

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

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

PETITIONER,
on behalf of STUDENT,¹

Petitioner,

Date Issued: April 4, 2012

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PETITIONER (the "Petitioner" or "Father"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In his Due Process Complaint, Petitioner alleges that DCPS denied Student a free appropriate public education ("FAPE") by changing his school placement/location from NONPUBLIC SCHOOL to

¹ Personal identification information is provided in Appendix A.

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STUDENT HEARING OFFICE
2012 APR -5 AM 2:00

CONTRACT PROGRAM at CITY HIGH SCHOOL ("CHS") at a December 22, 2011

Individualized Education Program ("IEP") meeting.

Student, an AGE young man, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on January 23, 2012, named DCPS as respondent. The undersigned Hearing Officer was appointed on January 24, 2012. With his Due Process Complaint, Petitioner filed a motion for stay-put protection, for Student to remain at Nonpublic School during the pendency of these proceedings. The Hearing Officer granted the stay-put motion by an order entered February 3, 2012. The parties met for a resolution session on February 6, 2012, but did not come to an agreement. The 45-day timeline for issuance of this HOD began on February 23, 2012. On February 13, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. In the Prehearing Order, the Hearing Officer ordered DCPS to file an amended response to the due process complaint, which complied with the requirements of 34 CFR § 300.503(e). DCPS filed its amended response on February 15, 2012.

The due process hearing was held before the undersigned Impartial Hearing Officer on March 20-21, 2012 at the Student Hearing Office in Washington, D.C. 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. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called, as witnesses, PROGRAM VP, Student, Nonpublic School DIRECTOR/CEO, Nonpublic School SPED TEACHER, Nonpublic School ENGLISH TEACHER, Nonpublic School SPED COORDINATOR, and EDUCATIONAL ADVOCATE. DCPS called, as witnesses, STUDENT PROGRESS MONITOR and CONTRACT PROGRAM

DIRECTOR. Petitioner's Exhibits, P-1 through P-16, were admitted into evidence without objection. DCPS' Exhibits R-1 through R-12, were admitted into evidence without objection, with the exceptions of R-7, R-8 and R-9. Exhibits R-8 and R-9 were admitted over Petitioner's objection. Exhibit R-7 was not introduced.

In lieu of making oral closing arguments, the parties made a joint request for leave to file post-hearing memoranda. DCPS' closing brief was filed on March 28, 2012. Petitioner's brief was filed on March 29, 2012.

JURISDICTION

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

ISSUE AND RELIEF SOUGHT

- WHETHER DCPS DENIED STUDENT A FAPE BY CHANGING HIS LOCATION OF SERVICES FROM NONPUBLIC SCHOOL TO CONTRACT PROGRAM AT CHS IN DECEMBER 2011.

For relief, Petitioner seeks an order for DCPS to fund Student's continued enrollment at Nonpublic School for the remainder of the 2011-2012 school year and to provide school transportation.

FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia, where he lives with his parents and siblings. Testimony of Father, Testimony of Student.
2. Student was last determined eligible for special education and related services on September 22, 2010 under the primary disability classification Specific Learning Disability

("SLD"). Exhibit R-5. In an August 30, 2010 Comprehensive Psychological Evaluation Report, CLINICAL PSYCHOLOGIST recommended that Student should be classified as a student with a Learning Disorder – Not Otherwise Specified, and reported that Student evidenced difficulties in all academic subjects, that would impact his ability to succeed in the classroom. Exhibit P-9.

3. At the beginning of the 2010-2011 school year, Student attended CITY MIDDLE SCHOOL ("CMS"). Testimony of Father. Student's March 2, 2010 CMS IEP provided that he would receive 21 hours per week of Specialized Instruction and 30 minutes per week Behavioral Support Services, all outside of the general education setting. Exhibit P-9.

