

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

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

OSSE
Student Hearing Office
March 19, 2014

PETITIONER,
on behalf of STUDENT,¹

Hearing Officer: Peter B. Vaden

Petitioner,

v.

PUBLIC CHARTER SCHOOL,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came for an expedited hearing upon the Administrative Due Process Complaint Notice filed by Petitioner (the Petitioner or MOTHER), 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 and Title 5-B, Chapter 5-B25 of the District of Columbia Municipal Regulations (DCMR). In her January 16, 2014 Due Process Complaint, Petitioner alleges that Respondent Public Charter School (PCS) denied Student a free appropriate public education (FAPE) by constructively expelling him in January 2014 and by failing to provide him an appropriate Individualized Education Program (IEP).

¹ Personal identification information is provided in Appendix A.

Student, an AGE child, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on February 5, 2014, named PCS as respondent. Petitioner requested an expedited hearing. On February 10, 2014, PCS filed a motion in opposition to Petitioner's request for an expedited hearing on the grounds, *inter alia*, that the IDEA's discipline procedures do not apply to a constructive expulsion, as alleged in the complaint. By order of February 13, 2014, I overruled PCS' motion. On February 14, 2014, I convened a telephone prehearing conference with counsel to discuss the hearing date, issues to be determined and other matters.

Pursuant to the IDEA, the expedited due process hearing was convened before me on March 5, 2014 at the Student Hearing Office in Washington, D.C. This Hearing Officer Determination must be issued within 10 school days after the hearing. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL. PCS was represented by its SPECIAL EDUCATION DIRECTOR and by PCS' COUNSEL.

Mother testified, and called as witness EDUCATIONAL CONSULTANT. PCS called Special Education Director as its only witness. Petitioner's Exhibits P-1 through P-22 were admitted into evidence without objection, with the exception of Exhibits P-16 and P-21 which were admitted over PCS' objections. PCS' Exhibits R-1 through R-19 were admitted without objection. Counsel for both parties made opening and closing statements. Neither party requested leave to file a post hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f), (k) and DCMR tit. 5-E, § 3029 and tit. 5-B, § 2510.

ISSUES AND RELIEF SOUGHT

The issues to be determined in this case are:

- Whether PCS failed to comply with the disciplinary procedures of the IDEA when it allegedly changed Student’s placement by a constructive expulsion in January 2014; and
- Whether PCS’ October 17, 2013 IEP was inappropriate because it did not meet Student’s alleged need for a full-time intensive special education program.

For relief, Petitioner seeks an order for PCS to reinstate Student pending the school’s identifying a different appropriate placement/location of services for him and that PCS reconvene Student’s IEP team to develop a full time, intensive educational program that can provide for Student’s academic and behavioral concerns. In addition, Petitioner requests an award of compensatory education to compensate Student for educational harm resulting from his alleged constructive expulsion from PCS in January 2014.

FINDINGS OF FACT

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

1. Student, an AGE boy, resides with Mother in the District of Columbia.

Testimony of Mother.

2. Student is eligible for special education and related services as a student with Multiple Disabilities, based upon underlying impairments Emotional Disturbance (ED) and Other Health Impairment – Attention Deficit Hyperactivity Disorder (OHI-

ADHD). Exhibits R-4, R-8.

3. Mother enrolled Student in PCS at the beginning of the 2013-2014 school year. Before enrolling in PCS, Student attended PRIOR CHARTER SCHOOL.

Testimony of Mother. Student's March 27, 2013 IEP at Prior Charter School identified his Primary Disability classification as ED. The IEP identified areas of concern in Mathematics, Reading, and Emotional, Social and Behavioral Development. The Prior Charter School IEP provided Student five hours per week of Specialized Instruction outside the General Education setting and 60 minutes per week of Behavioral Support Services, also outside General Education. Exhibit P-2.

4. Mother testified that Student's 2012-2013 school year at Prior Charter School had been unsatisfactory. Student stayed in the hallways, was disruptive when he was in class and was not doing his work. Mother decided it would be good for Student to get him out of that school setting. Testimony of Mother.

5. PCS has an enrollment of some 330 students. All students at PCS board at the school. Testimony of Special Education Director. In the summer of 2013, Student attended a trial summer program at PCS. During the trial program, Student got into trouble and Mother did not expect him to be admitted. However, Student was accepted for the 2013-2014 school year. Mother thought PCS would be appropriate for Student because the class sizes are smaller than at Prior Charter School and he would receive more attention from male adults. Testimony of Mother.

