

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

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

OSSE  
Student Hearing Office  
August 20, 2013

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[Parent], on behalf of  
[Student],<sup>1</sup>

Date Issued: August 20, 2013

Petitioner,

Hearing Officer: Jim Mortenson

v

[Local Education Agency],

Respondent.

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**HEARING OFFICER DETERMINATION**

**I. BACKGROUND**

The complaint in this matter was filed by the Petitioner on June 24, 2013. The Petitioner and Respondent are both represented by counsel. A response to the complaint was filed by the Respondent on July 3, 2013. A prehearing conference was convened on July 8, 2013, and a prehearing order was issued on that date. A resolution meeting was held on July 10, 2013, and resulted in an agreement that no agreement was possible, starting the 45-day hearing timeline. The due process hearing was rescheduled as a result of the new timelines.

The Petitioner filed a motion to compel the testimony of one of her witnesses on July 17, 2013. The Chief Hearing Officer provided the Petitioner with a Notice to Appear for the witness on July 18, 2013.

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<sup>1</sup> All proper names have been removed in accordance with Student Hearing Office policy and are referenced in Appendix C which is to be removed prior to public dissemination.

Both parties filed their trial briefs and exchanged their disclosures on August 9, 2013. The hearing was convened at 9:20 a.m. on Friday, August 16, 2013, in room 2006 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The hearing ended at 11:40 a.m. The due date for this Hearing Officer's Determination (HOD) is August 24, 2013. This HOD is issued on August 20, 2013.

## **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-E30.

## **III. ISSUE, RELIEF SOUGHT, and DETERMINATION**

The issue to be determined by the IHO is:

- 1) Whether the Respondent failed to ensure the placement decision for the Student was made by the individualized education program (IEP) team and was based on the Student's IEP when a local education agency (LEA) staff person unilaterally placed the Student in a self-contained program in a school, which the team lacked information about to make a determination, rather than the small structured therapeutic special education program, in a special school, determined necessary by the IEP team?
- 2) Alternatively, whether the location determination made by the Respondent is the least restrictive environment (LRE) for the Student?

The Petitioner is seeking placement of the Student in a small structured therapeutic non-public special education day school.

The Respondent did not fail to ensure the placement decision for the Student was made by the IEP team and was based on his IEP. The Respondent selected a location of service consistent with the IEP team's placement determination.

#### **IV. EVIDENCE**

Four witnesses testified at the hearing, all for the Petitioner. The Petitioner's witnesses were the Petitioner herself (P), an administrator from the non-public special education day school the Special Education Teacher from the School and a Psychologist who evaluated the Student . J.N. provided an expert opinion on the Student's programming.

All eight of the Petitioner's disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. Four of the Respondent's seven disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

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. Any credibility issues are specifically noted in the findings of fact. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. 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 12 year old learner with a disability enrolled in the Respondent's schools.<sup>2</sup> The Student attended the School A since fifth grade and completed the 2012-2013 school year there.<sup>3</sup>

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<sup>2</sup> P 1, Testimony (T) of P.

<sup>3</sup> T of P.

2. The Student was recently evaluated <sup>4</sup> The Student suffers from a reading disorder; disorder of written expression; mathematics disorder; oppositional defiant disorder; and attention deficit hyperactivity disorder, combined type (ADHD).<sup>5</sup> Generally, the Student's cognitive ability is in the low average range.<sup>6</sup> His overall level of academic achievement, based on the <sup>7</sup> Tests of Achievement, is very low.<sup>7</sup> He has a generally positive mood, but is often disrespectful, untruthful, and defiant towards school staff members, and has problematic relationships with peers and teachers.<sup>8</sup> His ADHD causes him to have limited alertness to academic tasks due to his heightened alertness to environmental stimuli.<sup>9</sup> The Student has crisis episodes that occur daily.<sup>10</sup> His problem behaviors escalate very quickly.<sup>11</sup> His behavior changed from the 2011-2012 school year to the 2012-2013 school year from crying and property destruction to physical aggression and statements such as "I am not scared."<sup>12</sup> The Student's behaviors have resulted in failing grades and involvement in the legal system.<sup>13</sup>
3. An observation of the Student by a LEA staff person resulted in the following relevant recommendations, among others: limit opportunities for movement; enforce a prearranged cue to leave the area; eliminate distractors; assign a safe place for cooling down/regrouping away from other students; develop plan to prevent triggers; a structured behavior

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<sup>4</sup> P 2. (None of evaluation or testimony was challenged or refuted by the Respondent.)

<sup>5</sup> P 2.

<sup>6</sup> P 2.

<sup>7</sup> P 2.

<sup>8</sup> P 2.

<sup>9</sup> P 2.

<sup>10</sup> P 3.

<sup>11</sup> P 3.

<sup>12</sup> P 3.

