

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

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

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

2011 FEB 22 AM 9:55

OSSE
STUDENT HEARING OFFICE

HEARING OFFICER DETERMINATION

BACKGROUND

Student is an _____ year-old female, who is currently attending a private, full-time special education school at public expense. Student's current IEP lists Emotional Disturbance ("ED") as her primary disability and requires her to receive 25 hours per week of specialized instruction outside general education, 2 hours per week of behavioral support services, and .5 hours per week of speech and language pathology services.

On December 21, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS denied Student a free appropriate public education ("FAPE") by failing to provide an alternative site location for services that could implement Student's IEP. As relief for this alleged denial of FAPE, Petitioner sought, *inter alia*, placement of and funding for Student at a specified private full-time school and compensatory education in the form of independent mentoring/counseling services.

On January 11, 2011, DCPS filed its Response to the Complaint. In its Response, DCPS asserted that DCPS determines the site where an IEP can be implemented because location is an administrative matter within the discretion of the LEA, that a site location chosen by DCPS is appropriate if it can implement the IEP, and that Student's current private school could implement Student's IEP and had resolved an issue concerning Student to DCPS's satisfaction.

On January 18, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. The hearing officer and counsel agreed that DCPS would be allowed until 3:00 pm on January 28th to propose an alternative site location for Student without conceding a denial of FAPE. The hearing officer issued the Prehearing Order on January 18, 2011.

By disclosure letter dated February 2, 2011, Petitioner disclosed fourteen documents (Petitioner's Exhibits 1 – 14). By disclosure letter dated February 4, 2011, DCPS disclosed DCPS-1 through DCPS-6.

The hearing officer convened the due process hearing on February 11, 2011.¹ The parties' disclosed documents were admitted into the record without objection. Upon the hearing officer's inquiry, DCPS advised that it had not provided Petitioner with an alternative site location for Student because it had not obtained any acceptances for Student from the schools considered. Thereafter, the hearing officer received opening statements, testimonial evidence from each party and closing statements. The hearing officer then brought the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUES

The issue(s) to be determined are as follows:

1. Did DCPS deny Student a FAPE by failing to provide an alternative site location for services that can implement the IEP?

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 years old, and she is in the grade. Student currently attends a private full-time special education school at DCPS's expense. Student's transcript reveals that she attended 10th grade at her current private special education school during the 2009/10 SY and received three grades of B+, one B, one B-, one C+, and two grades of C- as her final grades. Student's second quarter Progress Report for the current school year indicates that Student is earning an A- in Chemistry I, grades of B in Spanish I and Digital Networks, a B/C in English III, grades of P (for Pass) in Reader's Workshop and Writer's Workshop, and an F/A- in Geometry. (The F/A denotes an F for 1st quarter and

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

an A- for second quarter; however, according to DCPS's Meeting Notes for Student's November 12, 2010 IEP meeting, Student received the F first quarter "due to the lack of attendance."²

