

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

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

PETITIONERS, on behalf of
[STUDENT],¹

Petitioners,

Date Issued: October 16, 2011

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PARENTS (the "Petitioners"), 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 ("D.C. Regs."). In their Due Process Complaint, the Petitioners allege that Student is being denied a free appropriate public education by the refusal

¹ Personal identification information is provided in Appendix A.

of SPECIAL EDUCATION PCS to fully implement the three-step guided compliance protocol used by DEVELOPMENTAL DISABILITY INSTITUTE (“DDI”).

Student, an AGE child, is a resident of the District of Columbia. The Petitioners’ Due Process Complaint, filed on August 16, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on August 17, 2011. The parties met for a resolution session on September 1, 2011 and did not reach a settlement. The parties agreed to curtail the remainder of the resolution period. The 45-day time line for issuance of this HOD began on September 2, 2011. On September 6, 2011, a prehearing telephone conference was held with the Hearing Officer and counsel to discuss the hearing date, issues to be determined and other matters.

The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioners appeared in person and were represented by PETITIONERS’ COUNSEL. Respondent DCPS was represented by DCPS COUNSEL. Because both Petitioners are deaf, sign language interpreters provided simultaneous sign language interpretation of the proceedings.

Both Petitioners testified and called as witnesses CASE SUPERVISOR at PRIVATE SCHOOL, BEHAVIOR ANALYST from DDI, SENIOR BEHAVIOR ANALYST from DDI and EDUCATIONAL ADVOCATE. DCPS called as witnesses SPED TEACHER at Special Education PCS (“SEPCS”), BEHAVIOR CONSULTANT, and OFFICE RESOURCE SPECIALIST at SEPCS. Petitioners’ Exhibits P-1 through P-45 were admitted into evidence without objection, with the exceptions of the following exhibits which were withdrawn: P-5, P-6,

P-7, P-21, P-22, P-23, P-24, P-25, P-35, P-36, P-37, and P-46 (a DVD-R disc). DCPS Exhibits R-1 through R-23 were admitted into evidence without objection.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

- WHETHER STUDENT IS BEING DENIED A FAPE BY THE REFUSAL OF SEPCS TO IMPLEMENT THE "ESCAPE EXTINCTION" PART OF THE THREE-STEP GUIDED COMPLIANCE PROCEDURE USED BY DDI;
- WHETHER STUDENT'S PLACEMENT AT SEPCS IS INAPPROPRIATE BECAUSE THE SCHOOL WILL NOT FULLY IMPLEMENT THE DDI THREE-STEP GUIDED COMPLIANCE PROCEDURE; and
- WHETHER DCPS HAS FAILED TO FULLY INVOLVE PETITIONERS IN SCHOOL-RELATED DECISION MAKING BECAUSE DCPS HAS NOT COMMUNICATED REGARDING ALTERNATIVE PLACEMENTS TO SEPCS.

Petitioners request that the Hearing Officer order DCPS to revise Student's Behavior Support Plan to provide that the DDI three-step guided compliance procedure, including the escape extinction component, be implemented in its entirety; and order DCPS to change Student's IEP placement to a school that will fully implement the three-step guided compliance procedure.

FINDINGS OF FACT

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

1. Student is an AGE boy. He resides with his Parents and an older brother in the District of Columbia. Testimony of Father.

2. For the 2011-2012 school year, Student is enrolled in GRADE at SEPCS. Student is a child with a disability. His identified primary disability is Autism Spectrum Disorder. Student's most recent Individualized Education Program ("IEP") is dated May 3, 2011. The May 3, 2011 IEP provides for Specialized Instruction outside general education for 27.5 hours per week, Occupational Therapy ("OT") 1 hour per week and Speech-Language Pathology ("S/L") 1.5 hours per week. He receives the full time support of a dedicated aide. All of Student's IEP services are provided Outside General Education. Exhibit R-8. Parents did not agree with the contents of this IEP because SEPCS will not fully implement DDI's three step guided compliance protocol. Exhibit P-34.

3. Student has attended SEPCS since September 2005. Exhibit P-8. SEPCS is a D.C. Public Charter School. SEPCS, which has an student enrollment in the mid-200's, serves students, aged 3 through 22, with disabilities, including autism, multiple disabilities, and intellectual disability. Testimony of Office Resource Specialist.

