

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

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

STUDENT,¹

Petitioner,

Date Issued: November 11, 2011

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by STUDENT (the "Petitioner")², 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, Student alleges that DCPS failed to comply with a July 28, 2011 Hearing Officer Determination

¹ Personal identification information is provided in Appendix A.

² Student's educational rights under the IDEA transferred to him upon his reaching the age of majority.

requirement, by not placing him in a school capable of implementing his April 5, 2011 Individualized Education Program (“IEP”).

Student, an AGE young man, is a resident of the District of Columbia. His Due Process Complaint, filed on September 9, 2011, named DCPS as respondent. The undersigned Hearing Officer was appointed on September 13, 2011. The parties met for a resolution session on October 14, 2011 but did not come to an agreement. The 45-day time line for issuance of this HOD began on October 10, 2011. On September 28, 2011, a prehearing telephone conference was held with the Hearing Officer and counsel to discuss the hearing date, issues to be determined and other matters.

On September 22, 2011, the Hearing Officer denied Petitioner’s motion for an order to require DCPS to provide a more definitive response statement to his due process complaint.³ On October 12, 2011, the Hearing Officer denied DCPS’ motion to dismiss the due process complaint made under the doctrine of *res judicata*.⁴

The due process hearing was held before the undersigned Impartial Hearing Officer on October 25, 2011 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, EDUCATIONAL ADVOCATE, and PRIVATE SCHOOL ADMISSIONS DIRECTOR. DCPS called as witness SPED COORDINATOR. Petitioner’s Exhibits P-1 through P-15 were admitted into evidence without objection. Exhibit P-16, Student’s April 5, 2011 IEP, was admitted over DCPS’ objection that

³ See Decision and Order on Motion for More Definite Statement, Sept. 22, 2011.

⁴ See Decision and Order on Motion to Dismiss, Oct. 12, 2011.

the IEP was not disclosed as a potential exhibit before the hearing. DCPS offered no exhibits. Following presentation of Petitioner's evidence, DCPS made a motion for a directed finding, which the Hearing Officer denied.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

- WHETHER DCPS FAILED TO COMPLY IN GOOD FAITH WITH JULY 28, 2011 HOD REQUIREMENT THAT STUDENT'S MDT TEAM MEET TO DETERMINE WHETHER NEIGHBORHOOD HIGH SCHOOL COULD IMPLEMENT STUDENT'S APRIL 5, 2011 IEP; and
- WHETHER DCPS FAILED TO IMPLEMENT STUDENT'S APRIL 5, 2011 IEP BY OFFERING AN INAPPROPRIATE CLASS SCHEDULE AND NOT SEGREGATING STUDENT FROM GENERAL EDUCATION POPULATION.⁵

Petitioner seeks reimbursement for his unilateral placement expenses incurred at Private School and an order for DCPS to fund his ongoing placement at, and transportation to, Private School.

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 young man. Student moved to the District of Columbia from Minnesota in 2008. He resides with his mother in the District of Columbia. Testimony of Student.
2. Student is a "child with a disability" as defined by the IDEA. In an April 5, 2011 IEP, Student's Primary Disability is reported as Specific Learning Disability. Exhibit P-16.

⁵ See Decision and Order on Motion to Dismiss, Oct. 12, 2011.

3. In a December 30, 2009 comprehensive psychological evaluation, PSYCHOLOGIST diagnosed Student with a Learning Disorder Not Otherwise Specified and with Attention Deficit Hyperactivity Disorder, predominantly inattentive type. Exhibit P-13.

4. In a June 4, 2010 educational evaluation, EVALUATOR reported that compared to others of his age level, Student's performance is very low in basic reading skills and in broad reading and very low in broad writing skills. His performance was low average in broad math. Exhibit P-14.