4. On October 15, 2010, Petitioner filed a previous Due Process Complaint for Student (Case No. 2010-1315). In that complaint, Petitioner alleged, *inter alia*, that DCPS had denied Student a FAPE because Student required Specialized Instruction in all academic areas and CMS could not provide such a program. In a December 20, 2010 Hearing Officer Determination, Hearing Officer Wanda I. Resto Torres found, *inter alia*, that Student needed a small setting in a full-time special education program with individualized attention, that was not being provided at CMS. Hearing Officer Resto Torres ordered DCPS to fund Student's placement at Nonpublic School for the remainder of the 2010-2011 school year. Exhibit P-1.

5. In January 2011, Student enrolled in Nonpublic School. Nonpublic School operates on an 11 month program. For the remainder of the 2010-2011 extended school year at Nonpublic School, Student did well, and made good academic progress. He was named salutatorian for his class and was promoted to Grade for 2011-2012 school year. Testimony of Father, Educational Advocate, Nonpublic School Director/CEO, Nonpublic School SPED Coordinator.

6. During the first and second advisory periods of the 2011-2012 school year, Student was placed in a group home. While he lived at the group home, Student became oppositional at Nonpublic School, was non-compliant with teachers, and just “shut down.”

Testimony of Nonpublic School Director/CEO, Nonpublic School SPED Teacher. In January or February 2012, Student returned to his family home. Testimony of Father. He immediately got back on track at Nonpublic School. As of the hearing date, Student was doing a lot better academically and had great rapport with his teachers. Testimony of Nonpublic School Director/CEO, Nonpublic School SPED Coordinator.

7. Woodcock-Johnson achievement testing, administered to Student in November 2011, showed that Student had made a year’s progress in most areas, since enrolling in Nonpublic School in January 2011. Testimony of Educational Advocate.

8. On December 22, 2011, DCPS convened an IEP annual review meeting for Student at Nonpublic School. DCPS PROGRAM MANAGER and Student Progress Monitor represented DCPS at the IEP meeting. Father and Educational Advocate attended the meeting. Testimony of Educational Advocate, Exhibits R-4, R-5. The December 22, 2011 IEP continues Student’s full-time Specialized Instruction and provides 60 minutes per week of Behavioral Support Services, all outside the General Education Setting. Exhibit R-5. Over the objection of Father, Educational Advocate and Nonpublic School IEP team members, DCPS changed Student’s location of services from Nonpublic School to Contract Program at CHS. At the IEP meeting, the DCPS representatives stated it was DCPS’ prerogative change the location for Student’s services. Program Manager also mentioned Student’s behavior problems at Nonpublic School as justification for the change. Testimony of Educational Advocate.

9. In a Prior Written Notice issued December 22, 2011, DCPS gave written notice

that “The IEP team proposed to change [Student’s] location of services from [Nonpublic School] to [Contract Program at CHS].” The notice stated that the IEP team proposed the change “because of a lack of reported progress in behavioral management, and DCPS can provide FAPE to this student at a new [location of services] and can address his deficits there.” Exhibit R-6.

10. Prior to the December 22, 2011 IEP meeting, Student Progress Monitor and DCPS CO-LOCATION CLASSROOMS COORDINATOR had decided that all DCPS supported students should be moved out of Nonpublic School. At the IEP meeting, Contract Program at CHS was the only alternative placement option considered for Student. Testimony of Student Progress Monitor.

11. Contract Program at CHS is one of several special education programs within DCPS public high schools operated by DCPS CONTRACTOR, a private company. DCPS Contractor began working directly with DCPS in August 2011. The goal for DCPS Contractor is to reintegrate its students to a DCPS neighborhood school. Testimony of Assistant VP.

12. Program Director is responsible for deciding whether to admit prospective students proposed by DCPS for the Contract Program. Her main criterion is whether a proposed student could likely be successfully transitioned, eventually, to an inclusion or self-contained special education setting in a DCPS neighborhood high school. In her consideration of students proposed for Contract Program, Program Director reviews a prospective student’s IEP, psychological evaluation report, IQ level, grade equivalency and social-emotional level. Testimony of Program Director.

