DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

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

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OSSE
STUDENT HEARING OFFICE

PETITIONER,
on behalf of STUDENT,[1]

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: August 8, 2012

Hearing Officer: Peter B. Vaden

Case No: 2012-0443

Hearing Date: July 30, 2012

Student Hearing Office, Room 2004
Washington, D.C.

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 "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 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, Petitioner alleges that DCPS' June 4, 2012 Individualized Education Program ("IEP") denies Student a free appropriate public education ("FAPE") because the IEP does not provide for small classroom size and instruction in a full-time, outside general education, setting.

[1] Personal identification information is provided in Appendix A.

Student, an Age young man, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on June 19, 2012, named DCPS as respondent. The undersigned Hearing Officer was appointed on June 20, 2012. The parties met for a resolution session on June 25, 2012. The parties agreed that no agreement was possible and that the case should proceed to the due process hearing. The 45-day deadline for issuance of this Hearng Officer Determination began on June 26, 2012. On July 10, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on July 30, 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, CLINICAL PSYCHOLOGIST and ADMISSIONS COORDINATOR. DCPS called one witness, SPECIAL EDUCATION COORDINATOR ("SEC"). Petitioner's Exhibits P-1 through P-7 were admitted without objection.[2] DCPS' Exhibits R-1 through R-14 (including R-9A) were admitted without objection. Counsel for both parties made opening and closing statements. Neither party requested leave to file a post-hearing brief.

[2] Petitioner failed to file a disclosure of her proposed witnesses and exhibits prior to the hearing. *See* 34 CFR § 300.512(a)(3). At the due process hearing, counsel for DCPS waived objection to this omission.

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 THE JUNE 4, 2012 IEP DEVELOPED FOR STUDENT AT DC HIGH SCHOOL DENIES STUDENT A FAPE BECAUSE IT DOES NOT MEET STUDENT'S ALLEGED NEED FOR SMALL CLASSROOM SIZE AND FOR FULL-TIME, OUTSIDE OF GENERAL EDUCATION, SPECIALIZED INSTRUCTION.

For relief, Petitioner seeks an order for DCPS to fund Student's enrollment at NONPUBLIC PLACEMENT for the 2012-2013 school year.

FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia. During the last school year, he resided at times with his mother and with other family members in the District. Testimony of Mother, Exhibits R-5, R-10.

2. Student was last found eligible as a student with a disability, who continued to need special education and related services, on October 18, 2011 at DC HIGH SCHOOL under the primary disability Emotional Disturbance (ED). Exhibit R-8.

3. Student's educational problems date at least to kindergarten. He was reportedly retained in both kindergarten and first grade at PCS-1. He attended NONPUBLIC ACADEMY, a full-time therapeutic school, for three of four years, followed by PCS-2 and PCS-3 for middle school. Testimony of Mother, Exhibit R-5.

4. For the 2011-2012 school year, Student was enrolled in the GRADE at DC High School. He was projected to graduate in June 2015 with a regular high school diploma. Exhibit P-2.

5. DC High School offers "core" subjects required for a DCPS regular high school diploma, including English, mathematics and history, only in the general education setting. Testimony of SEC.

6. Student's classes at DC High School had a student-teacher ratio of at least 25 to 1. Testimony of Mother. His World History class had a minimum of 15-20 students. Testimony of SEC.

7. When Student's IEP team convened at DC High School on October 18, 2011, Student was failing all of his classes. His Present Level of Educational Performance ("PLEP") in mathematics was at a very low to low range and he was reported to require resource support. Student's PLEP in Reading was failing and he showed deficits in reading comprehension and difficulty working independently. He was reported not to complete assignments and to be extremely disruptive in class. In Written Expression, Student's PLEP was within the average range, but his deficits in Written Expression negatively impacted his ability to access the general education curriculum. In the area of Emotional, Social and Behavioral Development, Student was reported to have difficulty staying on task and remaining focused in the classroom and difficulty following directions and difficulty accepting responsibility for his actions. Under his October 18, 2011 IEP, Student was provided 18 hours per week of Specialized Instruction in the general education setting and one hour per week of Behavioral Support Services. Exhibit P-2.