4. From January 14, 2008 through June 25, 2009, Student was treated at the Neurobehavioral Unit Outpatient Clinic ("NBU OPC") at DDI for the assessment and treatment of aggressive, disruptive, and self-injurious behaviors. Exhibit P-9. During this period, Parents took Student to NBU OPC in Baltimore two times every week. Testimony of Father.

5. For several weeks in April 2010, Student was admitted to the neuropsychiatry unit at HOSPITAL in Baltimore for severe behaviors including head banging and biting, pinching, kicking, hitting, pulling hair, urinating on the floor and screaming. Exhibit P-11, Testimony of Father.

6. At a Multidisciplinary Team ("MDT") meeting at SEPCS on May 6, 2010, Parents reported that Hospital had noted that SEPCS may not be an appropriate place to address

Student's needs because SEPCS does not use basket holds on children. Exhibit P-28.

7. At a September 17, 2010 MDT team meeting, Father talked about why Parents were doing basket holds with Student because the holds were the only way to stop Student from being aggressive at home. Father reported that Student is combative, bites, and hits. Father stated that the Parents believe it is best to coordinate behavior management strategies at home and school. He stated that because SEPCS does not do physical restraints in that way, he believed it was confusing and detrimental to Student's making progress and managing his behaviors. Exhibit P-30.

8. Prior to Student's inpatient admission to DDI in January 2011, Student was no longer making behavioral progress at SEPCS under his Behavior Support Plan. Testimony of Behavior Consultant.

9. Prior to his inpatient admission to DDI in January 2011, Student was making satisfactory academic progress at SEPCS. He had mastered all of the goals in his December 1, 2009 IEP and was progressing well on the new goals in his November 23, 2010 IEP. Testimony of SPED Teacher.

10. Student was admitted to the inpatient Neurobehavioral Unit (NBU-IP) at DDI from January 20, 2011 through August 2011 for the assessment and treatment of severe problem behaviors. His diagnoses included Disruptive Behavior Disorder, Stereotypic Movement Disorder with Self-Injury, Autism Spectrum Disorder, Mood Disorder, Impulse Control Disorder and Mixed Expressive/Receptive Language Disorder. Prior to his admission to the NBU-IP, Student's aggression and self-injury behaviors had become increasingly severe and difficult to manage both at home and in the community. Exhibits P-13, P-14, P-17. The program at DDI is a behavioral program – not a school program. Parents' family health insurance funded Student's

hospitalization at DDI. Exhibit P-30.

11. Three-Step Guided Compliance is part of a behavior plan recommended by DDI for Student. In a March 30, 2011 Preliminary Behavior Plan, DDI described the system: Three-Step Guided Compliance is a graduated prompting system which should be used for all requests made of Student. This will encourage compliance with adult requests and limit the risk that inappropriate behavior will produce escape from demands. The sequence is as follows:

- a. **Step 1: Tell.** Tell Student what you want him to do. Do not present the demand in the form of a question unless he has the option of refusing. State what you want him to do clearly so that Student knows exactly what he is expected to do (“Student, put on your shoes.”).
Give him 5-10 seconds to comply with your request.
If Student complies, provide enthusiastic verbal praise.
If he does not comply, go to step 2.
- b. **Step 2: Show.** Repeat the request and show him what you want him to do.
If Student complies, provide enthusiastic verbal praise.
If he does not comply, go to Step 3.
- c. **Step 3: Guide.** Use hand-over-hand assistance to have him complete your request. If you have to physically guide Student to complete a task, do not provide him praise or any verbal comments. Always use the minimum amount of physical contact necessary for the request to be completed.

Exhibit P-13.

12. “Escape extinction” is a component of the three-step guided compliance protocol. Escape extinction means that Student is physically guided to complete requests if he is noncompliant, despite engaging in problem behavior or resistance. Exhibit P-16. At DDI, the staff, on occasion, used escape extinction if Student resisted a “request.” Escape extinction is effected by DDI as part of Step 3 if hand-over-hand guidance does not suffice. Examples of escape extinction for Student included crossing Student’s arms in front of him and guiding him forward, lifting Student by his armpits, and picking Student up and carrying him to where he

needed to be. Physical force prompting would be effected for a maximum of 5 to 10 seconds if Student physically resisted. Testimony of Behavior Analyst.

13. At DDI, the three-step guided compliance system was effective for interrupting Student's problem behaviors and in getting Student back on task. DDI saw an increase in Student's academic performance because Student was no longer escaping work. Testimony of Behavior Analyst.

