

**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

Date Issued: April 17, 2012

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

OSSE
STUDENT HEARING OFFICE
2012 APR 17 PM 12:53

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Respondent by the Petitioner on January 13, 2012. It was amended on February 2, 2012.

A prior complaint was filed by the Petitioner and resulted in a Hearing Officer's Determination (HOD) in June 2011 (Case #2011-0343). Another complaint was filed by the Petitioner and was dismissed November 4, 2011, because it raised a question identical to one in Case #2011-0343.

A response to the present complaint, prior to its amendment, was filed January 24, 2012. A response to the amended complaint was filed on February 7, 2012. A prehearing conference was convened on January 24, 2012, and resulted in, among other things, leave to amend the

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

complaint. A second prehearing conference was convened following the amended complaint and response on February 17, 2012. The resolution meeting was attempted on February 7, 2012. However, the Respondent refused to participate. The meeting was rescheduled to February 24, 2012, and resulted in no agreements between the parties. The 45 day hearing timeline began on March 4, 2012.

The parties were ordered to file trial briefs outlining their legal arguments and describing the evidence they intended to present and how that evidence would support their case. The briefs were to be filed no later than March 21, 2012. Neither party filed a trial brief as required by the undersigned Independent Hearing Officer (IHO).

The due process hearing was convened and held on March 28, 2012 and on April 10, 2012, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The Petitioner's case was presented on the first day of hearing, and the Respondent's case was presented on the second day of hearing. Petitioner requested the opportunity to file a written closing statement and both parties were given the opportunity to do so. The Respondent declined, providing an oral closing at the hearing. The Petitioner improperly filed her closing statement on April 11, 2012.² The due date for this HOD is April 17, 2012. This HOD is issued on April 17, 2012.

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. 5, Chap. 30.

² It was sent to the Student Hearing Office and not filed directly with the IHO as required by the undersigned.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

- (1) Whether the assignment of the Student to _____ was a change in educational placement, and if so, whether the change was in conformity with the Student's individualized education program (IEP), was in conformity with the least restrictive environment (LRE) requirements, and was determined by the Student's IEP team?
- (2) If the Student was inappropriately placed, whether the Petitioner's unilateral placement of the Student at _____ is an appropriate placement for the Student?

The substantive requested relief is reimbursement for the Student's placement at and transportation to _____

The assignment of the Student to _____ was not a change in educational placement following the closing of _____. As a result, the appropriateness of _____ is moot.

IV. EVIDENCE

Seven witnesses testified at the hearing, six for the Petitioner and one for the Respondent.

The Petitioner's witnesses were:

- 1) Yasmeen Howell, Educational Advocate, James E. Brown & Associates (Y.H.)
- 2) The Student's Mother, Petitioner (P)
- 3) _____ Psychologist,
- 4) _____ Special Education Teacher,
- 5) _____ Assistant Educational Director,

³ The parties agreed, on the last day of hearing, that the name of the school was not, as stated in the original complaint, prehearing order, and some pieces of evidence, _____ but rather _____

6) Student, (S)

The Respondent's witness was Justin Douds, Compliance Case Manager, DCPS (J.D.).

15 exhibits were admitted into evidence of 26 disclosures from the Petitioner. The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 4	December 19, 2011	IEP
P 5	December 19, 2011	Meeting Notes
P 6	December 19, 2011	(Advocate's Meeting Notes)
P 7	September 23, 2011	Advocate's Notes
P 9	October 25, 2010	IEP (DCPS)
P11	September 19, 2011	Letter from Howell to Beers
P 12	September 14, 2011	Letter from Hannah to Henderson
P 13	September 13, 2011	Letter from Howell to Nyankori
P 14	September 2, 2011	Letter from Corley to [Petitioner]
P 18	December 19, 2011	DCPS Graduation Requirements
P 19	June 20, 2011	Report to Parents on Student Progress
P 20	November 3, 2011	[Student] Contingency Contract
P 21	September 16, 2011	Mountain Manor Treatment Center Weekly Clinical Update – HSCSN Clients
P 22	September 5, 2011	Therapeutic Hold/Restraint/Seclusion Progress Note
P 24	June 1, 2011	Amended Progress Report

12 exhibits were admitted into evidence of the Respondent's 19 disclosures. The

Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 2	June 2, 2011	HOD Case #2011-0343
R 3	June 8, 2011	Email chain ending from Henderson to Douds
R 4	June 9, 2011	Letter from Douds to [Petitioner]
R 5	June 9, 2011	Email from Douds to Henderson
R 6	July 28, 2011	Email from Benkharafa to Douds
R 7	July 7, 2011	Functional Behavioral Assessment
R 8	July 7, 2011	Email Chain ending from Henderson to Douds
R 9	August 29, 2011	Confirmation of Meeting Notice
R 10	August 29, 2011	Email from Douds to Howell
R 11	September 23, 2011	Resolution Meeting Notes
R 12	Undated	Intervention Behavior Plan (sic)
R 19	School Year 2011-2012	Quarterly Grade Report Card