8. From August 15, 2011 to January 18, 2012, Student was absent from school for 14.5 out of 90 school days. He had 84 unexcused class absences, 37 suspensions from class, and

numerous tardy arrivals. Exhibit R-8A.

9. On January 18, 2012, at Mother's request, DC High School convened a Multidisciplinary Team ("MDT") meeting for Student. Mother was concerned that Student was not progressing in any of his classes and was failing all of his courses. ENGLISH TEACHER reported that Student exhibited poor behavior through inappropriate language, cursing at the teacher and other students and not following redirection. Student's other teachers expressed the same sentiments. Mother expressed her disappointment with Student's academic performance and behaviors, and asserted that he needed to be placed in smaller classrooms to help him be successful. CASE MANAGER discussed placing Student in resource classes for mathematics and English. At the time, Mother was unwilling for Student to be placed in resource classes, because this change would keep Student from graduating on schedule. Exhibit R-9.

10. On March 7-8, 2012, Clinical Psychologist conducted an independent comprehensive psychological evaluation of Student. In her March 16, 2012 report, Clinical Psychologist found that Student's visual motor skills appeared to be age appropriate. On the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV), Student's performance varied significantly by domain. While Student's full-scale IQ score was low average, Clinical Psychologist described Student as a child who had very unevenly developed cognitive skills which ranged from average to borderline. Student's academic achievement in reading, mathematics and written expression were evaluated with subtests from the Woodcock-Johnson III: Normative Update of Achievement (W-J III). He scored in the very low range for overall mathematics ability (comparable to an average child at age 9 years, 8 months). He scored in the average range in written expression and in the low average to average range on the reading subtests. Exhibit R-5.

11. Clinical Psychologist reported that Student's social-emotional functioning was an area of concern. She found that a previous diagnosis of Attention Deficit Hyperactivity Disorder ("ADHD") continued to be appropriate for Student and that his problem behaviors and truancy in school were consistent with Oppositional Defiant Disorder ("ODD") and Cannabis Abuse. Clinical Psychologist also reported that Student demonstrated an inability to build and maintain satisfactory interpersonal relationships with peers and teachers and displayed inappropriate behaviors and feelings under normal circumstances, thus meeting the criteria for the ED special education disability classification. Exhibit R-5.

12. Clinical Psychologist diagnosed Student with ADHD - Combined Type, ODD and Mathematics Disorder, a type of Specific Learning Disability. Exhibit R-5.

13. Clinical Psychologist recommended that Student's classroom size should be small (8-10 students) in order to ensure that he receives the high level of individualized attention that he requires and that, due to the severity of Student's issues, a full-time Special Education therapeutic setting was highly recommended so that Student could be provided with the emotional, behavioral and academic supports he needs. Clinical Psychologist also recommended that Student receive individual and group counseling and that a functional behavioral assessment and behavior intervention plan would be useful. Exhibit R-5.

14. For the 2011-2012 school year, Student failed all of his classes, except for Advisory 1.0 (D), Art & Design Foundations (C-), Phys Ed 1 (C) and Phys Ed II (D+). Student's World History teacher reported that Student can grasp the material, but does not function well in a regular classroom setting. Exhibit P-3. Student was unsuccessful for the entire 2011-2012 school year at DC High School. Testimony of SEC. Student exhibited chronic

truancy, failure to complete assignments, and disruptive/oppositional behavior. Exhibits P-3, P-4, P-5, R-8.

15. Student's IEP team met at DC High School on June 4, 2012 to develop his IEP for the 2012-2013 school year. Petitioner and Petitioner's attorney attended. The IEP team retained most of the PLEP's and Annual Goals from the prior October 18, 2011 IEP. The IEP team proposed changing Student's Specialized Instruction Services from 18 hour per week in the general education setting to 18 hours per week, split between outside general education (8 hours) and general education (10) hours. Exhibit R-8. Petitioner refused her consent to implement the proposed June 4, 2012 IEP. Testimony of Petitioner.

