPE is satisfied “by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

Moreover, IDEIA requires a public agency to provide an appropriate educational placement for each child with a disability, so that the child’s needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. Under IDEIA, separate

¹⁹ Testimony of Admissions Director.
HO Decision/Case

schooling or other removal of children with disabilities from the regular educational environment is permissible where the nature or severity of the child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. See 34 C.F.R. § 300.114(a)(2)(ii).

The evidence in this case demonstrates that Student has made academic progress at the charter school, as reflected by her standardized test scores on the WJ-III and the Stanford 10. However, Student has barely managed to earn passing grades since she began attending the charter school, and there is no dispute that the lack of correlation between Student's academic progress and her grades is due to her poor behavior in school. Indeed, as time has progressed, Student has begun to miss significant amounts of instruction in school because of the frequent timeouts, in-school suspensions, removals from class and out-of-school suspensions that have been imposed because of her behavior problems.

Student has been diagnosed with both ADHD and Bipolar Disorder, and her inappropriate behaviors tend to reflect these conditions. As a result, Student's inappropriate behaviors in school include hollering, making threats, having outbursts, using profanity, and engaging in other oppositional and defiant acts such as yelling at teachers and refusing to follow directions. These behaviors began during the 2008/09 school year, and they have escalated over time to the point that they are now explosive, very intense, and tend to last for most of the school day. Indeed, Student's current case manager testified that some of Student's outbursts are more severe than he has seen with any of this other students, and the case manager is concerned that Student's behaviors are so extreme and that she requires so many interventions from him and other staff members at the charter school.

The charter school has made many efforts to address Student's behavior issues. The charter school has held repeated IEP meetings for Student, as well as a number of unofficial meetings with Parent. The charter school has conducted an FBA for Student and also implemented a BIP for her. The charter school has also employed a number of other interventions for Student, such as having her meet with her social worker at the beginning of each day, refraining from redirecting her in front of her classmates, and allowing her to participate in the school's paycheck behavior management system. When it became clear that the many interventions employed were proving insufficient to address Student's extreme behavior problems, the charter school shortened Student's school day. As a result, Student leaves school 1½ hours before her schoolmates, and she is the only Student at the school who does not participate in the extended school day that is one of the hallmarks of the charter school.

Student has made some progress with her behavior since her school day has been shortened, in that she has had fewer outbursts. However, Student's case manager, who is also her inclusion and resource teacher and her homeroom teacher, is of the opinion that Student would be a good candidate for a change in placement to a more restrictive environment because of the severity and frequency of her extreme behavior problems. It appears that other staff members at the charter school may also be of the opinion that a change in placement would be appropriate for Student. Hence, at Student's most recent MDT meeting in December 2009, the team agreed to request a site visit from DCPS and to schedule another MDT meeting after the site visit to discuss possible changes to Student's IEP and the possibility of a change in location of services

for her. Although the site visit has since taken place, the charter school and Parent have delayed having another MDT meeting because of the instant administrative proceedings.

The charter school is one of the highest performing schools in the District of Columbia. And as it has done with Student, it attempts to provide every service and intervention it can before it will determine that it is not an appropriate location of services for a particular student. However, the charter school cannot provide full-time special education services to its students. At most, it can provide 20 to 23 hours of specialized education services that includes a combination of inclusion and pullout services.

On the other hand, Student has been accepted for admission into a local private school that offers a full-time therapeutic setting for disabled students with ED, ADHD and other behavior-related issues. The school utilizes a behavior management plan for all of its students, and the plan has proven successful for more than 90 percent of the students at the school, all of whom have come from public and charter school environments. The school seats each student in a cubicle to minimize distractions, and each student is assigned his or her own social worker. The school would place Student in a class with 10 other students, a certified special education teacher, and two assistants.

At the due process hearing in this case, Petitioner argued that Student needs a more therapeutic school setting because the interventions the charter school has implemented for her have not been successful and she has regressed behaviorally even though she has made some academic progress. DCPS acknowledged that Student has struggled at the charter school, but DCPS contended that the current IEP is appropriate because Student is making academic progress, and DCPS noted that the charter school has been very attentive to Student and Parent and will continue to make changes to attempt to more effectively meet Student's needs.

Upon consideration of the foregoing evidence and party arguments, the hearing officer concludes that Petitioner has met its burden of proving that Student's current IEP and school site are inappropriate. More specifically, the hearing officer concludes that the current IEP and school site are inappropriate because they do not provide Student with the amount and/or type of behavioral support services she requires to successfully access the personalized instruction and general curriculum that are being made available to her.

Based on the hearing officer's conclusion that Student's current IEP and school site are inappropriate to meet her needs, as well as the fact that the only options presented to the hearing officer at the due process hearing were either the current charter school's combination program or a full-time, private therapeutic program, the hearing officer will award Student funding and transportation for the full-time private school.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proving that Student's current IEP and school site are inappropriate.

VII. ORDER

1. Within 10 school days of the issuance of this Order, DCPS shall begin providing Student with funding for, and transportation to and from, the full-time private therapeutic school that has accepted Student for admission into its program.
2. DCPS shall also convene or participate in a 30-day review meeting to review Student's progress at the private school and to revise her IEP to reflect the amount of services she will be receiving at the private school.
3. Petitioner's remaining requests for relief are **DENIED**.

/s/ Kimm H. Massey

Kimm H. Massey, Esq.
Impartial Due Process Hearing Officer

Dated this 13th day of January, 2010.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).