<sup>13</sup> R 2.

management program; etc.<sup>14</sup> The staff person recommended that the IEP team review and discuss the benefits of the Behavior Education Service (BES) program for the Student.<sup>15</sup>

4. The independent educational evaluation (IEE) recommended, in relevant part: a much more structured and restrictive educational placement because his placement at School A allows him more freedom than he is mature enough to handle; support for his emotional, behavioral, and academics; and a class size limited to five to ten students so that individualized attention can be provided; and the availability of mental health clinicians on a full-time basis.<sup>16</sup>
5. On June 13, 2013, the IEP team met to discuss the Student's programming and placement.<sup>17</sup> Based on a review of the evaluation the school psychologist at the meeting agreed that the Student would benefit from a structured therapeutic setting.<sup>18</sup> The IEP team agreed and the IEP was revised to include specialized instruction per week outside of the general education setting, and 360 minutes per month of behavioral support services outside of the general education setting.<sup>19</sup> The IEP team discussed the recommendation of the BES program and noted that it was a self-contained program including a behavior tech, special education teacher, social worker, and a classroom size of no more than 10 students.<sup>20</sup> There was not additional information available about the BES program and the team had some specific questions about the responsibilities of staff in the program before they would approve it as a placement for the Student.<sup>21</sup> Despite this, the

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<sup>14</sup> P 3.

<sup>15</sup> P 3.

<sup>16</sup> P 2.

<sup>17</sup> P 4.

<sup>18</sup> P 4.

<sup>19</sup> P 4.

<sup>20</sup> P 4.

<sup>21</sup> P 4.

Respondent determined to assign the Student to the \_\_\_\_\_ School were the BES program was located.<sup>22</sup>

6. \_\_\_\_\_, the Respondent provided a written notice to the Petitioner stating that the Student would be placed at the \_\_\_\_\_ School because that school could implement the Student's IEP and provide the behavioral support services he required.<sup>23</sup>

7. A month later the Student was accepted at the Non-Public School which has a program similar to the self-contained BES program at the \_\_\_\_\_ School, except that the Non-Public School serves students with disabilities exclusively.<sup>24</sup>

8. The BES program at the \_\_\_\_\_ School is a segregated program for students with disabilities who have behavioral issues and require very intensive support and monitoring.<sup>25</sup> All classes, including specials, lunch, physical education, and recess, occur segregated from non-disabled peers.<sup>26</sup> The classrooms are in a hallway that is kept secured from the rest of the school, including the use of staff to monitor entry and exit of the hall.<sup>27</sup> In addition to a social worker, there are four special education teachers and four behavioral techs for the program, which currently has 12 to 13 children enrolled (enrollment can change).<sup>28</sup> Students will be escorted by a behavior tech when out of the classroom.<sup>29</sup> There is also a behavior coordinator to support the behavior techs.<sup>30</sup> All the staff in the program are trained to work with

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<sup>22</sup> P 4.

<sup>23</sup> P 5.

<sup>24</sup> P 6, T of W.H.

T of O.W.

<sup>27</sup> P 4, T of O.W.

<sup>28</sup> T of O.W.

<sup>29</sup> T of O.W.

<sup>30</sup> T of O.W.

behavioral problems, conflict resolution, and the use of the cool-down room.<sup>31</sup> The Student will be prepared for eighth grade State-wide academic assessments.<sup>32</sup>

## **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 a 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).
2. Educational placement is a concept within the Individuals with Disabilities Education Improvement Act (IDEA) that works hand-in-hand with the concept of least restrictive environment (LRE). *See*: 34 C.F.R. §§ 300.114-300.120, also 71 Fed. Reg. 46587, 45588 (August 14, 2006). There is a continuum of alternative placements each LEA must have, including "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions[.]" 34 C.F.R. § 300.115. Furthermore, while the placement decision is based on the IEP of the child, the IEP of the child is not based on the placement. 34 C.F.R. § 300.324. The Office of Special Education Programs (OSEP) analyzed

the question of “whether a public school board has the unilateral discretion under the [IDEA] to choose the educational placement of a child with a disability as an administrative matter to the exclusion of any input from that child's parents.” Letter to Veazey, 37 IDELR 10 (OSEP Nov. 26, 2001). The answer is no, but the matter is more complicated because of the vagaries of what is a “placement.” The selection of a particular location for services (the physical surrounding, such as the classroom) is not a change in placement. 71 Fed. Reg. 46588-89 (August 14, 2006). 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. A placement decision is made, in the District of Columbia, by the IEP team. *See* D.C. Mun. Regs. 5-E3001.1.

3. In this case, the IEP team met, including the Petitioner, and decided to change the Student’s individualized education program and placement to a more structured program. The Respondent then assigned the Student to its more structured program at the School. There was some confusion because the program was still being created and the Respondent failed to ensure staff were present at the meeting or subsequently who could adequately describe the new program the Student was to be assigned to at the School. While the Respondent’s failure to communicate with the Petitioner is unfortunate, the assignment is consistent with the Student’s education placement determined by the IEP team and there is no substantive violation in this case. The School program is structured and segregated as the IEP team envisioned and has the low student to teacher ratio and support staff determined necessary by the IEP team for the Student. The IEP team did not adequately

documents this placement and program determination in the IEP, and this should be corrected. The Petitioner did not challenge the IEP, however, and so this is not addressed further here.

### **VII. DECISION**

The Respondent did not fail to ensure the placement decision for the Student was made by the IEP team and was based on his IEP. The Respondent selected a location of service consistent with the IEP team's placement determination.<sup>33</sup>

### **VIII. ORDER**

The complaint is dismissed with prejudice.

**IT IS SO ORDERED.**

Date: August 20, 2013



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Independent Hearing Officer

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<sup>33</sup> The IEP lacks the details the IEP team discussed and determined were necessary for the Student's program and placement. This should be corrected by the Respondent and IEP team.

**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).