16. Clinical Psychologist's March 16, 2012 Comprehensive Psychological Evaluation of Student was considered by the IEP team. Testimony of SEC.

17. The IEP team's intent, in providing 8 hours per week of Specialized Instruction, outside general education, was to provide two resource classes per day, in a small group setting, to support Student in his areas of identified need. At D.C. High School, instruction in core courses required for graduation, including English and mathematics, is offered only in regular education classrooms. Removing Student from the regular education classroom for 8 hours per week would cause Student's expected graduation date to be delayed, because there would be less time in his class schedule for Student to take the core courses he requires to earn credits for a regular high school diploma. Testimony of SEC.

18. At the June 4, 2012 IEP meeting, English Teacher reported that on the days when Student was focused and on-task, he would ask good questions and be engaged, but that a large group setting was very distracting for Student and, if there are other distractions in the classroom, he cannot stay on task. When English Teacher worked with Student after school in a

small group, Student was much more focused. At the IEP meeting, Student's school social worker and special education teacher also agreed that Student would benefit from a smaller setting. Exhibit R-10.

19. Nonpublic Placement is a nonpublic school in suburban Maryland serving exclusively children with disabilities. The high school program has 70 students enrolled. Nonpublic Placement is an Office of the State Superintendent of Education ("OSSE") approved nonpublic day school. Approximately one-third of the students there are funded by the D.C. school system. The typical student at Nonpublic Placement has an emotional disability, but some students have other disabilities. Nonpublic Placement has a behavior modification program in place which utilizes both rewards and consequences to address behavior issues. The maximum class size is 12 students. Each class is staffed with a teacher and a program assistant. All students receive individual and group counseling. The annual tuition for Nonpublic Placement approaches per school year. Testimony of Admissions Coordinator.

20. Student was accepted for the 2012-2013 school year by Nonpublic Placement following an interview with Admissions Coordinator in July 2012. Admissions Coordinator also reviewed Student's IEP and psychological evaluation. Admissions Coordinator concluded that Student would be an appropriate fit for the school because he appeared to be capable of learning, but has behavior and attendance problems which the school would be able to address with its behavior modification program. Testimony of Admissions Coordinator.

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* 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

DOES DCPS' JUNE 4, 2012 IEP DENY STUDENT A FAPE BECAUSE IT DOES NOT MEET STUDENT'S NEED FOR SMALL CLASSROOM SIZE OR PROVIDE FOR FULL-TIME, OUTSIDE OF GENERAL EDUCATION, SPECIALIZED INSTRUCTION?

Student's June 4, 2012 IEP, developed at DC High School, provides that he would receive 18 hours per week of Specialized Instruction services, including 8 hours per week outside of the general education setting. Petitioner contends that the IEP is not appropriate because Student, who failed most of his classes for the 2011-2012 school year, requires full-time specialized instruction in a small-classroom setting. DCPS maintains that its proposed IEP would provide educational benefit to Student and that Student's poor academic performance over the last school year was not due to a deficiency with his IEP.

The IDEA requires that "all children with disabilities have available to them a free appropriate pubic education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *N.T. v. District of Columbia*, Civil Action No. 11-676 (RMC) (D.D.C. January 11, 2012) quoting 20 U.S.C. § 1400(d)(1)(A). In seeking an appropriate education for students with disabilities, the child's IEP team members collaborate to develop an IEP to meet the child's unique needs. *Id.* "The IEP must, at a minimum, 'provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'"

Reid ex rel. Reid v. District of Columbia, 401 F.3d 516, 519 (D.C. Cir. 2005) (quoting *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 203 (1982)). To determine whether a FAPE has been provided, a hearing officer must determine whether: (1) the school complied with the IDEA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits. *See N.T., supra,* citing *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1312 (11th Cir. 2003).