6. Student's first week at PCS was wonderful. After that, everything went downhill. Student returned to the same behaviors which he exhibited at Prior Charter School – not staying on task, lack of focus, not caring what anyone said to him. He was disciplined and suspended several times by PCS. Testimony of Mother.

7. The parties stipulate that for all of Student's disciplinary suspensions from PCS, PCS' Manifestation Determination Review (MDR) team determined that Student's violations of the school's code of conduct were manifestations of his IDEA disabilities.

Stipulation of Counsel.

8. On September 20, 2013, Student was suspended from school for two days, following an incident in which Student allegedly was in the school hallway and went to the doorway of another classroom. From the doorway, he mimicked the gesture of holding a gun and pretending to shoot at several students. At a September 25, 2013 MDR meeting, the MDR team was in agreement that the incident was a manifestation of Student's OHI-ADHD disability. The MDR team also decided that Student should receive a Functional Behavioral Assessment (FBA) and a clinical psychological evaluation, and that a Behavior Intervention Plan (BIP) would be developed. Mother consented to the evaluations. Exhibits P-9, R-1, R-2.

9. CLINICAL PSYCHOLOGIST conducted a Clinical Psychological Evaluation of Student on September 27, 2013 following the mimicked shooting incident. In her September 29, 2013 report, Clinical Psychologist reported that an assessment of Student's current emotional status was desired as part of the determination of Student's fitness for returning to campus. Clinical Psychologist concluded, *inter alia*, that Student has a history of poor behavioral control, lack of focus and academic under performance due primarily to failure to hand in work; that Student was taking medications for ADHD as well as Seroquel at night. Testing of Student, performed at Prior Charter School, also documented a weakness in visual perceptual functioning and processing speed that probably affects Student's ability to complete work quickly and easily. In addition Student has a stutter that has been remediated with speech therapy in the past; the

stutter was still noticeable but has been rated “very mild” according to his records. Student has had many school absences, sometimes as a result of being hospitalized after running away and/or threatening to harm himself. The family had experienced significant stressors including deaths of extended family members, temporary housing and parental illness. Results of Clinical Psychologist’s current clinical evaluation and attention screening indicated that Student continued to experience significant challenges with distractibility and inattention. Salient factors affecting Student’s behavior seemed to be family stressors that may have put him under pressure to assume inappropriate responsibilities while feeling unsupported and vulnerable. In addition, in school, Student struggled not only with trying to keep his attention on schoolwork but also with what appeared to be a significant weakness in processing speed. As a consequence he may be fearful of exhibiting this weakness by working slowly and producing written work that doesn’t look very good. Student seemed to have learned that escaping from this uncomfortable situation by leaving the classroom or refusing to do the work feels better than struggling and producing work that he feels is poor. Clinical Psychologist recommended that Student’s MDT team consider as Diagnostic impressions: Attention Deficit Hyperactivity Disorder, predominantly inattentive presentation Moderate severity; Childhood Onset Fluency Disorder; and Adjustment Disorder with disturbance of conduct. Exhibits P-4, R-3.

10. On October 4, 2013, Student was suspended from PCS for three days for a fighting incident. Exhibit P-12.

11. Also, October 4, 2013, a school staff member found a utility tool with a knife blade attachment on Student’s bed, partially under the covers. Student explained that on his last trip home, he has used the tool to work on his bicycle and had forgotten

that he left it in his pocket when he returned to PCS. On October 8, 2013, an MDR team meeting was convened at PCS to consider the incident. Clinical Psychologist attended the meeting and reviewed her September 29, 2013 clinical psychological evaluation with the MDR team. After hearing from Clinical Psychologist, the MDR team determined that Student's bringing the knife to school was a manifestation of his disability. Exhibit P-6. By letter of October 11, 2013, PCS administrative staff informed Mother that PCS had decided to suspend Student from school for 45 days, because his bringing a weapon to school was a special circumstance that permitted a long term suspension. During the suspension, alternative interim educational services would be provided to Student. Student would be permitted to return to school on December 16, 2013 as a day student. Upon his return, Student would be required to demonstrate safe behaviors for a 3-week time span before he would be permitted to return to PCS' overnight program. Exhibit P-3.²

12. After the 45-day suspension, Student returned to PCS on December 16, 2014. Testimony of Mother, Exhibit P-15. On December 17, 2013, Student was again suspended from PCS for alleged failure to follow routines that endanger safety, fighting and physical threats. Mother was provided a Written Notice of Suspension which informed her that Student was being suspended for December 18-19, 2013. The notice stated that for Student to be allowed to return to school, a parent would have to accompany Student to a "Reflection Meeting" with the Dean of Students scheduled for December 20, 2013. Testimony of Mother; Exhibits P-14, R-15. Student did not return for the scheduled Reflection Meeting. Testimony of Special Education Director.