2. During a May 15, 2009 Comprehensive Psychoeducational Clinical Evaluation, Student received the following Axis I diagnoses: Posttraumatic Stress Disorder ("PTSD"); Depressive Disorder Not Otherwise Specified; Attention Deficit/Hyperactivity Disorder ("ADHD"), Combined Type. The Background section of the evaluation indicates that Student began suffering from symptoms associated with depression and PTSD after she was gang raped in the spring of 2008. At the time of the 2009 evaluation, Student was taking Zoloft to treat her symptoms of anxiety and depression, and Concerta to address her ADHD symptoms.³
3. Student's performance on a September 10, 2010 administration of the Woodcock-Johnson III Tests of Achievement ("WJ-III") resulted in the following standard scores ("SS") and grade equivalencies ("GE"): Broad Reading – 84 SS, 3.4 GE; Reading Skills – 80 SS, 4.2 GE; Passage Comprehension – 87 SS, 6.0 GE; Written Expression – 70 SS, 3.9 GE; Spelling – 74 SS, 4.2 GE; and Broad Written Language – 71 SS, 4.0 GE. By comparison, Student's performance on a May 15, 2009 administration of the WJ-III resulted in the following: Broad Reading – 72 SS, 3.9 GE; Reading Skills – 72 SS, 3.3 GE; Passage Comprehension – 87 SS, 6.0 GE; Written Expression – 70 SS, 3.9 GE; Spelling – 74 SS, 4.2 GE; and Broad Written Language – 71 SS, 4.0 GE. Hence, Student's scores in the areas of Reading and Written Expression have primarily remained the same over the past year and a half, but she showed a slight improvement in the areas of Broad Reading and Reading Skills. Student's Math Scores on the May 15, 2009 administration of the WJ-III resulted in GEs ranging from 5.2 to 5.4, but the record does not contain Math scores for the September 10, 2010 administration of the WJ-III.⁴
4. At the November 2, 2010 elections for the Student Government Association at Student's current private school, Student was elected to the position of Treasurer.⁵
5. Student contributed an article to the second advisory newsletter for her current private school. The article is entitled, "SGA Happenings." In the article, Student describes a field trip she and the other SGA officers took on December 8, 2010 to the U.S. Capitol building. Student and her fellow officers took a tour of the building, saw various members of Congress, ate lunch in a room where meetings are held, had an extended visit with an unnamed Congressman, and also had an extended visit and office tour with Congresswoman Eleanor Holmes Norton.⁶
6. Student's current IEP is dated November 12, 2010. This IEP identifies Student's primary disability as ED and requires Student to receive 25 hours per week of specialized

² DCPS-4; DCPS-3; *see* DCPS-2.

³ Petitioner's Exhibit 8.

⁴ Petitioner's Exhibits 5 and 8.

⁵ DCPS-6.

⁶ DCPS-6.

instruction, 2 hours per week of behavioral support services, and .5 hour per week of speech language pathology services, with all specialized instruction and related services to be delivered in an outside of general education setting.⁷

7. Student's November 12, 2010 IEP meeting was memorialized in notes taken by DCPS, Student's current private school, and Petitioner's advocate, with the result that there are three sets of Meeting Notes.⁸
8. DCPS's Meeting Notes state that the purpose of the meeting was to review Student's IEP, and the Notes reflect that Student's progress in the areas of Math, Reading, Writing, Speech and Language, Emotional/Social/Behavioral Development, and Transition was discussed. With respect to Math, the Notes reflect that Student had recently tested on the 1st grade level on a Key Math test but is taking geometry. In the Speech and Language Area, the speech provider opined that Student could function without the services and expressed an intent to phase Student out. In the area of Emotional/Social/Behavioral Development, the Notes indicate the following: Student is struggling with explosive emotional episodes because she erupts over small events; Student expressed an issue with a teaching assistant who was not allowing Student to go to the quiet room as needed; Student stated she does not trust the social worker at times; Parent's concerns with the social worker are in the areas of trust and confidentiality; Parent also is concerned that Student's progress toward her educational goals is hampered by the many behavioral issues occurring at the current school; and Parent stated that she does not like some actions that are taking place at the current school. Ultimately, the social worker stated she would transfer Student off of her caseload. However, Parent wanted to look at different locations of service and stated that Student had been accepted to attend another private full-time special education school. Moreover, at the end of the meeting, parent asked for another meeting to address a possible change in location of services, and both Parent and the advocate requested the other private full-time special education school that had accepted Student.⁹
9. The Meeting Notes prepared by the current private school state that the purpose of Student's November 12, 2010 IEP meeting was to update the IEP and address any concerns from Parent and the advocate. These Notes reflect that the team discussed Student's transition goals first, and then proceeded to review Student's progress and/or goals in the areas of Math, Reading, Written Expression, Speech and Language, and Social/Emotional/Behavioral Development. In Math, there was concern that Student is taking geometry but received Key Math test scores ranging from the 1.5 to 4.2 grade levels. The Speech and Language service provider stated that she will begin to phase Student out of the services next year. In the area of Social/Emotional/Behavioral Development, the Notes indicate: Student's explosive episodes have caused her to miss academic time; Student prefers to take a break from the classroom and/or call Parent when issues occur in school; Student had concerns about not seeing her behavioral support service provider enough and trust being lost; and the service provider stated she

⁷ Petitioner's Exhibit 5.