Whether DCPS complied with the IDEA's procedural requirements is not an issue in this case. Therefore, the present inquiry is limited to whether DCPS' June 4, 2012 IEP was reasonably calculated for Student to receive educational benefits. In *Rowley*, the Supreme Court held that courts in the position of assessing whether a child is receiving FAPE must focus on whether the child has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 201. The Court noted further that there existed "no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children." *Id.* 198. As U.S. District Judge Facciola noted in *Hunter v. District of Columbia*, Civil Action No. 07-695 (JMF), 2008 WL 4307492 (D.D.C. Sept. 17, 2008) (D.D.C. 2008), the District Court for the District of Columbia has added that "[a]cademic success is an important factor 'in determining whether an IEP is reasonably calculated to provide education benefits.'" citing *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C.2006). *See, also,* additional cases cited in *Hunter, supra*: *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 130 (2d Cir.1998) ("An appropriate public education under IDEA is one that is 'likely to produce progress, not regression.'"); *Danielle G. v. N.Y. City Dept. of Educ.*,

2008 WL 3286579, at *7 (E.D.N.Y. Aug. 7, 2008) ("A school district will fulfill its substantive obligations under the IDEA if the student is likely to make progress, not regress, under his IEP, and if the IEP affords the student with an opportunity 'greater than mere trivial advancement.'"); *P.K. ex rel. P.K. v. Bedford Cent. Sch. Dist.*, 569 F. Supp. 2d 371, 384 (S.D.N.Y. 2008) ("[I]n determining whether a school district has met its obligations under the IDEA, a court must look for objective evidence in the record indicating whether the student would likely have progressed or regressed under the challenged IEP").

I find in this case that DCPS' proposed June 4, 2012 IEP denies Student a FAPE because the evidence establishes that Student is not likely to make progress under such an IEP, which does not provide for instruction in a small classroom setting with a low student-to-teacher ratio. DCPS admits that Student was unsuccessful for the entire 2011-2012 school year at DC High School. In her end of year progress report, Student's World History teacher reported that Student does not function well in a regular classroom setting. At the June 4, 2012 IEP meeting, English Teacher reported that a large group setting was very distracting for Student and, if there are other distractions in the classroom, he cannot stay on task. Student's school social worker and special education teacher, both members of the IEP team, also agreed that Student would benefit from a smaller setting. Petitioner's expert, Clinical Psychologist, opined that Student's placement at DC High School allows him a greater degree of freedom than he is mature enough to handle and that he requires a highly-structured, more restrictive educational environment. I find her opinion, which was buttressed by the teachers' reports and not refuted by DCPS, to be credible.

DCPS proposes to address Student's need for a smaller classroom setting by providing 8 hours per week of additional support in a pull-out resource classroom. However, DC High

School does not offer core subject area courses, required for graduation, in a resource classroom. Student would still be placed in a regular classroom, with a high student-to-teacher ratio, to earn the academic credits (Carnegie Units) he requires for graduation. Furthermore, in order to free up his schedule for the resource room hours proposed in the June 4, 2012 IEP, Student would have to defer enrolling in some core subject classes required for graduation. The IDEA requires that children with disabilities must have access to the same range of programs and services that a public agency provides to nondisabled children. *See Analysis of Comments and Changes*, 71 F.R. 46583-46584 (August 14, 2006); 34 CFR § 300.110. By limiting Student's opportunity to enroll in required classes and graduate on track with his nondisabled peers, DCPS' proposed IEP would violate the IDEA requirement that children with disabilities have access to the same program options that are available to nondisabled children in DCPS schools. *See id.*

In summary, I find that Petitioner has established that Student requires instruction in a highly-structured, small classroom setting in order to have a likelihood of academic success. DCPS' proposed June 4, 2012 IEP offers Student instruction, in core subject area courses, only in the regular classroom setting and would not provide Student the same graduation track program options available to nondisabled peers. I find, therefore, that the June 4, 2012 IEP is not reasonably calculated for Student to receive educational benefits and that Student has been denied a FAPE. Petitioner prevails on this issue.

Remedy

Petitioner's requested remedy in this case is that DCPS be ordered to fund Student's enrollment at Nonpublic Placement for the 2012-2013 school year.[3] "Where a public school system has defaulted on its obligations under the IDEA, a private school placement is 'proper

[3] In her complaint, Petitioner also requested a compensatory education award. Petitioner's Counsel did not pursue a compensatory education remedy at the July 10, 2012 Prehearing Conference or at the due process hearing.