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. To the extent the findings of fact do not reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are not credited. 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 a year old learner with a disability.⁴ The Student has been determined eligible for special education and related services under the definition of emotional disturbance.⁵ The Student has been diagnosed with Mood Disorder, Conduct Disorder, Attention Deficit-Hyperactivity Disorder, and Oppositional-Defiant Disorder.⁶ The Student's needs are functional in nature, primarily consisting of behavioral problems (aggression, disobedience, and truancy) that result from his disabilities.⁷ His behaviors have resulted in missed class time over the years that have, in turn, resulted in poor academic performance.⁸
2. The Student has been treated (including hospitalization) for drug use and psychiatric problems.⁹ He was placed in a drug rehabilitation facility in Maryland on August 5, 2011 and remained there through mid-September 2011.¹⁰ He was hospitalized for psychiatric problems

⁴ P 9.

⁵ P 9.

⁶ P 24.

⁷ P 9, P 24, R 2, R 11, Testimony (T) of J.E..

⁸ P 9, T of S.S.

⁹ T of P, T of S, T of J.E., T of A.W., P 7, R 11.

¹⁰ T of P, T of S, P 1, P 22.

for eight days in October 2011 and 10 days in February 2012.¹¹ Medication helps manage his psychiatric problems, and he does not always take them.¹²

3. The Student attended _____ during the 2010-2011 school year.¹³ _____ Academy closed at the end of the 2010-2011 school year.¹⁴ The school was a separate school housed in its own building away from other schools.¹⁵ The school was primarily for students with emotional disturbances who required education outside of the general education setting all of the time.¹⁶ Students at _____ Academy had no opportunity to interact with students without disabilities during the school day.¹⁷ It is unknown whether Students at the school could or did participate with non-disabled students in extracurricular and other non-academic activities.¹⁸
4. The Student failed all of his classes except “Advisory” for the 2011-2012 school year.¹⁹ Excessive absenteeism was noted by all of his teachers.²⁰
5. The Student was very difficult to manage at home and in the community by June 2011, and was engaging in criminal behavior in the community.²¹ To address this, his therapist and the Director of his mental health clinic recommended “a more restrictive environment with 24-hour supervision” to help manage his behavior (not education).²² The Court was apparently asked to place the Student in a residential facility and declined to do so.²³

¹¹ T of J.E.

¹² T of J.E.

¹³ T of S.

¹⁴ T of P, T of J.D., T of Y.H., P 21, P 22, R 11,

¹⁵ T of J.D., T of Y.H.

¹⁶ T of J.D.

¹⁷ T of J.D.

¹⁸ Neither party presented evidence on this point.

¹⁹ P 19.

²⁰ P 19.

²¹ P 24.

²² P 24.

²³ T of P.

6. On September 13, 2011, the Petitioner, through her advocate with her Counsel's law firm, sent notice to the Respondent that she "intends to obtain an alternate placement for [Student] in a more restrictive environment with 24-hour supervision" in accordance with a recommendation made as part of a June 2011 "Amended Progress Report" from the Student's mental health clinic.²⁴ This request was unilaterally denied without the IEP team on September 14, 2011.²⁵ The Petitioner, again through her advocate, submitted another notice, on September 19, 2011, that she still intended to obtain a more restrictive alternate placement, but this time at _____ Academy.²⁶ This request was discussed at the September 23, 2011, IEP team meeting and the team did not agree a change in placement was necessary.²⁷ The Student had been accepted at _____ on September 2, 2011, and began attending there in mid-September following his discharge from the drug rehabilitation facility in Maryland and before the September 23, 2011 IEP team meeting.²⁸
7. The Student's IEP was last revised comprehensively in October 2010.²⁹ The counseling services and a lack of a behavior intervention plan (BIP) was challenged in a complaint filed March 31, 2011.³⁰ The IHO found that the IEP lacked a necessary BIP and required the Respondent to pay for an independent behavior intervention plan to be completed before the start of the 2011-2012 school year.³¹
8. The Respondent agreed to fund a functional behavioral assessment (FBA) and the Petitioner agreed to permit the IEP team, including the Respondent, develop the BIP after the school

²⁴ P 13, P 24.