13. Contract Program at CHS consists of three classrooms, exclusively for Contract Program students, located on the second floor of CHS. The Contract Program classrooms are physically located with the CHS general education classrooms. Testimony of Program Director.

14. Each Contract Program at CHS classroom is staffed by a special education teacher, a behavior intervention counselor and an instructional assistant. Testimony of Assistant VP. The special education teachers are certified in special education. None of the Contract Program staff is certified to teach in a subject/content area. Testimony of Assistant VP.

15. As of the due process hearing date, Contract Program at CHS only has two special education teachers, due to one teacher's resignation. Until a replacement third teacher is hired, Contract Program at CHS will use only two classrooms. Testimony of Program Director.

16. Contract Program at CHS is designed for a maximum 12:3 student-to-staff ratio. None of the classrooms is at maximum enrollment. For the present, while Contract Program is using only two classrooms, there are 8 students in one classroom and 6 students in the other classroom. Testimony of Program Director.

17. Students enrolled in Contract Program at CHS may range in age from 14 to 21. Contract Program currently serves students with special education disabilities, Emotional Disturbance ("ED"), SLD, Multiple Disabilities ("MD") and Intellectual Disability ("ID"). Classroom assignments are made, based on students' needs. A student's age is a consideration for classroom placement, but there is no rigid age line. Testimony of Assistant VP.

18. Contract Program students have only limited in-school interaction with other CHS students. Contract Program students are met at the school entry and escorted to and from their classrooms by Contract Program staff. They eat lunch in the school cafeteria, at a different time from other CHS students. Testimony of Program Director.

19. Students at Contract Program at CHS are evaluated using Direct Instruction ("DI") Curriculum evaluations, Pearson Reading Level Indicator, and Woodcock-Johnson

achievement tests. New students are administered the DI assessment to determine small group placement and the student's academic performance baseline. Testimony of Program Director.

20. Contract Program at CHS uses a combination of direct instruction and computer learning with its Students. Contract Program uses the DI curriculum for students who may not be on grade-level in reading, writing or mathematics. Testimony of Program Director.

21. Instruction in core academic courses needed for regular high school graduation credits is provided using the A Plus Learning System, an on-line internet program. The A Plus system provides grade level instruction for access to the general education curriculum. It is not adapted for children with disabilities. The system is student self-monitored and self-paced. The classroom special education teacher can provide real-time monitoring of each student's computer learning activities, and the special education teacher or one of the other instructional staff can assist a student as needed. Testimony of Program Director.

22. The Contract Program special education teacher also provides large group instruction in reading, writing and mathematics, using the DI scripted curriculum. Students are also taught in small groups and one-on-one by the special education teacher and the other staff members. Testimony of Program Director.

23. Contract Program at CHS is currently unable to provide instruction in "specials" courses – art, music, physical education, and foreign languages (except Spanish I). DCPS is working on developing a way to provide instruction in specials to Contract Program students. Testimony of Program Director.

24. The Contract Program behavioral specialist teaches a daily one-hour class to all students on social skills, and provides one-on-one counseling. Testimony of Program Director.

25. Contract Program at CHS follows a block schedule with 90-minute long block classes. Testimony of Program Director.

26. Program Director reviewed Student's psychological evaluation and IEP and determined that he would be an appropriate student for Contract Program at CHS. She did not interview Student, his parents or his teachers at Nonpublic School. Testimony of Program Director.

27. Nonpublic School is a nonprofit school for children with disabilities, located in northeast Washington, D.C. Currently there are 32 students enrolled at the school, 98 percent of whom are classified as SLD or ED. Nonpublic School operates separate programs for middle school and high school students. All students are on an 11 month (220 day) extended school year program. Testimony of Director/CEO.

28. In addition to core academic subjects, Nonpublic School offers specials classes, including music, art, physical education, technology, business management, career transition and college prep transition. Testimony of Director/CEO.