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 *Rowley, supra,* 458 U.S. at 176, 102 S.Ct. at 3034. *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). An award of private-school placement is "prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA." *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8, 11 (D.C. Cir. 2005) (citations omitted).

In this case, I have found that DCPS failed to offer Student appropriate services and placement in the June 4, 2012 IEP. A private school placement award is, therefore, proper under the IDEA, provided the education offered by Private Placement is reasonably calculated to enable Student to receive educational benefits. Placement awards, must be tailored to meet the child's specific needs. *Branham, supra.* To inform this individualized assessment, courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. Pursuant to the *Branham* guidance, I will address each of these considerations in turn.

a. Nature and Severity of Student's Disability

The evidence in this case establishes that Student's primary disability is ED and that he is also diagnosed with ADHD, ODD and Mathematics Disorder, a type of Specific Learning Disability. For the 2011-2012 school year, Student exhibited chronic truancy, failure to complete assignments, and disruptive/oppositional behavior. He failed most of his classes. In

the opinion of Clinical Psychologist, because of the severity of his disabilities, Student clearly needs the emotional, behavioral and academic supports of a full-time special education therapeutic setting.

b. Student's Specialized Educational Needs

According to Clinical Psychologist, Student requires, *inter alia*, a high level of individualized attention, specialized instruction - particularly in mathematics, an attendance plan, consistent and intensive counseling services and a behavior intervention plan.

c. Link between Student's Needs and the Services Offered by Private School

Admissions Coordinator at Nonpublic Placement testified that the maximum class size at the school is 12 students. Each class is staffed with a teacher and a program assistant. Nonpublic Placement implements a behavior modification program which utilizes both rewards and consequences to address behavior issues. All students receive individual and group counseling. The school has an outreach program to work with students and their families to monitor and address attendance issues. I find that the services offered by Nonpublic School are likely to be appropriate to Student's identified needs.

d. Cost of Placement at Private School

The tuition cost at Nonpublic Placement approaches per year. DCPS offered no evidence that tuition expenses at this private school are higher than costs at other OSSE approved nonpublic day schools for students with an ED disability.

e. Least Restrictive Environment

The IDEA requires school districts to place disabled children in the least restrictive environment possible. *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 43 (D.D.C. 2006) (citing 20 U.S.C. § 1412(a)(5); 34 C.F.R. 300.550; D.C. Mun. Regs. tit. 5, § 3011

(2006)). "In determining the least restrictive environment, consideration is given to the types of services that the child requires." *Id.* (citing 34 C.F.R. § 300.552(d)). According to Clinical Psychologist, Student requires a highly-structured, more restrictive educational environment which DC High School cannot provide.

As the U.S. District Court held, in *Schoenbach v. District of Columbia*, 46 IDELR 67 (D.D.C. 2006), "[M]ainstreaming is not proper for every disabled child. The key consideration is whether a proposed placement is appropriate under the IDEA." *Id.*, citing *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). As a full-time special education school, Private Placement is a very restrictive environment. However, in this case, DCPS has proposed no alternative to Student's current placement at DC High School, where Student was unsuccessful for the 2011-2012 school year. Considering all of the above factors, as well the failure by DCPS to offer a less restrictive placement, tailored to meet Student's educational needs, I conclude that Nonpublic Placement is a proper placement for Student under the IDEA.

ORDER

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

1. DCPS shall fund Student's enrollment at Nonpublic Placement for the 2012-2013 school year, and shall provide school transportation for Student in accordance with the school transportation policies of OSSE and the LEA;

2. Before the commencement of the 2012-2013 school year, DCPS shall initiate and conduct a meeting to develop an IEP for Student in accordance with the findings of this determination and with 34 CFR §§ 300.320 and 300.324. The agency shall ensure that a representative of Nonpublic Placement attends the meeting; and

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

Date: August 8, 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).