5. Student entered FIRST PRIVATE SCHOOL ("FPS") in January 2009. Exhibit P-14.

6. Student's last DCPS IEP was developed on April 5, 2011 while he was enrolled at SECOND PRIVATE SCHOOL ("SPS"). Due to Student's lack of attendance at Second Private School, it was difficult for the IEP team to assess his present levels of performance and annual goals. No specific needs or goals are identified in the IEP. The IEP team determined that Student should receive 26.5 hours per week of Specialized Instruction Outside General Education and .75 minutes per day of Behavioral Support Services. The IEP team determined that Student required transportation services as a related service. The IEP team reported that Student's "Projected Exit Category" was high school diploma. Exhibit P-26.

7. Since April 2011, Student has attended Private School under a unilateral private placement. Testimony of Admissions Director, Exhibit P-9.

8. In May 2011, Petitioner brought a prior due process complaint (Case No. _____) in which he alleged, *inter alia*, that DCPS denied him a FAPE by failing to offer him an appropriate placement and that the placement offered by DCPS, NEIGHBORHOOD HIGH SCHOOL ("NHS"), was unable to implement his April 5, 2011 IEP. Administrative Due Process

Complaint Notice, May 13, 2011 ("Prior Complaint") p. 4.⁶

9. Following a due process hearing on June 16, 2011, Hearing Officer Kim Massey issued a Hearing Officer Determination (the "July 28, 2011 HOD"). In the July 28, 2011 HOD, Hearing Officer Massey held that Petitioner had failed to present reliable evidence proving that NHS could not provide full-time out of general education services required by Petitioner's IEP and that Petitioner had failed to present reliable and currently relevant evidence tending to prove the lack of appropriateness of the programming at NHS. The Hearing Officer concluded that Petitioner had not met his burden of proving that DCPS provided him with an inappropriate placement on April 5, 2011. Hearing Officer Massey denied and dismissed with prejudice all claims and requests for relief in the Prior Complaint. Exhibit P-10.

10. Hearing Officer Massey also found that some of the evidence at the prior due process hearing tended to call into question whether NHS currently could implement Student's IEP. She ordered, *inter alia*, that DCPS convene a Multidisciplinary Team ("MDT") meeting within 20 calendar days "to discuss and determine whether [NHS] can implement Student's IEP, and if it is determined that [NHS] cannot implement Student's IEP, then the team shall discuss and determine an appropriate location of services for Student." Exhibit P-10.

11. On August 9, 2011, COMPLIANCE CASE MANAGER emailed Petitioner's Counsel to propose dates and times for a MDT meeting to comply with the July 28, 2011 HOD. When the parties were unable to match available dates, Petitioner's counsel agreed, in writing, to an extension of the time to comply with the HOD's MDT meeting requirement. After some back and forth communications between Compliance Case Manager and Educational Advocate, the MDT team met on August 31, 2011 at NHS. Educational Advocate did not confirm her availability for an MDT meeting before the August 31, 2011 date. Student and Educational

⁶ Attachment to DCPS' Motion to Dismiss, September 29, 2011.

Advocate participated by telephone. Exhibit P-8.

12. At the August 31, 2011 MDT meeting, the DCPS representatives stated that NHS could implement Student's IEP. SPED Coordinator provided NHS's proposed class schedule for Student:

- 1st – Math Application Skills
- 2nd – Developmental Reading
- 3rd – Math Application Skills
- 4th – Music Theory
- 5th – Writing Workshop
- 6th – Writing Workshop
- 7th – Developmental Reading

Exhibit P-3. All classes would be taught in self-contained classrooms outside of the general education setting. None of the classes would earn credits toward graduation, except Music Theory, which would earn ½ credit per semester. The seemingly repeated classes, Math Application Skills, Developmental Reading and Writing Workshop, are not the same courses, but identically named courses taught by different teachers. Testimony of SPED Coordinator. A DCPS social worker at the MDT meeting stated that she could provide 75 minutes per day of behavioral support (counseling) services, as specified in the April 5, 2011 IEP. Educational Advocate objected to the placement at NHS because Student's IEP provided for 30 hours per week of services and NHS did not have a 30 hour per week schedule and because she did not believe that NHS could implement the IEP which states that Student is on a high school diploma route. Exhibit P-3, Exhibit P-4, Testimony of Educational Advocate.