² In this case, Petitioner has not challenged PCS' conduct in suspending Student for the alleged weapon violation.

13. After the December 17, 2013 suspension, Mother decided that maybe “someplace else” would be better for Student because PCS was not working for him. Testimony of Mother. Mother telephoned Special Education Director to inform her that she would be withdrawing Student from PCS because the school was not working out for Student. Testimony of Special Education Director. The details of that telephone conversation are disputed. Mother testified that she told Special Education Director that she was thinking about withdrawing Student and Special Education Director responded, “Yeah, I think that’s a good idea.” Special Education Director testified that she told Mother that PCS was a “school of choice” and it was Mother’s prerogative if she wanted to withdraw Student. Special Education Director testified that Mother did not ask for her guidance and that she did not tell Mother it would be a good idea to withdraw Student. Special Education Director testified that she reminded Mother that Student’s expulsion from PCS was not under consideration. Mother admitted that she was not told that if Student got into trouble again, he would definitely be suspended. There were no witnesses to the telephone conversation and neither party introduced written notes memorializing what was said. Due to the conflict in testimony, I find that Mother has not proven by the preponderance of the evidence that Special Education Director told her that it would be a good idea to withdraw Student. I further find there was no evidence that Special Education Director told Mother that PCS was considering expelling Student.

14. Mother did not send Student back to PCS after his December 18-19, 2013 suspension because she did not see a reason to wait until after winter break to withdraw him, when she knew that PCS was “just not working” for Student. Testimony of Mother.

15. After Student did not return to PCS following the winter break, Special Education Director telephoned Mother. Special Education Director asked whether Student was going to return to school or Mother would be withdrawing him. Testimony of Special Education Director. Special Education Director gave Mother the name of PCS' ENROLLMENT DIRECTOR. On January 9, 2014, Mother went to PCS and met with Enrollment Director. Mother executed the PCS Student Withdrawal Form. The form indicates that Student would be attending CITY MIDDLE SCHOOL, which is Student's neighborhood school. Mother told Enrollment Director that she did not want Student to attend City Middle School. Enrollment Director left City Middle School on the form, pending a decision by Mother on what school Student would attend. Mother said that was fine. Testimony of Mother, Exhibit R-16.

16. As of the date of the due process hearing, Student was not enrolled in any school. Mother does not want Student to go to City Middle School or to return to PCS. Mother had hoped to enroll Student in PUBLIC CHARTER SCHOOL 3, but that school had a waiting list. Mother hopes that Petitioner's Attorney will be able to help get Student enrolled in another school. Testimony of Mother.

17. On October 17, 2013, PCS convened Student's IEP team to amend Student's Prior Charter School IEP to change Student's Primary Disability Classification to MD and to add transportation services for Student upon his return to PCS as a temporary day student. No other changes were made to Student's IEP. Mother was in agreement with the amendments to Student's IEP. Exhibits R-7, R-8.

18. PCS SCHOOL PSYCHOLOGIST started Student's FBA before his long term suspension began on October 4, 2013. Only one observation of Student was completed because of Student's absence from school. Mother and Student's teachers

were interviewed to gather additional data. Exhibit R-9. A draft BIP was completed on November 8, 2013. The draft plan identified targeted behaviors and objectives, provided for daily monitoring and documenting, and provided that Student would receive counseling for 60 minutes weekly, a weekly review of progress and modifications to the BIP as necessary. Exhibit R-10.

19. On December 13, 2013, PCS convened an IEP team meeting for Student to add bus transportation services to Student's IEP, review the FBA and draft BIP, and prepare supports and interventions to be implemented when Student returned to school after the end of his 45-day suspension. Mother and Student attended the meeting. The IEP team identified transition steps/supports to facilitate Student's successful transition back to PCS. The team scheduled a follow up meeting for January 10, 2013 to review Student's progress and to prepare for his transition back to the PCS boarding program. Exhibit R-12. The IEP team finalized Student's BIP at the December 13, 2013 meeting. Testimony of Special Education Director.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR 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).