14. DDI prepared a March 30, 2011 Preliminary Behavior Plan for Student, which included use of three-step guided compliance, for Parents and school staff to implement after his discharge. Exhibit P-13.

15. At an April 5, 2011 MDT meeting, the SEPCS PRINCIPAL'S DESIGNEE stated that SEPCS can and will verbal prompt, model and physically guide Student, but will not do forced compliance. Exhibit P-32.

16. At a May 3, 2011 MDT meeting, Principal's Designee reported that SEPCS was willing to modify Student's behavior plan to incorporate every part of the DDI program, except for the escape extinction phase of three-step guided compliance. Principal's Designee stated that SEPCS uses restraints when Student was putting himself or others in danger. Exhibit P-34.

17. At the May 3, 2011 MDT meeting, Educational Advocate gave notice that Parents would be looking at other schools that would fully implement three-step guided compliance. Exhibit P-34.

18. On August 23, 2011, SEPCS sent Behavior Consultant to observe Student at DDI and meet with Student's behavior team there. Behavior Consultant informed Behavior Analyst at DDI that at SEPCS, staff could physically prompt Student if needed and persist, but could not force him. Exhibit P-15.

19. On August 31, 2011, DDI Behavior Analyst and Sr. Behavior Analyst wrote that despite their belief that three-step guided compliance, as developed at DDI, should be implemented for Student consistently across settings, they did discuss some possible deviations with Behavior Consultant. For example, they discussed the possibility of bringing materials to the floor to Student, if Student drops to the floor and continuing to provide instructional prompts; bringing materials from "Specials" to Student should he drop en route; and attempting to limit access to reinforcers if Student engaged in problem behavior during leisure time. However, Behavior Analyst and Sr. Behavior Analyst cautioned that without escape extinction, it is possible for Student to continue escaping demand situations. Behavior Analyst and Sr. Behavior Analyst reported that it is unknown the extent to which these protocol deviations may negatively impact Student's overall levels of problem behavior and academic progress. Exhibit P-16.

20. Student was discharged from DDI to his home after August 23, 2011 and resumed attending SEPCS on September 9, 2011. Exhibits P-15, R-13.

21. SEPCS developed a revised Positive Behavior Support Plan for Student dated September 6, 2011. The plan was based upon DDI's March 30, 2011 Preliminary Behavior Plan with modifications. Notably SEPCS added the following language to the three-step compliance program:

If while providing the physical prompt, Student attempts to pull away, do not use physical force to control/restrict his movement in order to gain his compliance. Instead, identify all potential reinforcers in the environment and withhold access as long as Student is non-compliant. Assure that the environment is rich in opportunities for reinforcement at other times to maximize the contrast. Show Student a highly motivating item that he may access if he complies and returns to Level 3. Wait until he shows interest in the reinforcer and then immediately prompt. If he shows no interest, try a different item. These items should be available all times when Student is on break and in Level 3, not just after he becomes non-compliant. Continue until Student complies. (At

"Level 3" [Green Level] Student has access to highly preferred toys and the couch during leisure, differential reinforcement during academics, non-contingent access to highly preferred edibles during interactive and independent leisure and access to adult attention.)

The Parents did not give their consent for implementation of the proposed September 6, 2011

Positive Behavior Support Plan. Testimony of Behavior Consultant, Exhibit R-13.

22. Under the SEPCS September 6, 2011 Positive Behavior Support Plan, school staff, certified in the Mandt restraint technique, should physically escort Student to a safe area if necessary to ensure the safety of Student or others. One of the following criteria must be met:

- i. Caregivers cannot effectively block head banging or aggression.
- ii. Student has suffered a physical injury and must be immediately stopped from acting out.
- ii. There is imminent risk to Student if he is not moved (e.g., he is in the street).

Exhibit R-13, Testimony of Behavior Consultant.

23. SEPCS is willing to implement all of the three-step guided compliance protocol for Student up to the escape extinction part of the third step. SEPCS will employ a hand-over-hand physical prompt, but if Student pulls back or resists, instead of using force on Student, SEPCS will reintroduce the physical prompt until Student is compliant. Testimony of Behavior Consultant.