13. On August 31, 2011, DCPS issued a "Prior to Action Notice" informing Student that his placement was being changed to NHS "per HOD." Exhibit P-3.

14. On August 24, 2011, Petitioner's counsel faxed a letter to DCPS, providing "official notice" that Student intended to remove himself from DCPS and unilaterally place

himself at Private School for the remainder of the 2011-2012 school year because DCPS had allegedly failed to provide an appropriate placement for Student. Petitioner's Counsel gave notice in the letter that Student would seek DCPS funding for his placement at Private School and reimbursement for his school transportation. Exhibit P-7.

15. Private School, an Office of State Superintendent of Education ("OSSE") approved nonpublic school, is a therapeutic vocational high school. Students at Private School take traditional academic courses as well as vocational programs such as automotive repair. Private School follows DCPS curriculum standards and offers a District of Columbia high school diploma. Private School currently has 32 students enrolled in 9th through 12th grades. All students at Private School have special education disabilities. Private School has small class sizes with no more than 10 students in a class. Private School has a clinical therapist and a behavioral team on staff. A DCPS program monitor follows children with disabilities placed by DCPS at Private School. Tuition at Private School is per day, the maximum *per diem* rate set by OSSE. Testimony of Admissions Director.

16. Student has been accepted at and is currently attending Private School. Testimony of Admissions Director. His class schedule for the current school year includes English, History, Spanish, Mathematics and car mechanics. Student loves Private School and is learning well there. Testimony of Student. Since matriculating to Private School in April 2011, Student has earned five academic credits. Student is on a diploma track. If he passes his classes, he should graduate in the summer of 2012. Testimony of Admissions Director.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, and the 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:

DISCUSSION

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).

1. DID DCPS FAIL TO COMPLY IN GOOD FAITH WITH JULY 28, 2011 HOD REQUIREMENT TO CONVENE STUDENT'S MDT TEAM TO DETERMINE WHETHER NHS COULD IMPLEMENT STUDENT'S APRIL 5, 2011 IEP?

In her July 28, 2011 HOD, Hearing Officer Massey ordered that DCPS convene an MDT meeting within 20 calendar days "to discuss and determine whether [NHS] can implement Student's IEP, and if it is determined that [NHS] cannot implement Student's IEP, then the team shall discuss and determine an appropriate location of services for Student." Petitioner contends that although DCPS did convene Student's MDT team on August 31, 2011, the meeting was untimely and the MDT team did not make a good faith determination of whether NHS could implement the April 5, 2011 IEP.

With regard to the timeliness of the MDT meeting, Petitioner's complaint lacks merit. Petitioner's counsel waived, in writing, the HOD's 20-calendar day requirement when Educational Advocate was not available on the meeting dates first proposed by DCPS. Educational Advocate did not confirm her availability for the meeting until she agreed to the

August 31, 2011 date. Under these circumstances, DCPS cannot be faulted for not convening the meeting within the original 20-calendar day period set in the July 28, 2011 HOD.

Petitioner also contends that DCPS failed to comply in good faith with the July 28, 2011 HOD, when it refused to offer Student an alternative placement and “instead tried to shoe-horn” Student into fitting the placement at NHS. Due Process Complaint (Sept. 9, 2011). While I find that the preponderance of the evidence does establish that NHS is not a school capable of fulfilling Student’s IEP needs, *see Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991), it appears that NHS could have provided the hours of Specialized Instruction and Related Services specified in the April 5, 2011 IEP. I find, therefore, that the MDT team’s determination that NHS could implement Student’s IEP was not made in bad faith. DCPS prevails on this issue.

2. DID DCPS FAIL TO IMPLEMENT STUDENT’S APRIL 5, 2011 IEP FOR THE 2011-2012 SCHOOL YEAR, BY OFFERING AN INAPPROPRIATE CLASS SCHEDULE AND BY NOT PROVIDING FOR STUDENT’S SEGREGATION FROM NONDISABLED PEERS?

At the August 31, 2011 MDT meeting, DCPS proposed a daily class schedule for Student that consisted of two periods of Math Application Skills, two periods of Developmental Reading, two periods of Writing Workshop, and one period of Music Theory. All of these classes would be provided in self-contained classrooms. However, at NHS, credits toward graduation are generally only available in general education classrooms. Under the schedule proposed by DCPS at the MDT meeting, Student could only receive one credit toward graduation for the entire 2011-2012 school year.

To determine whether the proposed NHS placement was appropriate for Student, one must refer to his IEPs. *See Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 44 (D.D.C. 2006). “Designing an appropriate IEP is necessary but not sufficient. DCPS must also

implement the IEP, which includes offering placement in a school that can fulfill the requirements set forth in the IEP. 20 U.S.C. § 1401(9).” *O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 53 (D.D.C. 2008). Student’s April 5, 2011 IEP provides that his projected “Exit Category” is a high school diploma and that he is to receive 27.5 hours per week of Specialized Instruction outside of the general education setting. At NHS, these two IEP requirements are in conflict. NHS offers classes outside of general education (self-contained classes), but these classes, with few exceptions, do not accrue credits toward a high school diploma. NHS offers diploma-credit classes to students with disabilities. However these classes are taught in the general education (inclusion) setting. NHS is unable to implement a program, like Student’s April 5, 2011 IEP, which requires all instruction to be provided outside of the general education setting and leads to a high diploma. At NHS, DCPS can implement the outside-of-general-education services specified in Student’s IEP, but, only by requiring Student to forego the opportunity to earn a high school diploma.

I find that DCPS’ failure to offer Student full-time special education programming, outside of general education, that will allow him the opportunity to earn a high school diploma, is a material failure to implement Student’s April 5, 2011 IEP.⁷ *See S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56, 67-68 (D.D.C.2008) (A material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and those required by the child’s IEP.) The lack of opportunity for Student to earn a high school diploma under DCPS’ proposed placement at NHS is more than a minor discrepancy. Petitioner prevails on this issue.

⁷ Petitioner’s contention that Student must be placed in a setting segregated from his non-disabled peers is without merit. Student’s April 5, 2011 IEP contains no such requirement, which would be highly unusual under the IDEA’s least restrictive environment (“LRE”) mandate. *See* 20 U.S.C. § 1412(a)(5).

REMEDY

Reimbursement for Private School Placement

In this determination, I have found that DCPS has denied Student a FAPE by not providing him full-time special education programming, outside of general education, that will allow him the opportunity to earn a high school diploma. In April 2011, Student enrolled in Private School. On August 24, 2011, Petitioner's counsel gave written notice to DCPS that Student would unilaterally place himself at Private School and that he would look to DCPS for tuition reimbursement. Student now seeks reimbursement for his tuition cost at Private School and an order for DCPS to pay for his ongoing enrollment and transportation for Private School.

When an adult student with a disability, who previously received special education and related services under the authority of DCPS, self-enrolls in a private secondary school without the consent of or referral by DCPS, a hearing officer may require DCPS to reimburse the student for the cost of that enrollment, if the hearing officer finds that DCPS had not made FAPE available to the student in a timely manner prior to that enrollment and that the private placement is appropriate. *See* 34 C.F.R. § 300-148(c). However, under the IDEA, a student who unilaterally decides to enroll in a private school, without obtaining the consent of local school officials, “[does] so at [his] own financial risk.” *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993) (quoting *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). A student may only receive tuition reimbursement if a court concludes that (1) “the public school placement violated the IDEA” and (2) “the private school placement was proper under the Act.” *Id.* at 15, 114 S.Ct. 361. Importantly, the first factor is a threshold question: if the public school placement would have been appropriate, the hearing officer's analysis ends, and the student is not entitled to

reimbursement. See *N.S. v. District of Columbia*, 709 F.Supp.2d 57, 67 (D.D.C. 2010).

In this case, I have found that DCPS denied Student a FAPE, and thereby violated the IDEA, by its material failure to implement Student's April 5, 2011 IEP for the 2011-2012 school year. The threshold question from *Florence County* being answered, I next address the second factor: Was Student's placement at NHS proper under the IDEA? "[P]arents . . . are entitled to reimbursement only if . . . the private school placement was an appropriate placement, and [the] cost of the private education was reasonable[.]" *Holland v. District of Columbia*, 71 F.3d 417, 425 (D.C.Cir. 1995) (citing *Florence County School District Four, supra*, 510 U.S. at 15.) "[A] particular 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 (D.D.C. 1994) (quoting *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 207 (1982)).

Private School is located in the District of Columbia and is an OSSE approved non-public school. Unlike NHS, Private School is able to meet the Student's April 5, 2011 IEP requirements, both that he receive his 26.5 hours per week of Specialized Instruction outside of the general education setting, and that his exit category be a high school diploma. Since matriculating to Private School in April 2011, Student has already earned five academic credits. Student "loves" Private School and affirms that he is learning well there. Private School Admissions Director expects Student to graduate after June 2012 if he passes his courses. I find therefore that Student's placement at Private School is reasonably calculated to enable him to receive educational benefits. Private School charges tuition at the maximum *per diem* rate, per day, set by OSSE. I find this cost for Student's private education at Private School to be reasonable. Furthermore, DCPS has provided no evidence to suggest that Student's placement at

Private School is not appropriate. In sum, the evidence establishes that Student's placement at Private School is proper under the Act and governing case law. Hence, I will require DCPS to reimburse Student for part of the period of his enrollment there.

The cost of private school reimbursement may be reduced or denied if,

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section.

34 C.F.R. § 300-148(d)(1). Student has attended Private School since April 2011. However, Student may not seek reimbursement for the period preceding the July 28, 2011 HOD. *See Decision and Order on Motion to Dismiss*, Oct. 12, 2011. By letter of August 24, 2011, Petitioner's Counsel provided notice to DCPS that Student would unilaterally place himself at Private School because, up to that date, DCPS had not convened a MDT meeting to determine if NHS could implement Student's IEP. At the August 31, 2011 MDT team meeting, Educational Advocate informed the MDT team that Student declined the placement at NHS, because, *inter alia*, NHS could not implement Student's IEP which "clearly states that [Student] is on a high school diploma route." Both parties understood that Student intended to continue to attend Private School at DCPS expense. I find, therefore, that DCPS should be required to reimburse Student for the cost of his enrollment at Private School only beginning September 7, 2011 (10 business days after the August 24, 2011 unilateral placement notice from Petitioner's Counsel) and to fund Student's ongoing enrollment at Private School until such time as the Student is provided with an appropriate placement. *See District of Columbia v. Abramson*, 493 F.Supp.2d

80, 87 (D.D.C. 2007).

SUMMARY

In summary, I have found that DCPS has denied Student a FAPE for the 2011-2012 school year by offering him a placement only at NHS, which is unable to implement Student's April 5, 2011 IEP. Private School is a proper placement for student under the *Florence County* and *Holland v. District of Columbia* decisions criteria. I will order DCPS to reimburse Student for the cost of his enrollment at Private School beginning September 7, 2011 and to fund Student's ongoing enrollment there, and provide school transportation, until DCPS provides Student with an appropriate placement.

ORDER

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

1. That DCPS shall reimburse Student for the expenses he incurred in enrolling at Private School since September 7, 2011;
2. That DCPS shall fund Student's ongoing enrollment at Private School for the remainder of the 2011-2012 school year and until such time as Student is provided with an appropriate placement;
3. That DCPS shall provide Student's transportation to and from Private School in accordance with DCPS' special education transportation regulations; and
4. That within 10 business days of this order, DCPS shall convene Student's MDT/IEP team to effect his change of placement/location to Private School pursuant to the requirements of 34 C.F.R. § 300.325. A representative of Private School must attend the IEP meeting; and

further ORDERED that all other relief requested by Petitioner herein is denied.

Date: November 11, 2011

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).