²⁵ P 12. (It is also noted that no evidence of a prior written notice meeting the requirements of 34 C.F.R. § 300.503 was provided.)

²⁶ P 11.

²⁷ P 7, R 11.

²⁸ P 7, P 14, R 11, T of A.W., T of J.E., T of P, T of S.

²⁹ P 9.

³⁰ R 2. (There were other issues in the complaint, irrelevant to this finding of fact.)

³¹ R 2, P 9. (Other determinations in the HOD are irrelevant to this matter.)

year started, rather than have it developed independently and before the start of the school year as ordered by the IHO.³² A meeting to develop the BIP was convened on September 23, 2011.³³ A BIP to address the Student's truancy and inattentiveness was developed at the meeting, but the Student was already attending _____ Academy, a private school in Virginia, the Petitioner had enrolled the Student in.³⁴ No other changes to the IEP were made.³⁵

9. _____ is a non-public day school for children with disabilities that include behavioral needs.³⁶ The Student has continued to have behavior difficulties at _____ and reports that he likes it there.³⁷ He plays on the basketball team.³⁸ His mother has been attempting to get him into Accotink for two years, and requested it as a remedy in the prior complaint filed in March 2011. (Placement at _____ was denied as relief).³⁹

10. Following the closure of _____ Academy, the Respondent assigned the Student to _____ is a special secondary school for students with emotional disturbances and behavioral issues.⁴¹ _____ is located on the bottom floor of the _____ High School building.⁴² The school began operating at the start of the 2011-2012 school year.⁴³ There is an entrance to _____ separate from the rest of _____ School.⁴⁴ There is security provided within the building to keep the students at

³² R 3, R 4, R 5, R 6, R 7, R 8.

³³ P 7, R 11.

³⁴ T of P, T of S, R 11, P 7.

³⁵ P 7, R 11.

³⁶ T of A.W.

³⁷ T of S, T of J.E., T of S.S., P 4, P 6, P 30.

³⁸ T of S.

³⁹ T of P, R 2.

⁴⁰ T of P, T of J.D.

⁴¹ T of J.D. (Y.H. also testified about _____. Her testimony was not based on any first-hand knowledge, however, and relied on hearsay from "anonymous" sources. Thus, her testimony about _____ is given very little weight.)

⁴² T of

⁴³ T of

⁴⁴ T of

segregated from the students attending School.⁴⁵ Many of the students who attended Academy were reassigned to One of the Assistant Principals for School is also an administrator for but no additional evidence of the administration of was provided at hearing.⁴⁷ provides services to students on a fully segregated basis as well as to those who only need special education services part of their school day.⁴⁸

11. The Petitioner never visited or discussed the new school with staff.⁴⁹ The Petitioner does not want the Student to attend any of the Respondent's schools.⁵⁰

12. Academy created its own IEP for the Student in December 2011.⁵¹

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);

⁴⁵ T of

⁴⁶ T of

⁴⁷ T of

⁴⁸ T of

⁴⁹ T of P.

⁵⁰ T of P.

⁵¹ P 4, P 5. (This is not an IEP under IDEA since the Student was enrolled in an out-of-state non-public school by his parent and the Respondent no longer had a responsibility to supervise his education or provide a FAPE to him to the same degree a publicly placed student is entitled. See 34 C.F.R. § 300.137.)

Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. There are vagaries of what is meant by “placement.” When moving a child from one building to another where the schools are “substantially and materially similar” there is no change of placement. 71 Fed. Reg. 46588-89 (August 14, 2006). The schools need not be identical.

According to OSEP:

Historically, we have referred to “placement” as points along the continuum of placement options available for a child with a disability, and “location” as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child’s special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.

Id. at 46588.⁵² This analysis differs slightly from the analysis OSEP used in 1994. OSEP stated in 1994 that the placement team (the IEP team in both Tennessee and the District of Columbia) must, in addition to selecting the “specific option from the continuum of alternative placements in which the child’s IEP can be implemented. . . .select a location, i.e. school or facility that the child would attend if not disabled, if appropriate, or another school or facility as close as possible to the child’s home, that is consistent with the student’s IEP and the option on the continuum selected to implement the student’s IEP.” Letter to Fisher, 21 IDELR 992, p. 4 of PDF, (OSEP 1994). Selecting the specific location in terms of a school or facility is no longer viewed by OSEP as purview of the placement team because it is now OSEP’s view “that placement refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school.” 71 Fed.

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Reg. 46687 (August 14, 2006). Thus, this IHO concludes the consideration of a specific school is not considered to be an IEP team decision, absent some exigent circumstance.