24. When Student first returned to SEPCS on September 9, 2011, the incidence of his self-abusive and aggressive behaviors increased. New problems were observed such as Student would crawl – instead of walk – to his classroom, not follow his visual schedule, not join in group activity, not sit in his chair and refuse to transition between classrooms. Behavior Consultant responded by adjusting the in-school environment, making things predictable for Student and training staff on ways to reduce the problem behaviors. The rates of target behaviors reduced significantly. Student is walking (instead of crawling) more, sits more in his

chair, transitions between classes more easily and is joining in groups. In the days preceding the due process hearing, Student's problem behaviors were in decline. All problems behaviors were occurring at a lower rate than last reported by DDI. Testimony of Behavior Consultant.

25. In 2010 and 2011, SEPCS convened MDT meetings for Student on May 6, 2010, July 22, 2010, September 17, 2010, November 23, 2010, April 5, 2011, April 28, 2011, May 3, 2011 and September 8, 2011. Father, Mother and/or Special Education Advocate attended each of these meetings and were active participants. Exhibits P-28, P-29, P-30, P-32, R-7, P-33, P-34, R-13.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the 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:

DISCUSSION

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioners in this case. *See* D.C. Regs. 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).

1. DOES THE REFUSAL OF SEPCS TO IMPLEMENT THE "ESCAPE EXTINCTION" PART OF THE THREE-STEP GUIDED COMPLIANCE PROCEDURE DENY FAPE TO STUDENT?

The principal issue raised by the Parents in this case is a narrow one. The Parents and SEPCS are at loggerheads on one point. Parents contend that SEPCS' September 6, 2011

Positive Behavior Support Plan is not adequate for Student, because the plan does not permit the use of physical force “escape extinction” to curtail Student’s problem behaviors. The three steps of DDI’s three-step guided compliance protocol are “Tell,” “Show” and “Guide.” DDI recommends that, if after the first two steps, Tell and Show, Student persists in his problem behavior, the school should implement the third step, Guide. The Guide step is physical “prompting.” It begins with hand-over-hand guidance to direct the Student. If that is ineffective, the staff member or parent would be expected to use safe force, “escape extinction,” to obtain Student’s compliance, such as crossing Student’s arms in front of him and guiding him, lifting the Student off the floor by his armpits, or picking Student up to carry him to where he needs to be.

SEPCS has incorporated DDI’s three step compliance into Student’s Behavior Support Plan with an important limitation. SEPCS will follow the three-step guided compliance protocol to the point of hand-over-hand guidance. However, if Student pulls back or resists the physical prompting, SEPCS would not permit a staff member to persist in coercive physical force, except for crisis management when there is an imminent risk of Student’s physically harming himself or others. Parents request that DCPS be ordered to change Student’s Behavior Support Plan to permit the use of physical force escape extinction pursuant to the DDI three-step guided compliance protocol.

Student’s Positive Behavior Support Plan is an element of his IEP. *See* 34 C.F.R. § 300.324(a)(2)(i). As with the IEP itself, the IDEA requires that a Behavior Support Plan must be reasonably calculated to furnish educational benefits to the child and must be developed with parental involvement. *See Long v. District of Columbia*, Civil Action No. 09-2130 (GK) (D.D.C. March 23, 2011), citing *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 200,

201, 102 S.Ct. 3034, 3048, 73 L.Ed.2d 690 (1982). The IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide him with educational benefit. *R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1122 (9th Cir. 2011). “The [IDEA] does not require an educational program to ‘maximize the potential of handicapped children,’ but mandates, more modestly, one ‘sufficient to confer some educational benefit.’ ‘Thus, proof that loving parents can craft a better program than a state offers does not, alone, entitle them to prevail under the Act.’” *Leonard by Leonard v. McKenzie*, 869 F.2d 1558, 1561 (D.C.Cir. 1989) (citations omitted).

Parents’ frustration with SEPCS’ policy, limiting the physical force aspect of three-step guided compliance, is understandable. They placed their son in DDI’s inpatient behavior management program for eight months, because the child’s aggression and self-abusive behaviors had become unmanageable in their home. Parents are concerned that any deviation from DDI’s three-step guided compliance may result in a behavior set-back for Student. However, the Parents’ conviction that the three-step guided compliance will be less effective without the escape extinction step is not enough for them to prevail on their due process claim. The Parents’ burden was to establish that, because of the SEPCS limits on the use of physical force in Student’s Behavior Support Plan, the plan was not adequate for Student to receive educational benefits. *See County Sch. Bd. of Henrico v. Z.P. ex rel. R.P.*, 399 F.3d 298, 308 (4th Cir. 2005) (citations omitted.) (“If an IEP is ‘reasonably calculated to enable the child to receive educational benefits,’ the hearing officer cannot reject it because the officer believes that a different methodology would be better for the child.”)

In a letter dated August 31, 2011, Senior Behavior Analyst and Behavior Analyst

cautioned that it was unknown the extent to which barring physical force may negatively impact Student's problem behaviors and academic progress. Assuming that by eschewing coercive physical force, the DDI three-step guided compliance procedure will be rendered less effective for Student, the evidence does not establish that Student would not still receive educational benefits from implementation of SEPCS' September 6, 2011 Behavior Support Plan, which includes all but the ultimate physical force element of the DDI protocol. The September 6, 2011 Behavior Support Plan adopts an alternative to physical force, which combines withholding access to desired reinforcers while Student is noncompliant, motivating toward compliance with such reinforcers and persistent repetition of non-coercive physical prompting. Since returning to SEPCS in September 2011, Student has had several problem behavior incidents and he has always eventually complied with staff requirements without the staff's resorting to physical force. Moreover, Behavior Consultant testified that using physical prompts over Student's resistance would violate SEPCS' policy against the use of restraints. SEPCS' refusal to use physical force is reasonable in light of the school's understanding of the Office of the State Superintendent of Education's ("OSSE") policy on use of restraints on students.²

In conclusion, I find that Parents have not met their burden of proof to establish that SEPCS' Behavior Management Plan for Student, which incorporates three-step guided compliance, but does not allow coercive physical force, is not reasonably calculated to provide

² Counsel did not cite applicable D.C. law or regulation regarding the use of restraints in a public school or public charter school. It appears that OSSE has proposed, but not yet adopted, regulations to address the appropriate and selective use of seclusion and restraint techniques in public schools. See District of Columbia Register, Vol. 57, No. 38, Notice ID 499858 (September 17, 2010). Cf. D.C. Regs. tit. 5-A, § 814.3 (Nonpublic special education schools and programs shall not use restraints in any form as a means of coercion, discipline, convenience or retaliation.) I make no finding on whether the use of physical force "escape extinction," as part of three-step guided compliance, contravenes D.C. law or OSSE policy on the use of restraints.

Student educational benefits. It necessarily follows that Student's placement at SEPCS is not inappropriate due to the school's refusal to implement the ultimate physical force step of three-step guided compliance. DCPS prevails on this issue.

2. HAS DCPS FAILED TO FULLY INVOLVE PETITIONERS IN SCHOOL-RELATED DECISION MAKING BY NOT COMMUNICATING REGARDING ALTERNATIVE PLACEMENTS TO SEPCS?

The IDEA "establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *See District of Columbia v. Doe*, No. 09-70262010, (D.C.Cir. July 6, 2010) (citation omitted.). Parents contend that they have been denied meaningful input in the placement decision for Student because DCPS PLACEMENT SPECIALIST allegedly stated at Student's IEP meetings in 2010 and 2011 that DCPS would provide information on possible alternative school placements for Student, and DCPS never provided that information. The record establishes that Placement Specialist did offer to investigate other programs for Student. *See, e.g.* Exhibit P-29. Whether or not Placement Specialist followed through on that undertaking, I find no evidence that Parents were ever denied meaningful input in any aspects of Student's education, including his placement at SEPCS. To the contrary, the record shows that in 2010 and 2011, SEPCS convened MDT meetings for Student on May 6, 2010, July 22, 2010, September 17, 2010, November 23, 2010, April 5, 2011, April 28, 2011, May 3, 2011 and September 8, 2011. Father, Mother and/or their educational advocate attended each of these meetings and were active participants. The record amply reflects the tremendous amount of access and input the parents appropriately had throughout the IEP and Behavior Support Plan development process for Student. DCPS prevails on this issue.

SUMMARY

In summary, I find that SEPCS' Behavior Support Plan for Student is reasonably calculated to provide educational benefits, even though SEPCS rejects the use of coercive physical force as part of three-step guided compliance. The Parents have not been denied meaningful input in decision making regarding Students IEP placement. The Parents have not met their burden of proof to establish that Student has been denied a FAPE.

ORDER

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

All relief requested by the Petitioners herein is denied.

Date: October 16, 2011

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).