⁸ See DCPS-2, Petitioner's Exhibits 6 and 7.

⁹ DCPS-2.

would seek another social worker for Student due to the lack of trust issues. Finally, Parent indicated that she had an acceptance letter from another private full-time special education school located outside of the District and requested placement there. The Notes state: "Team will reconvene when a new location of services has been identified to officially move Student] to new location."¹⁰

10. The advocate's Notes from the November 12, 2010 IEP meeting indicate that Student's Transition goals were reviewed first, then the team discussed the areas of Math, Reading, Written Expression, Speech and Language, and Social/Emotional Development. In Math, the team discussed Student's low scores on the September 10, 2010 administration of the Key Math test compared to her current placement in geometry. The Speech and Language services provider indicated a desire to re-evaluate Student for the coming year to wean her from services. In the area of Social/Emotional Development, the Notes indicate the following: Student's explosive emotional episodes take away from academic time; Student does not trust her social worker and does not feel the social worker cares; Student does not feel that anyone at the school is available for her; Student prefers to call Parent and take time out when she is frustrated; parent is concerned that safety and confidentiality has been breached and is not comfortable with the current social worker; Parent reported calls at inappropriate times but also stated that she prefers calls right away in every situation; Student stated that she is seen only when she needs a social worker and is not seen once per week; Parent expressed numerous frustrations with the staff, including marks allegedly left on Student; and the social worker offered to switch Student to another caseworker. Parent requested another location of services, stated she had an acceptance for Student at another private special education school located outside of the District, and requested a move to that school for Student. The advocate's Notes indicate as follows: "Team will have to reconvene to discuss placement/location change."¹¹
11. Parent primarily is concerned that at Student's current private special education school, Student has had ongoing physical and verbal difficulties with a particular teaching assistant and with a particular male student, marks have been left on Student as a result of physical restraints that were used on Student in crisis intervention situations, the ratio of male to female students in Student's classes is so high that last year Student was the only female in a class of 6 and this year Student is one of two females in a class of 6, and Student's former social worker breached her obligation of confidentiality by revealing to another staff member at the school that Student was raped. Parent is also concerned that Student may not be making academic progress, but her primary concern is the safety and emotional issues, in that Parent does not feel that she can go to work and know that Student is safe in school.¹²
12. Similarly, Student is concerned with the amount of conflict she is having with the staff and her peers at her current private special education school. In particular, Student is concerned that she is always the person to be removed from class when a conflict occurs

¹⁰ Petitioner's Exhibit 7; DCPS-2.

¹¹ Petitioner's Exhibit 6.

¹² Testimony of Parent.

while the other person involved in the conflict is not removed, and as a result Student is missing up to 40 minutes of class on each occasion which includes missing her classwork. Student is also extremely concerned that in November before the November 12, 2010 IEP meeting, she overheard her then counselor telling another teacher that Student had been raped. However, immediately after the IEP meeting, Student received a new social worker. Unfortunately, Student reports that the new social worker follows the old social worker's pattern of only picking Student up for services when Student is in crisis mode. On the other hand, beginning in December 2010 and continuing into the present, another counselor and two other staff members have been providing Student and her entire class with group counseling every day at school during 7th period. Student also notes that she has concerns about her safety at the current school because one boy threw pens at her head, she exploded and was removed from the class; she has experienced ongoing difficulties with a particular teaching assistant; and one boy touched her rear end and was sent home for the rest of the day but was not subjected to any other consequences even though Student has to see this boy every day in her homeroom.¹³