Analysis

- A. Did PCS fail to comply with the disciplinary procedures of the IDEA when it allegedly changed Student's placement by a constructive expulsion in January 2014?

Section 612(a)(1)(A) of the IDEA provides that FAPE must be made available to all children with disabilities, including children with disabilities who have been suspended or expelled from school. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46716 (August 14, 2006). Therefore, when a school expels a student with a disability, the local education agency (LEA) must ensure that the student continues to receive educational services, so as to enable him to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in his IEP. *See* 34 CFR § 300.530(d). PCS has elected to be treated as an "LEA Charter," *i.e.*, as its own LEA for purposes of part B of the IDEA. *See* 5E DCMR § 923.3. Therefore, with respect to children enrolled in PCS, the charter school is responsible for meeting the IDEA requirements applicable to an LEA

Petitioner alleges that PCS violated the above disciplinary requirements of the IDEA by constructively expelling Student in January 2014 and not ensuring that he would continue to receive education services. On October 4, 2013, PCS suspended Student for 45 days for allegedly bringing a knife to school. After Student had returned to school following the 45-day suspension, he was again suspended for a new conduct violation. Mother testified that on or about December 19, 2013, she telephoned PCS' Special Education Director to state that she was thinking about withdrawing Student and that Special Education Director responded, "Yeah, I think that's a good idea." Mother's testimony was refuted by Special Education Director, who testified that she did

not say that withdrawing Student was a good idea, but told Mother that PCS was a “school of choice” and it was Mother’s prerogative if she wanted to withdraw Student. Because neither witness’ account of this conversation was corroborated by a third party or by any written documentation, I have no basis to accord greater weight to either witness’ version of their conversation.

Moreover, even if Special Education Director had told Mother that it was a good idea to withdraw Student, that statement would not constitute a constructive expulsion from PCS. What would constitute a constructive expulsion for purposes of the IDEA’s disciplinary procedures is not evident from the Act and there are very few judicial decisions on point. In *Bitsilly ex rel. Denet-Yazzie v. Bureau of Indian Affairs*, 253 F.Supp.2d 1257 (D.N.M. 2003), the plaintiff alleged that school authorities informed the student’s guardians that he was wasting the school’s time and he would be expelled indefinitely if they did not withdraw him. The Court held that the plaintiffs’ complaint, including the constructive eviction allegation, stated a claim for substantive deprivations of FAPE. *Id.* at 1262. *Cf. Stevenson ex rel. Stevenson v. Martin County Bd. of Educ.*, 3 Fed.Appx. 25, 30, 2001 WL 98358, 4 (4th Cir.2001), cert. denied, ___ U.S. ___, 122 S. Ct. 54 (2001) (“[Student’s] constructive expulsion argument is a novel theory that has not yet been accepted by any court. It is inspired by constructive discharge cases arising under the employment laws. These cases hold that an employer constructively discharges an employee when the employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job. In the school violence context, the theory would mean that a student’s property interest in public education is triggered when school officials deliberately make the learning environment so dangerous or intolerable that the student is forced to transfer to another school. *Id.* at

30. (internal quotation marks and citations omitted)). Here there was no evidence, akin to the allegations in *Bitsilly*, that PCS threatened to expel Student if Mother did not withdraw him. Nor was there evidence that Student withdrew because PCS made his learning environment dangerous or intolerable. I conclude that Petitioner has not established that there was a constructive expulsion of Student in this case. Therefore, the IDEA's disciplinary procedures are not applicable to Student's withdrawal from PCS.

B. Was PCS' October 17, 2013 IEP inappropriate because it did not meet Student's alleged need for a full-time intensive special education program?

On October 17, 2013, during Student's 45-day suspension, PCS convened Student's IEP team to revise his March 27, 2013 IEP to identify Student's newly-reported OHI disability and to provide Student short-term school transportation after he returned from the suspension. Petitioner contends that with the October 17, 2013 IEP amendment, PCS denied Student a FAPE because the revised IEP did not increase Student's hours of services to a full-time special education program. PCS responds that the October 17, 2013 IEP amendments were appropriate modifications and that changing Student's hours of services would have been premature, because Student was newly enrolled at PCS and there had been no opportunity to attempt to address Student's behavior issues with a Behavior Improvement Plan.