3. OSEP's analysis in determining whether a change in location is a change in placement, as articulated in Letter to Fisher remains persuasive, however. OSEP outlines four components to examine in determining whether "a proposed change would substantially or materially alter the child's educational program": 1) Whether the IEP was revised; 2) Whether the child will be able to be educated with non-disabled children to the same extent as present; 3) Whether the child will have the same opportunities to participate in non-academic and extracurricular services; and 4) Whether the new placement option is the same option on the continuum of alternative placements. Letter to Fisher at p. 4 of PDF.
4. There was no IEP team meeting prior to the assignment of the Student to [redacted] and other than the BIP that was created September 23, 2011, no changes to the IEP were made following the closure of [redacted] Academy.
5. Had the Student attended [redacted] he would have continued to be educated exclusively with disabled peers because his IEP was not changed to place him in classes with non-disabled peers. The fact that [redacted] is housed in the same building as a secondary school he could attend if not disabled is immaterial where the Student's classes are entirely segregated from that school.
6. There was very little, if any, evidence of what extracurricular and non-academic activities the Student had the opportunity to participate in while at [redacted] Academy. Certainly, attending school in the same building as the regular secondary school will ensure the Student not only has the same extracurricular activities as he may have had at [redacted] Academy, but likely more. The Respondent could not very well prohibit the Student's participation in

the secondary school's extracurricular and non-academic activities under other laws prohibiting discrimination based on disability.

7. is a special school, just as Academy was. They are the same option on the continuum of alternative placements (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions). 34 C.F.R. § 300.115. The fact that is housed in the same building as High School does not change its place on the continuum where the schools are not administered by the same group and the classrooms that make up the two schools are segregated from each other.⁵³ Furthermore, increased opportunities for students with disabilities to participate in classes and other activities with non-disabled peers does not, by itself, change the place on the continuum of the alternative school but rather only simplifies the implementation of the expectation in the law that students not be segregated unless absolutely necessary. *See*, 34 C.F.R. § 300.114. This may be done here when the IEP team determines the Student no longer requires complete segregation in classes and can begin attending classes with non-disabled peers. In the mean-time, the Student will be completely segregated as required by his IEP.
8. Based upon the four factors considered, is substantially and materially similar to Academy and the placement required by the Student's IEP (as determined in the HOD for the prior case and not independently examined here). Thus, the assignment of the Student to following the closure of Academy was not a change in educational placement and no remedy is necessary.

⁵³ The Schools share at least one administrator. This is not persuasive evidence that the Schools are, in fact, administered by the same staff.

9. Even if the assignment of the Student to _____ were a change in educational placement under IDEA, the Petitioner would not be entitled to reimbursement for her placement of the Student at _____. Even a parent eligible for a reimbursement award may have that award reduced or denied in certain circumstances. In this case, the circumstances are that proper notice was not provided at least 10 days prior to the Petitioner's removal of the Student from the public school and her actions in that removal and seeking reimbursement were unreasonable.⁵⁴ See 34 C.F.R. § 300.148(d). The notice that she was seeking reimbursement for _____ was provided September 19, 2011. The student may have already been attending _____ and at a minimum was attending four days later on September 23. Furthermore, the Petitioner had sought public financing for placement at _____ in the hearing held in the spring of 2011 and was denied. Despite this, rather than even investigate the new school the Student was assigned to, she persisted in seeking a private placement. At first it was a residential placement, due to problems at home and in the community. This was denied by a Court and by the Respondent. Then she sent the Student to _____ and subsequently sought reimbursement, again, even though the Respondent had closed the Student's prior school that the Petitioner was not satisfied with (and apparently the Respondent was dissatisfied with) and created a new school to which the Student was assigned. Again, without even raising questions about the new school or investigating it herself, she had her agent send a demand letter to the Respondent after she had already enrolled her child in the school she wanted. This was unreasonable and would warrant no reimbursement even if there had been a denial of free appropriate public education in the first place.

⁵⁴ It must be noted that there is no question the Petitioner had the right to enroll her child in a non-public school. The issue here is the impact of how she went about that and sought public reimbursement for it.

VII. DECISION

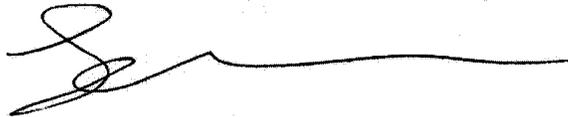
The Petitioner has not persuaded the undersigned that the assignment of the Student to
was a change in placement. No remedy is warranted and the Student
may, if Petitioner chooses, attend at public expense.

VIII. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that the
complaint is dismissed with prejudice.

IT IS SO ORDERED.

Date: April 17, 2012



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).