13. The crisis intervention services provided to Student at her current private school are considered part of her individual counseling services.¹⁴
14. Petitioner filed the instant Complaint on December 21, 2010.
15. DCPS convened a resolution session for this case on January 7, 2011, but the parties were unable to reach an agreement during the session.¹⁵
16. On January 18, 2011, DCPS's Progress Monitor for Student's current school emailed the advocate and requested a meeting concerning location of services on January 27, 28 or 25. The Progress Monitor sent this email after learning that Petitioner had filed a Complaint concerning location of services. By reply email, the advocate stated that she could contact Parent but wanted DCPS to provide the proposed placements so that Parent could look into them and wanted to finalize location of services in the meeting. The advocate further stated that if DCPS was not prepared to offer placements, the advocate and Parent would "wait to solidify a meeting date."¹⁶
17. Parent would like to have Student moved at DCPS's expense to the private full-time special education school located outside of the District that has accepted her. However, approximately one week prior to the due process hearing in this case, two full-time private schools made contact with Parent at DCPS's request. Both of the schools sent information to Parent via the mail. Moreover, one of the schools called Parent and asked whether she and Student could visit the school that day, but Parent said no and had not had any further contact with the school as of the date of the due process hearing in this case. DCPS contacted these two schools, as well as two others, during the month of

¹³ Testimony of Student.

¹⁴ Testimony of DCPS Progress Monitor.

¹⁵ Petitioner's Exhibit 11.

¹⁶ Petitioner's Exhibit 12; testimony of Progress Monitor.

January after the instant Complaint had been filed, in an attempt to secure an alternative placement for Student.¹⁷

18. Student's current private full-time special education school offers a program for students in the 10th through 12th grade with ED and behavior issues. The school takes the approach of changing its program to meet its students' needs. Hence, the school's administration has been open to dealing with problems expressed by Parent and Student. For example, Student's social worker was changed the day after Student's November 12, 2010 IEP meeting where Student and Parent mentioned the problems/trust issues Student had with her then social worker. Similarly, the administration moved another child from Student's class because Student and that child were having difficulties getting along. The administration has also allowed meetings and/or mediations when Student desired. The school's administrative staff has been aware of the conflicts between Student and one of the TA's since the fall, and they conducted mediation with Student and the TA prior to finally removing the TA from the one class she had with Student. This removal of the TA took place during the week of February 7th. On February 10th, the day before the due process hearing in this matter, Parent discussed with the school's Program Director the possibility of allowing Student to switch classes 5 minutes before the rest of the students so that Student does not come into contact with the TA in the halls. The Program Director is willing to make this change, even though it will mean that Student has to be escorted separately to each class 5 minutes before everyone else. The Program Director is of the opinion that the school remains an appropriate location of services for Student. However, it seems that Parent and Student are not satisfied despite the changes that have been made to accommodate Student, and the Program Director is unsure whether she will be able to make further changes to the program for Student once Student begins changing classes 5 minutes before all of the other students.¹⁸

19. In this case, Petitioner submitted a Compensatory Education Proposal, which calls for Student to receive 30 hours of independent counseling/mentoring services. The proposal recites that it is meant to address the following issues: Student has identified an established distrust of some of the staff members at her current private school; the level of frustration that Student is experiencing has interrupted her learning process and is displayed in emotional explosions; Parent and Student requested a change of placement and the IEP team was to reconvene for DCPS to make proposals, but when DCPS offered meeting dates the advocate requested a list of proposed placements first and those have not yet been presented; Student's emotional disruptions and frustration are not being properly addressed; Student has received inconsistent service in behavior counseling; and Student's emotional and behavior state are impeding her academic progress.¹⁹

¹⁷ Testimony of Parent; testimony of DCPS Progress Monitor.

¹⁸ Testimony of current private school's Program Director.

¹⁹ Petitioner's Exhibit 14.

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:

Location of Services

Under IDEIA, a public agency must provide an appropriate educational placement/location of services for each child with a disability, so that the child's needs for special education and related services can be met. See 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate secondary school and are provided in conformity with the Student's IEP. See 34 C.F.R. § 300.17.

"Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). On the other hand, however, a public school system is not required to furnish every special service necessary to maximize each handicapped child's potential. Instead, IDEIA is designed to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. *Rowley, supra*, 458 U.S. 176.

In this case, there is no dispute that Student requires a full-time therapeutic special education program, or that Student is currently attending a private full-time therapeutic special education school at DCPS's expense. Instead, the dispute centers on whether the current private school is providing Student with a FAPE. Petitioner maintains that Student does not feel safe or comfortable at her current private school and requires a change of location to receive FAPE because she cannot access her education at the current school. DCPS counters that the LEA determines the location of services, and in this case, the current private school can implement Student's IEP, has made changes to accommodate Student where necessary, and is, therefore, appropriate.