The IDEA requires that the LEA ensure that the IEP team—

(i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) Revises the IEP, as appropriate, to address any lack of expected progress toward annual goals and in the general curriculum, the results of any reevaluation, information about the Student provided by the parents, the Student's anticipated needs and other matters.

34 CFR § 300.324(b). An IEP must be “reasonably calculated to enable the child to

receive educational benefits” in order to adequately confer a FAPE upon a given child. *Pinto v. District of Columbia* 2013 WL 1445344, 4 (D.D.C.2013), quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). When Student transferred to PCS at the beginning of the 2013-2014 school year, PCS elected to adopt and implement the March 27, 2013 IEP which had been developed by Prior Charter School. That IEP provided Student five hours per week of Specialized Instruction outside the General Education setting and 60 minutes per week of Behavioral Support Services.

Soon after Student enrolled at PCS, he began exhibiting behavior problems. At an MDR meeting on September 25, 2013, the PCS MDT team decided Student needed an updated clinical psychological evaluation and as well as an FBA in order to develop a behavior plan to address Student’s behaviors. The psychological reevaluation was completed in four days. However, on October 4, 2013, before the FBA was completed, Student was involved in a more serious behavior incident – possessing a knife at school – which resulted in a long-term 45 day suspension. On October 17, 2013, weeks before Student was allowed to return from suspension, PCS convened a meeting of Student’s IEP team for the limited purposes of revising his IEP to change his primary disability classification to MD, based on Clinical Psychologist’s reevaluation, and to add school transportation for when Student would return from suspension. Mother attended the IEP meeting and was in agreement with the amendments.

School Psychologist completed Student’s FBA while he was still on suspension. On December 13, 2013, shortly before Student returned from the long term suspension, Student’s IEP team reviewed the FBA and adopted a BIP and a transition plan for when Student returned from suspension. At the December 13, 2013 meeting, the IEP team

agreed to reconvene in a month to review how Student was doing with the BIP and the transition plan. Student returned to school on December 16, 2013. Two days later, he was again suspended, after which Mother never sent him back to PCS.

Petitioner's expert, Educational Consultant, opined that the Behavioral Support Services in Student's March 27, 2013 IEP were insufficient to address his ED disability and implied that the PCS IEP team should have increased Student's hours of services at the October 17, 2013 IEP meeting. However, PCS' expert, Education Director, emphasized that at the time of the October 17, 2013 IEP meeting, Student had only been at PCS for five to six weeks and at that meeting, the IEP team was focused on Student's interim educational placement during his 45 day suspension. She explained that the IEP team did not provide additional service hours right away because the team wanted to see if a BIP would be effective before making Student's educational environment more restrictive. I find that here, it is appropriate to defer to the expertise of PCS' special education personnel on the timing of any changes to Student's IEP. *See, e.g., Tice By and Through Tice v. Botetourt County School Bd.*, 908 F.2d 1200, 1207-1208 (4th Cir.1990) (Court should not disturb an IEP simply because we disagree with its content. Rather, we must defer to educators' decisions as long as an IEP provided the child "the basic floor of opportunity that access to special education and related services provides." (quoting, *Rowley, supra* 458 U.S. at 201)); *T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C. 2007) (LEA personnel had special education expertise requiring deference.)

I find unpersuasive Educational Consultant's contrary opinion that Student's IEP team should have added more Behavioral Support service hours to Student's IEP at the October 17, 2013 meeting, before Student's FBA was completed and before the team had

information on the efficacy of the BIP and post-suspension transition plan. When a student's behavior impedes his learning, the IDEA requires the IEP team to consider the use of positive behavioral supports, and other strategies to address that behavior. *See* 34 CFR § 300.321(a)(2)(i). *Cf. S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 66 (D.D.C. 2008) (The measure and adequacy of an IEP can only be determined as of the time it is offered to the student.) I conclude that it was not inappropriate in October 2013 for the IEP team to try behavior supports and interventions before increasing the services hours on Student's IEP, and that Petitioner has not shown that the October 17, 2013 amendments to Student's March 27, 2013 IEP were not reasonably calculated to enable Student to receive educational benefits. *See Rowley, supra.*

ORDER

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

All relief requested by Petitioner in this case is denied.

Date: March 18, 2014

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).