29. Nonpublic School classes have a 5:1 student-teacher ratio, except for gym and computer which may have a 6:1 ratio. Testimony of Director/CEO.

30. Nonpublic School is on the D.C. Office of the State Superintendent of Education's ("OSSE") December 19, 2011 list of Approved Nonpublic Schools. Exhibit P-12.

31. Not all of Nonpublic School's teachers are certified in the District of Columbia to teach special education, or content-certified to teach in substantive areas. Testimony of Director/CEO, Student Progress Monitor.

32. In October 2011, Student Progress Monitor reported by email to DCPS Program Manager her concerns about Nonpublic School. The problems she alleged included concerns

about the physical plant, notably dampness due to past flooding, and “tiny” classrooms; “sub-par” faculty and staff and poor instruction; lack of transparency in terms of providing information to DCPS; and unlicensed interns’ providing behavior counseling. Exhibit R-8, Testimony of Student Progress Monitor.

33. Student Progress Monitor is not aware of any action taken by DCPS in response to her reported concerns about Nonpublic School. Testimony of Student Progress Monitor.

CONCLUSIONS OF LAW

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

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* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

ANALYSIS

DID DCPS DENY STUDENT A FAPE BY CHANGING HIS LOCATION OF SERVICES TO CONTRACT PROGRAM AT CHS?

The sole issue in this case is whether DCPS denied Student a FAPE, by changing his location of services from Nonpublic School to Contract Program at CHS, at the December 22, 2011 IEP meeting. DCPS frames the question as being whether DCPS’ decision to move Student to Contract Program at CPS was, or was not, a change in placement. *See Morris Johnson, et al., v. District of Columbia*, 112 LRP 1338, Civil Action No. 12-303 (D.D.C. Mar. 16, 2012) (District is free to change student’s physical placement so long as the new placement does not

amount to a fundamental departure from IEP.) However, Petitioner is challenging the adequacy of Contract Program at CHS – as the location where Student is to receive services under the December 22, 2011 IEP. Petitioner is not challenging the content of the IEP. Therefore, the correct inquiry is not whether there was a change in placement, but whether Contract Program is capable of providing the services required by Student’s December 22, 2011 IEP. I find that Contract Program is not.

Under the IDEA, DCPS is obligated to devise IEPs for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C.Cir. 1991). *See, also, Angevine v. Smith*, 959 F.2d 292, 296-97 (D.C.Cir.1992) (Court must determine that a public school was not capable of providing and implementing an appropriate IEP.) Student’s needs, as set forth in his December 22, 2011 IEP, include,

- An educational environment that presents a small student to teacher ratio to give direct instruction and structured support in mathematics;
- Direct instruction to provide remediation for deficits in reading;
- Specialized instruction to provide remediation for deficits in the area of written language and expression; and
- Behavioral support service counseling to develop appropriate problem solving mechanisms and discuss school attendance issues.

In addition to fulfilling the specific needs identified in Student’s December 22, 2011 IEP, U.S. Department of Education IDEA regulations require, *inter alia*, that the services provided in the IEP enable Student to be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities, *see* 34 CFR § 300.320(a)(4); that Student have available the variety of educational programs and services available to nondisabled children in the area served by DCPS, including art, music, industrial arts, consumer

and homemaking education, and vocational education, *see* 34 CFR § 300.110; and that Student be afforded the opportunity to participate in the regular physical education program available to nondisabled children, *see* 34 CFR § 300.108.

At it now exists, Contract Program at CHS is not capable of fulfilling either the above general requirements for all IEPs or the specific needs in Student's IEP. At Contract Program, Student would not have available the variety of educational programs and services available to nondisabled children as required by 34 CFR § 300.320(a)(4). In the District, nondisabled high school students are instructed in core subjects by content-certified teachers. At Contract Program, Student's instruction in core subjects, required for graduation, would be available only on the A Plus internet learning system, supported by a special education teacher who is not certified to teach in core content areas. Contract Program at CHS also does not offer, in any form, the full variety of educational programs and services available to nondisabled children in the District, as required by 34 CFR § 300.110, including foreign languages, art, music, and physical education. I further find that Contract Program's reliance on the A Plus internet learning system does not fulfill Student's specific needs, identified in his IEP, for direct instruction and structured support in mathematics, reading, written language and expression.

In sum, I find that Contract Program at CHS is not capable of fulfilling Student's December 22, 2011 IEP needs and that DCPS has denied Student a FAPE by changing his location of services to that program. Petitioner prevails on this issue.

Remedy

Petitioner's proposed remedy in this case is that DCPS be ordered to continue to fund Student's enrollment at Nonpublic School. It is well established in this jurisdiction that, "[i]f no suitable public school is available, the school system must pay the costs of sending the child to

an appropriate private school.” *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C. Cir. 2005) (citation and alterations omitted). “[W]here a public school system has defaulted on its obligations under the IDEA, a private school placement is ‘proper under the Act’ if the education provided by said school is ‘reasonably calculated to enable the child to receive educational benefits.’” *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 v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). “[P]lacement awards, like compensatory awards, must be tailored to meet the child’s specific needs.” *Branham v. District of Columbia*, 427 F.3d 7, 11 (D.C.Cir. 2005) (citation omitted).

DCPS argues on brief that the hearing evidence showed that Nonpublic School cannot provide appropriate Specialized Instruction and services for this Student. DCPS cites the evidence of Student Progress Monitor, who testified to her concerns about academics and safety at Nonpublic School, including concerns about the physical plant, alleged “sub-par” faculty and poor instruction, lack of administrative transparency, and behavioral counseling by unlicensed interns. I found Student Progress Monitor to be a credible witness, who clearly has the best interests of District school children at heart. However, the evidence also established that for all of its alleged shortcomings, Nonpublic School has provided educational benefits to this Student. *Cf. Jenkins v. Squillacote*, 935 F.2d 303, 305 (D.C. Cir. 1991) (appropriate program is one reasonably calculated to enable the child to receive educational benefits.) For example, Educational Advocate testified that November 2011 Woodcock-Johnson achievement testing showed that Student had made a year’s progress in most areas, since enrolling in Nonpublic School. Finally, because placement decisions implicate equitable considerations, the Hearing Officer may consider the parties’ conduct. *See Branham, supra*, 427 F.3d at 12. Here, DCPS

representatives at the December 22, 2011 IEP meeting insisted that DCPS had the prerogative to change the location of Student's services to Contract Program, without considering other options and without accounting for the impact of a mid-year transfer on Student. *Cf. Lopez v. District of Columbia*, 355 F.Supp.2d 392, 401 (D.D.C. 2005) (noting the social, emotional, and academic costs of a mid-year transfer).

Having determined that Contract Program at CHS is not an appropriate placement for Student, I find that the equities of this case weigh against removing Student from Nonpublic School to another school before the end of the 2011-2012 school year. However, I agree with respondent that the evidence establishes that DCPS has cause to question whether Student's future placement at Nonpublic School would be appropriate under the IDEA. Accordingly, I will order DCPS to reconvene Student's IEP team, prior to the end of the current school year, to revise and update his IEP, as appropriate, and to match Student with a school capable of fulfilling his ongoing IEP needs after the 2011-2012 school year.

ORDER

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

1. DCPS shall continue to fund Student's enrollment at Nonpublic School for the remainder of the 2011-2012 school year, and shall provide school transportation for Student in accordance with the school transportation policies of OSSE and the LEA;
2. Prior to the end of the 2011-2012 regular school year, DCPS shall convene Student's IEP team to revise and update his IEP, pursuant to 34 CFR § 300.324(b), and DCPS shall then match Student with a school capable of fulfilling Student's needs as may be established in the revised IEP. At this time, I

make no determination as to whether Nonpublic School is such a school; and

3. All other relief requested by the parties herein is denied.

Date: April 4, 2012

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).