

**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: May 8, 2012

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

OSSE
STUDENT HEARING OFFICE
2012 MAY -8 PM 4: 52

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed with the Respondent and Student Hearing Office (SHO) by the Petitioner on February 27, 2012. A resolution meeting was held on March 7, 2012, and no agreements were reached. A response to the complaint was also filed on March 7, 2012. A prehearing was convened on March 12, 2012, resulting in an order that, among other things, clarified the issues for hearing, the substantive relief requested, and rules to follow concerning evidence and prehearing motions. One such order was that the Respondent was to provide to the Petitioner a list of the types and locations of educational records for the Student by March 15, 2012. The Respondent was also to provide all of the Student's educational records in the possession of Respondent's Counsel by that date as well. This order was not complied with. The

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

Petitioner made a motion to compel and/or subpoena duces tecum on April 12, 2012. This motion was denied at the hearing on April 23, 2012, because the Respondent had, on April 13, 2012, provided to Petitioner's Counsel all of the educational records she had. Further, it was determined that no other records existed.

The Petitioner served a notice to appear on one of the Respondent's employees, Shyra Gregory, on April 12, 2012. The Respondent failed to ensure its employee, Shyra Gregory, appeared at hearing, despite the Petitioner's right to compel the attendance of witnesses pursuant to 34 C.F.R. § 300.512(a)(2). As a sanction, paragraphs 13 and 14 from the complaint, allegations the Petitioner contended would be addressed by the witness, were treated as statements of the witnesses for purposes of the evidentiary record. The statements are:

13. The following Monday, February 6, 2012, [Petitioner] visited the DCPS Office of Special Education and discussed [Student's] new placement with a DCPS Placement Specialist.
14. At the February 6, 2012, [meeting] the DCPS Placement Specialist placed [Student] at his neighborhood school, Spingarn Senior High School ("Spingarn").

Trial briefs were submitted on April 13, 2012. The Hearing was convened at 9:34 a.m. on April, 23, 2012, at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The

Respondent only appeared through counsel (despite the order of the undersigned)

The due date for this

HOD is May 12, 2012. This HOD is issued on May 8, 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.

III. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the IHO is:

Whether the Respondent has failed to provide the Student an appropriate placement when the Student's placement at _____ School was not: a) determined by an individualized education program (IEP) team; b) made in conformity with least restrictive environment (LRE) requirements; and c) based on the Student's IEP?

The substantive requested relief at the time of hearing was placement at the non-public special education school,

The Student's placement upon his return to the District of Columbia was consistent with his IEP and the Respondent made no new placement determinations that required an IEP team.

IV. EVIDENCE

Three witnesses testified at the hearing, all for the Petitioner. The Petitioner's witnesses were:

- 1) The Student's Mother, Petitioner (P)
- 2) _____ Special Education Coordinator,
- 3) Ida Jean Holman, Educational Advocate, James E. Brown & Associates (I.H.)²

16 exhibits were admitted into evidence of 21 disclosures from the Petitioner. The

Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 6	April 12, 2012	Email from Cooley to Ostrem
P 7	October 21, 2008	(IEP) Meeting Notes
P 8	April 29, 2009	Meeting Notes
P 9	April 29, 2008	Advocate's Notes
P 10	April 29, 2009	IEP
P 11	May 26, 2010	Academy Meeting Notes
P 12	May 26, 2010	Advocate's Notes
P 13	July 13, 2011	IEP

² This witness is an expert in developing programming for students with disabilities.

P 14	January 23, 2006	WIAT-II Interpretive Report
P 15	January 26, 2006	Psychological Re-evaluation
P 16	May 23, 2008	Psychiatric Evaluation
P 17	Undated	Brigance Transition Skills Inventory
P 18	March 13, 2012	[Untitled interest data form]
P 19	April 11, 2012	Letter of Understanding, Transcript (See R 2)
P 20	Undated	Resume Ida Jean Holman
P 21	Undated	Resume Natasha Nelson

Three exhibits were admitted into evidence of the Respondent's 10 disclosures. The Respondent's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
R 2	April 11, 2012	Letter of Understanding, Transcript (See P 19)
R 9	April 2012	Student Status Sheet
R 10	March 1, 2012	Notes Report

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.³ The Student has been determined eligible for special education and related services under the definition of emotional disturbance.⁴ His disability results in oppositional and disruptive behaviors that reduce is availability for

³ P 13.

⁴ P 10.

learning.⁵ When his last IEP was last revised in July 2011 he was not experiencing negative behaviors.⁶ The Student can perform well academically.⁷

2. The Student was arrested for being in a stolen car in the summer of 2010 and was Court placed in a program called “Abraxis” located in Pennsylvania.⁸ Abraxis is a program for youth with very challenging behaviors.⁹
3. While at Abraxis, the Student’s IEP was revised on July 6, 2011.¹⁰ This was the most recent revision of the IEP when the Student was release and is the revision currently in place for the Student.¹¹ The IEP includes five goals: three academic (two writing and one math), and two functional (one of which deals with behavior).¹² All of his specialized instruction and program modifications were to take place in the regular education classroom, except for tutoring which could take place in the regular education classroom or the resource room, and was required only when requested by the Student or the teacher.¹³ The explanation of the extent, if any, the Student will not participate with students without disabilities in the regular education class is that the Student “will participate in all regular education classes.”¹⁴
4. A meeting was held at the Department of Youth Rehabilitation Services (DYRS) in November 2011 in which the Petitioner and Shyra Gregory, the DCPS placement specialist,

⁵Testimony (T) of P, P 10.

⁶ P 13.

⁷ T of P, P 13.

⁸ T of P.

⁹ T of I.H. (The evidence does not show that Abraxis is only for students with disabilities.)

¹⁰ P 13.

¹¹ There is no other IEP since that revision in the record and no one testified or argued that there was a subsequent revision.

¹² P 13.

¹³ P 13.

¹⁴ P 13.

participated.¹⁵ The Student's return to the Respondent was discussed.¹⁶ No determinations were made at the November meeting.¹⁷

5. The Student was released from Abraxis and returned home on February 3, 2012.¹⁸ The following Monday, February 6, the Petitioner and the Student went to see Shyra Gregory about which school the Student would attend.¹⁹ Gregory advised the Petitioner that the Student would attend his neighborhood school, _____ School.²⁰ There was no copy of the Student's IEP at the meeting on February 6, 2012.²¹
6. The Student required a "step-down" from the facility at Abraxis before reintegrating into the regular public school, but neither the Court nor DYRS provided a "step-down."²²
7. The Petitioner was hesitant to send the Student to _____ because his friends were at the school, but he began attending on February 7, 2012.²³ The Student got into a fight with another student on Friday, February 10, 2012.²⁴ The Student has had two suspensions from _____ and has left the school three times resulting in no reentry for the days he left.²⁵
8. The Petitioner did not request an IEP team meeting to discuss or review the Student's IEP and placement, but rather filed a complaint initiating this matter on February 27, 2012.²⁶ It is unknown what was discussed at the resolution meeting or whether the relevant IEP team members were there, besides the Petitioner, were even present.²⁷ The IEP must be reviewed

¹⁵ T of P.

¹⁶ T of P.

¹⁷ T of P. (The only evidence about what was discussed or happened at the meeting is the testimony of P.)

¹⁸ T of P.

¹⁹ T of P, Presumed T of Gregory.

²⁰ T of P, Presumed T of Gregory.

²¹ T of P.

²² T of I.H. (This is the unchallenged expert opinion of I.H.)

²³ T of P.

²⁴ T of P.

²⁵ T of P.

²⁶ T of P, T of I.H. (I.H. is the Petitioner's advocate and did not request a meeting on her behalf), Due Process Complaint, February 27, 2012.

²⁷ T of P, Resolution Period Disposition Form, March 7, 2012.

and revised given the Student's poor academic and functional performance since he enrolled in

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); Holdzelaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. Placement "refers to the provision of special education and related services rather than a specific classroom of specific school." 71 Fed. Reg. 46687 (August 14, 2006). Students must be educated with non-disabled peers to the maximum extent appropriate and special classes separate schooling, or other removals of children with disabilities may occur only if the nature or severity of the Student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved. 34 C.F.R. § 300.114(a)(2).

Placement decisions must be:

made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

²⁸ T of P, R 2/P 19, R 9, R 10. (*See*, 34 C.F.R. § 300.324(b)).

Furthermore, the placement decision must be:

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 is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. § 300.116.

3. When a child with a disability transfers from another State with an IEP and enrolls in a new school within the same school year, the new school district:

(in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency-

(1) Conducts an evaluation pursuant to §§ 300.304 through 300.306 (if determined to be necessary by the new public agency); and

(2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in §§ 300.320 through 300.324.

34 C.F.R. § 300.323(f).

4. The Student was receiving special education and related services while incarcerated in another State, where he has placed by the Court. The Student's IEP required the Student to be educated with students without disabilities in all regular education classes. Supports and special education services included: Tutoring when requested by the Student or teacher; cues to remain on task in the classroom; extended time on assignments and tests; no penalizing for spelling errors on written assignments; psychological services once per week. The Student was released in February 2012. No plan for reintegrating the Student was created, other than an informal meeting at DYRS at which both the Petitioner and a DCPS representative were participants. The reintegration of the Student is not necessarily the Respondent's responsibility, where the Court placed the Student and agencies other than the Respondent were responsible for the Student prior to his release. When the Student was released he was

enrolled in the school he would attend had he not been disabled, consistent with his IEP. No IEP team meeting had yet been held to discuss making changes to the IEP and placement and the Petitioner did not request one. Rather, the Petitioner requested a hearing making a challenge, essentially, to the IEP created in the State he had been incarcerated in. Given the short period of time the Student had been at school prior to the complaint, it was not unreasonable that the Respondent had not yet proposed an IEP team meeting. Therefore, until the IEP team meets and discusses the Student's IEP and, subsequently, his placement, there is no violation and the Respondent was not in error for assigning the Student to School.

VII. DECISION

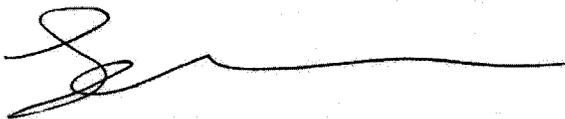
The Respondent prevails because the Student was enrolled in the school he would have attended if not disabled and in conformity with his IEP.

VIII. ORDER

The complaint is dismissed with prejudice. The Respondent is advised to convene the IEP team as soon as possible to review and revise the IEP to address the Student's academic and functional performance since enrolling with the Respondent.

IT IS SO ORDERED.

Date: May 8, 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).