A review of the evidence in this case demonstrates that Student is performing well academically at the current private school, where she consistently earns Bs and Cs. Although Student's standardized test scores reveal that she continues to perform below grade level, as she did prior to attending the current private school, a comparison of Student's scores on successive administrations of the same achievement test reveals that Student has maintained ground and even slightly improved in some academic areas.

The evidence further reveals that Student is an active participant in the extra-curricular activities at the current private school. Hence, she was elected treasurer of the Student Government Association ("SGA") in November 2010, and subsequently went on a field trip to visit the U.S.

Capitol building with the SGA in December of 2010. Then, she wrote an article about the field trip for the Second Advisory edition of the school's newsletter.

On the other hand, the evidence also reveals that Student has experienced some problems at the current school, such as difficulty getting along with a particular TA, difficulty getting along with a specific male classmate, and lack of trust and breach of confidentiality concerns about a social worker who was assigned to work with Student. However, the current school took steps to address these problems. Hence, mediation sessions were held with Student and the TA, and the TA ultimately was removed from Student's class. Similarly, the male student with whom Student had issues was reassigned to another class, and the school switched Student to another social worker's caseload the day after Student voiced her concerns about her then social worker at an IEP meeting. More recently, the school has agreed to implement Parent's suggestion that Student be allowed to change classes 5 minutes earlier than all the other students. Under these circumstances, it is clear that the current private school has gone to extensive lengths to accommodate Student.

Based on the evidence discussed herein, the hearing officer concludes that Petitioner has failed to meet its burden of demonstrating that DCPS has denied Student a FAPE by failing to provide her with an alternative location of services. Nevertheless, the hearing officer acknowledges that the evidence tends to demonstrate that Student has not been receiving all of the counseling services required under her current IEP. More specifically, Student has been receiving individual counseling only for crisis intervention purposes and has not been receiving the individual counseling sessions she requires on a weekly basis to begin to make progress toward her IEP goals in the area of Emotional, Social, and Behavioral Development. Moreover, the evidence tends to prove that Student began receiving group counseling in December but was not receiving group counseling prior to that time. Hence, the hearing officer will order DCPS to ensure that the current private school immediately begins providing Student with the individual counseling sessions required by her IEP and continues to provide Student with her group counseling services. Moreover, the hearing officer will order DCPS to convene an IEP meeting to determine exactly how much of her individual and group counseling services Student has not received during school year 2010/11, as well as the form and amount of compensatory education required to compensate Student for the missed services.

Finally, the hearing officer's review of all the testimonial and documentary evidence produced by the parties in this case suggests that although the current private school has provided Student with a FAPE to date, the accommodations and changes to the program Student requires may soon result in a situation where the current private school is no longer able to meet Student's needs. Hence, the hearing officer will order DCPS to propose at least one alternative location of service for Parent to consider prior to the IEP meeting that will be ordered in this HOD, and to discuss and consider whether Student requires a change of location for the 2011/12 school year.

ORDER

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

1. DCPS shall ensure that Student's current private school begins providing Student with all individual counseling sessions required under her IEP by or before the week of February 28, 2011. DCPS shall also ensure that Student's current private school continues to provide her with weekly group counseling sessions.
2. Within 14 calendar days of the issuance of this Order, DCPS shall propose to Parent and her representatives at least one possible alternative location of services for Student for the 2011/12 school year.
3. On or before March 31, 2011, DCPS shall convene an IEP team meeting for Student to: (i) determine exactly how much of the individual and group counseling services required by her IEP the current private school has failed to provide to Student since the start of the 2010/11 school year; (ii) determine the form and amount of compensatory education required to compensate Student for the missed individual and group counseling services and make an award of same; (iii) discuss and determine whether Student will require a change in location of services for the 2011/12 school year; and if so, (iv) taking into account the input of the entire IEP team, designate no more than 30 days after the IEP meeting ordered herein has been held a new location of services for the implementation of Student's IEP for school year 2011/12.
4. All other requests for relief made in connection with Petitioner's December 21, 2010 Complaint are hereby **DENIED**.

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).

Date: 2/21/2011

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer