

**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],<sup>1</sup>

Date Issued: November 16, 2011

Petitioner,

Hearing Officer: Jim Mortenson

v

District of Columbia Public Schools (DCPS),

Respondent.

---

OSSE  
STUDENT HEARING OFFICE  
2011 NOV 16 PM 1:56

**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed by the Petitioner on September 23, 2011. The

A response to the complaint was filed on October 3, 2011, and a prehearing conference was held on that date. A prehearing order was issued on October 4, 2011. A resolution meeting was convened on October 11, 2011, no agreements resulted and the 30 day resolution period was not suspended.

The due process hearing was convened and held on November 10, 2011, at 810 First Street NE, Washington, D.C. The due date for this HOD is December 7, 2011. This HOD is issued on November 16, 2011.

---

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

## 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 independent hearing officer (IHO) is:

Whether the Respondent denied the Student a free appropriate public education (FAPE) when it failed to place the Student in the least restrictive environment (LRE) pursuant to his individualized education program (IEP) when the IEP team determined he required a more restrictive setting and no such setting was assigned?

The substantive requested relief at the time of hearing is placement at

The Respondent's staff and the Petitioner agree that the Student requires a segregated day school that has a therapeutic environment to deal effectively with the Student's emotional disturbance. The Respondent failed to ensure the Student's IEP was so revised and the educational placement was made.

## IV. EVIDENCE

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

- 1) The Petitioner (P)
- 2) Juan Fernandez, Educational Advocate (J.F.)
- 3) Special Education Teacher,
- 4) Assistant Principal,
- 5) Assistant Principal,

- 6) Ebony Mack, Social Worker (E.M.)
- 7) Director of Admissions & Program Development,

18 exhibits were admitted into evidence of 36 disclosures. Only the Petitioner disclosed and offered evidence for hearing. The Petitioner's exhibits are:

<u>Ex. No.</u>	<u>Date</u>	<u>Document</u>
P 2	September 13, 2011	IEP
P 3	September 13, 2011	MDT/IEP Meeting Notes
P 4	September 7, 2011	Incident Information Report
P 5	September 7, 2011	Notice of Disciplinary Action
P 7	September 7, 2011	Email chain ending from Batson to Hull
P 8	September 20, 2011	Email chain ending from Batson to Hull
P 9	September 20, 2011	Email chain ending from Hull to Batson
P 10	September 20, 2011	Email chain ending from Batson to Hull
P 13	September 7, 2011	Student Incident History
P 14	April 10, 2011	Hearing Officer Determination (Case 2011-0147)
P 15	November 3, 2011	Email chain ending from Hull to George
P 16	October 28, 2011	Email chain ending from Morgan to Hull
P 17	November 1, 2011	Email from Hull to George
P 19	March 17, 2010	IEP
P 20	April 25, 2010	Comprehensive Psychological Evaluation
P 21	May 26, 2010	Independent Educational Evaluation Checklist
	July 19, 2010	Prior Written Notice
P 22	April 25, 2010	Review of Independent Educational Evaluation
P 32	December 20, 2010	Functional Behavior Assessment

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.

#### 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 eighth grader at
2. The Student is eligible for special education and related services under the definition of emotional disturbance.<sup>3</sup> The Student's disabilities include attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD), and impulse control disorder.<sup>4</sup> He is on medications for his conditions.<sup>5</sup> His disabilities cause him to be impulsive and occasionally he will have an explosive outburst resulting in physical violence toward both peers and adults.<sup>6</sup> He has been hospitalized in the past for aggressiveness toward peers.<sup>7</sup>
3. The Student has had two explosive outbursts this year at                   including                   a staff member resulting in a                   the staff member's                   and attempting to                   another staff member.<sup>8</sup> The Student was                   and charged for the first incident and was out of school with no services.<sup>9</sup> The Student was placed at Academy until November 23, 2011, following the second outburst.<sup>10</sup>
4. A hearing was held last school year and one of the issues was placement.<sup>11</sup> The IHO in that case determined the Petitioner had not met her burden of persuading the IHO that the Student's placement was not appropriate as, inter alia, the Student was making good academic progress.<sup>12</sup>

---

<sup>2</sup> P 2, Testimony (T) of P.

<sup>3</sup> P 2.

<sup>4</sup> P 20, T of P.

<sup>5</sup> T of P.

<sup>6</sup> T of P, T of O.W., T of P.M., T of D.D., T of E.M., P 2, P 20.

<sup>7</sup> T of E.M.

<sup>8</sup> P 4, P 5, T of P, T of O.W., T of P.M., T of D.D., T of E.M.

<sup>9</sup> P 4, T of P, T of E.M.

<sup>10</sup> T of P.

<sup>11</sup> P 14.

<sup>12</sup> P 14.

5. The Student did well academically when he was at school this year.<sup>13</sup> No evidence of his current academic progress was provided.
6. The Student's IEP team met on September 13, 2011, following his first violent outburst this school year.<sup>14</sup> Prior to the meeting the Special Education Coordinator (SEC) for the school advised the Petitioner's Counsel that placement for the Student could be discussed but that a "protocol" must be followed.<sup>15</sup> The Respondent's "protocol" for placement determinations includes: 1) a 30 day observation of the Student with accommodations and modifications along with positive behavior interventions and a behavior intervention plan which has been updated to reflect current behaviors wanted and unwanted; 2) After 30 days the team should meet again to review the progress of the interventions; 3) If progress is made, the student's placement will not be changed; 4) If progress is not shown, and the teachers and service providers can show they tried every possible strategy, then the "folder" is forwarded to the placement specialist who will perform another observation and make a decision as to appropriate placement.<sup>16</sup> The staff at                    made a recommendation to the "central office" that the Student be placed in another school.<sup>17</sup>
7. The IEP team determined that the Student required a full-time out of general education placement other than .                    but the IEP was not updated to reflect this and no change of placement was made but for an interim alternative educational placement as a result of a subsequent outburst.<sup>18</sup> The Student requires a therapeutic educational placement where there

---

<sup>13</sup> T of O.W., T of P.M., T of E.M.

<sup>14</sup> P 7, P 8.

<sup>15</sup> P 7.

<sup>16</sup> P 7, P 8.

<sup>17</sup> Stipulated Fact (SF), T of D.D.

<sup>18</sup> P 8, T of P.

are staff trained in appropriate restraints and de-escalation, and where there is a location for the Student to calm down and be processed with appropriately when an outburst occurs.<sup>19</sup>

8. The IEP was last revised September 13, 2011, and does not include measurable annual functional goals designed to meet his needs resulting from his disabilities.<sup>20</sup> The four goals under the heading "Emotional, Social, and Behavioral Development" are not measurable.<sup>21</sup>
9. The Respondent has a school, \_\_\_\_\_ that has appropriately trained staff and the therapeutic environment the IEP team determined the Student requires.<sup>22</sup> \_\_\_\_\_ cannot currently take additional students.<sup>23</sup>
10. The Student has been accepted at, but not yet enrolled in, \_\_\_\_\_ is an accredited non-public school in Largo, Maryland serving students with emotional disturbance in grades one through 12.<sup>25</sup> There is a District of Columbia public school monitor in the building, the District of Columbia curriculum is followed, and tuition rates are submitted for approval to the District of Columbia.<sup>26</sup> All staff are certified special education and in each class there is one teacher and one assistant and other service providers.<sup>27</sup> Most staff at the school are trained in therapeutic crisis intervention and helping students with emotional outbursts to de-escalate.<sup>28</sup> There are rooms available for de-escalation and calming to occur.<sup>29</sup> The school is not a chaotic environment and classes have about six students.<sup>30</sup> There are counselors on-site and a psychiatrist available 20 hours per week.<sup>31</sup>

---

<sup>19</sup> T of P, T of O.W., T of P.M., T of D.D., T of J.F., T of E.M. (No evidence was presented contradicting this.)

<sup>20</sup> P 2.

<sup>21</sup> P 2.

<sup>22</sup> T of P.M.

<sup>23</sup> SF.

<sup>24</sup> T of K.K.

<sup>25</sup> T of K.K., T of E.M.

<sup>26</sup> T of K.K.

<sup>27</sup> T of K.K.

<sup>28</sup> T of K.K., T of E.M.

<sup>29</sup> T of K.K.

## 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 due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to meet their burden. 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); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3). No evidence was provided by the Respondent at hearing.

2. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17.

3. A “determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. § 300.513(a)(1). A procedural violation may result in a determination that a child was denied FAPE “only if the procedural inadequacies- (i) Impeded the child’s right to a FAPE; (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) Caused a

---

<sup>30</sup> T of E.M.

<sup>31</sup> T of K.K.

deprivation of educational benefit.” 34 C.F.R. § 300.513(a)(2). “Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under §§ 300.500 through 300.536.” 34 C.F.R. § 300.513(a)(3).

4. Federal regulations at 34 C.F.R. § 300.115 addresses the continuum of alternative placements local education agencies (LEAs) must make available for students with disabilities:

- (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.
- (b) The continuum required in paragraph (a) of this section must—
  - (1) Include the alternative placements listed in the definition of special education under § 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
  - (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

5. Federal regulations at 34 C.F.R. § 300.116 described the process for making placement determinations:

- In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that—
- (a) The placement decision—
    - (1) Is 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;
  - (b) The child’s placement—
    - (1) Is 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.

In the District of Columbia, IEP teams make the placement determinations. D.C. Mun. Regs. 5-E3001 (“**IEP team** - a group of individuals, comprised of the persons listed in § 3003 of this Chapter, responsible for: . . . (c) Determining the placement of a child with a disability in the least restrictive environment (LRE) in accordance with 20 U.S.C. § 1414 (f), and § 3011 of this Chapter.”).

6. The IEP team agreed that the Student required a separate school with a therapeutic environment that included appropriately trained staff for crisis intervention and restraints and a timeout room. The IEP team did not revise the IEP to reflect this, however. Had the IEP team appropriately revised the IEP, then it should have made a placement determination in conformity with the IEP and other legal requirements. Instead, the Respondent injected its own process for making placement determinations in violation of IDEA and District of Columbia law. The IEP team did not make changes to the IEP and the subsequent placement determination because the SEC for the school advised that the process for making a placement determination involved "a 30 day observation. . . ." Then, according to the SEC, the IEP team "should meet again to review the progress and the interventions." If progress was made, according to the SEC, the placement would not be changed. If no progress was made, and the teachers and services providers show that they tried every possible strategy. "then we will forward the folder to the placement specialist who will perform an observation and make a decision as to appropriate placement." By replacing the IEP team's authority with this process, the Respondent denied the Student a FAPE by not following the standards for placement determinations under the IDEA and District of Columbia law and significantly impeded his Parent's involvement in the decision making process.
7. This hearing officer must grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). When considering prospective nonpublic placement as a remedy, the following factors must be considered: a) the nature and severity of the Student's disability; b) the Student's specialized educational needs; c) the link between those needs and the services offered by the private school; d) the reasonableness of the placement's cost; and e) the extent

to which the placement represents the least restrictive environment. Branham v. District of Columbia, 427 F. 3d 7, \_\_\_, 44 IDELR 149, \_\_\_ (pdf pg. 5) (D.C. Cir. 2005). "Because placement decisions implicate equitable considerations, moreover, courts may also consider the parties' conduct." Id., citing Reid v. District of Columbia, 401 F.3d 516, 524, 43 IDELR 32, \_\_\_ (D.C. Cir. 2005).

8. The Petitioner's request for placement at \_\_\_\_\_ has not been challenged by the Respondent. The Respondent failed to follow the law in revising the Student's IEP and making a placement determination delaying the decision-making and removing that power from the IEP team. The Respondent went to hearing over this complaint because it denied the IEP team had, in fact, agreed that the Student needs a new placement. Yet the Respondent presented no evidence to support this argument and to refute the Petitioner's evidence (which included primarily the testimony of Respondent's staff) that the team members determined the Student required a therapeutic environment in a separate school. At the conclusion of the hearing, the Respondent, in closing, changed its position in the face of the overwhelming evidence and stated that the program at \_\_\_\_\_ was limited in its ability to deal with the Student and that it did not identify an appropriate placement for him. The placement it had, \_\_\_\_\_ was full. Given the spurious defense the Respondent made to the claims, this must be taken into consideration given the resources it has used, forced the Petitioner to use, and that the SEA has had to use to resolve a matter that was never really in dispute.

9. Given the question of placement at \_\_\_\_\_ has been placed before the undersigned, the analysis under Branham must be applied. The Student's disabilities impact him behaviorally and result in occasional outbursts that can be serious and violent. While

these outbursts are not frequent, they occur often enough to disrupt the Student's access to the general curriculum, as has been seen twice this year already. In fact, the Respondent did change the Student's placement to an interim alternative placement as a result of at least one outburst. All the evidence shows the Student requires crisis intervention when he has an outburst, and the staff and space to do this are not available at [redacted] They are available at [redacted]

[redacted] tuition is based on approval from the District of Columbia and the Respondent has not challenged its reasonableness. While the placement at [redacted] is more restrictive than the Student likely requires (because there is no access to Student's [redacted] without disabilities), it has the staff and services the Student requires in order to enable him to be involved in and progress in the general education curriculum. Given the two outbursts the Student has experienced this school year, and the results of the outbursts in terms of injury to staff and removal of the Student from his program, the harmful effect to the Student of remaining in the setting at [redacted] is mitigated by the more restrictive setting at [redacted]

#### VII. DECISION

The Petitioner prevails because the Respondent denied the Student a FAPE when it did not revise his IEP and make a placement determination to reflect the IEP team's determinations about the appropriate programming and placement for the Student.

### VIII. ORDER

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

1. Within 10 business days of the date of this order the Respondent must convene the IEP team to revise the Student's IEP to reflect the services and the placement he requires. The IEP must be revised to reflect: 1) Measurable annual functional goals designed to meet the Student's needs resulting from his impulsivity and other disabilities; 2) The inclusion of the use of a time-out room and appropriately trained staff for crisis intervention and de-escalation (including the anticipated frequency, location, and duration of such services); and 3) An explanation why the Student will not be participating with non-disabled peers (his emotional disturbance leads to violent outbursts that require immediate and appropriate intervention by trained staff and in a location away from other students).
2. The Student will be placed at \_\_\_\_\_ and provided transportation, for the remainder of the 2011-2012 school year. Placement must be made and transportation provided the first school day following the end of the Student's interim placement at \_\_\_\_\_.
3. Nothing in this order prevents the IEP team from making other revisions to the IEP if it determines are necessary to provide FAPE, based on documented data and properly recorded in a written notice consistent with 34 C.F.R. § 300.503, and D.C. Mun. Regs. 5-E3024.1.
4. The OSSE is advised that based on the evidence and arguments in this hearing, the Respondent may be employing procedures concerning placement determinations that delay such determinations and/or remove the placement determination from IEP teams and may even be using the hearing process to make placement determinations that are to be made by \_\_\_\_\_.

IEP teams. The OSSE is encouraged to investigate the use of such procedures and outcomes  
at

**IT IS SO ORDERED.**

Date: November 16, 2011



\_\_\_\_\_  
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).