

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

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

OSSE
Student Hearing Office
February 08, 2013

PETITIONER,¹
on behalf of STUDENT,

Date Issued: February 8, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2012-0818

v.

Hearing Date: January 25, 2013

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Student Hearing Office, Room 2006
Washington, D.C.

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 “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 (“DCMR”). In her Due Process Complaint, Petitioner alleges that Student has been denied a free appropriate public education (“FAPE”) because DCPS has not provided him a placement in a small, structured, therapeutic educational 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 November 30, 2012, named DCPS as respondent. The case was assigned to the undersigned Hearing Officer on December 12, 2012. The parties met for a resolution session on December 11, 2012 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on December 31, 2012. On December 19, 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 January 25, 2013 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 was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called as witnesses COMMUNITY SOCIAL WORKER, STUDENT, EDUCATIONAL CONSULTANT, and NON-PUBLIC SCHOOL ADMISSIONS DIRECTOR. DCPS called, as its only witness, SPECIAL EDUCATION COORDINATOR. Petitioner's Exhibits P-1 through P-14 were admitted into evidence without objection. DCPS' Exhibits R-1 through R-4 were admitted without objection. Counsel for both parties made opening and closing statements. There was no request for post-hearing briefing.

JURISDICTION

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

ISSUE AND RELIEF SOUGHT

- WHETHER DCPS DENIED STUDENT A FAPE BY PLACING HIM AT CITY HIGH SCHOOL, WHICH ALLEGEDLY IS NOT A SCHOOL CAPABLE OF FULFILLING STUDENT'S NEED FOR ACADEMIC AND BEHAVIORAL SUPPORT IN A HIGHLY STRUCTURED PROGRAM.

For relief, Petitioner seeks an order for DCPS to fund Student's prospective enrollment at Non-Public School for the remainder of the 2012-1013 school year.

PARTY STIPULATION

In the Prehearing Conference, the parties, by counsel, stipulated that DCPS' March 23, 2012 Individualized Education Program (IEP) is an appropriate IEP for Student except for the placement/location of services at City High School. Prehearing Order, December 19, 2012.

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. Testimony of Student.
2. Student is eligible for special education and related services under the primary disability classification, Multiple Disabilities ("MD"). Exhibit P-2.
3. Student has a history of oppositional behaviors and engaging in unlawful activities. Exhibits P-3, P-4. At the end of June 2011, Student was placed by juvenile court authorities at [REDACTED] [REDACTED] serves students with behavior issues. The school has a structured program with 4-5 children in the classroom, and daily counseling. Its teachers and staff are able to deal with behavior problems. Testimony of Student, Testimony of Mother. Student's first two months at [REDACTED] were difficult. After he settled in, he did very well there. Testimony of Mother,
4. Student's December 2011 [REDACTED] monthly treatment plan review

reported Student's diagnoses as Bipolar Disorder, Mixed; Attention Deficit Hyperactivity Disorder; Conduct Disorder; and Marijuana Abuse. Exhibit P-5.

5. Student's grades for his summer 2011 term at [REDACTED] were four C's and one D-plus. By his last term in May 2012, he had earned two A-minuses, two B's and two C-pluses. He "graduated" from the program on May 11, 2012 and returned home to Washington. Exhibit P-7, Testimony of Student.

6. Student had "maxed out" the program at [REDACTED] by February 2012. He continued at the school until May 2012 because living arrangements had not yet been set up for his return to Washington, D.C. Testimony of Mother.

7. In a March 16, 2012 Comprehensive Psychological Evaluation, the evaluator reported that on the Wechsler Intelligence Scale for Children - Fourth Edition (WISC-IV), Student obtained a Full Scale IQ (FSIQ) score of 74, which fell in the Borderline range. However, due to significant discrepancies between the FSIQ score and Student's other index-scaled scores, his FSIQ score may not have been representative of his overall functioning and it was possible that Student's natural abilities fell in the Low Average range. Student's scores on the Woodcock-Johnson-III Tests of Achievement (WJ-III ACH) were at the lower end of the Borderline range for Broad Written Language, at the upper end of the Borderline range for Broad Reading and in the Extremely Low range for Broad Math. The evaluator diagnosed Student with Learning Disorder, Not Otherwise Specified; Disruptive Behavior Disorder, Not Otherwise Specified; and Attention-Deficit Hyperactivity Disorder (by history). Exhibit P-4.

8. Student's March 23, 2012 DCPS IEP, developed when Student was still at [REDACTED] [REDACTED] was prepared for Student's transition back to DCPS schools. The IEP contains Annual Goals for Mathematics, Reading, Written Expression and Emotional, Social and

Behavioral Development. The IEP provides Student 26 hours per week of Specialized Instruction outside of the general education setting and 1 hour per week of Behavioral Support Services. In the IEP Present Level of Educational Performance (PLEP) for Mathematics, the IEP team reported that in the classroom, Student participates in instruction and is able to stay focused. The PLEP for Emotional, Social, and Behavioral Development stated that Student had improved self-regulating his behaviors, but he needed consistent support in identifying problematic behaviors and processing potential outcomes. Exhibit P-2.

9. Student began attending City High School at the beginning of the 2012-2013 school year, repeating GRADE. He is on the DCPS high school diploma track and needs three and one-half years of credits to graduate. Testimony of Student. Student's initial schedule at City High School was for general education classes, contrary to the requirements of the March 23, 2012 IEP. Testimony of Community Social Worker. His schedule was later changed to special education resource room classes. In his current classes, there are more than 20 students in the classroom. His teachers are reported to be dually certified in special education and in the academic subject. Testimony of Community Social Worker.

10. For most of the fall 2012 semester, Student was not successful in the City High School program. In the opinion of Special Education Coordinator, Student was unable to adjust to transitioning between classes. Between class periods, he would have problems in the hallway and get into trouble. Testimony of Special Education Coordinator. He was failing his classes. Testimony of Mother.

11. Since September 20, 2012, the City High School social worker has attempted, unsuccessfully, to engage Student in individual counseling. Exhibit R-4. Student did not attend these Behavioral Support sessions because he did not want to talk about what the counselor

wanted to talk about. Testimony of Student.

12. In the fall of 2012, Community Social Worker made observations of Student at City High School. Most of the times when Community Social Worker would see Student, he was not in his classroom. Student would say that he did not know where to go. Testimony of Community Social Worker.

13. Since November 2012, Student has been trying hard to succeed in school because he does not want to have to repeat the academic year. He has been going to all of his classes and doing his school work. His staying in the classroom has improved and he is learning more now. Student's teacher has modified his work for him. Testimony of Student.

14. City High School is establishing a new program for children with behavior concerns, effective January 28, 2013. The program was developed because Special Education Coordinator decided that the school needed to offer a more structured, self-contained program. Each class will be staffed by a special education teacher dually-certified in special education and academic content, a behavior teacher and a paraprofessional. There will be 6 or 7 students per classroom. The behavior teacher will be responsible for implementing behavior plans for the students in her class. Instead of the students transitioning between classrooms, the teachers will rotate between the classrooms. These students will only be with their nondisabled peers at breakfast, lunch and typing class. Students will be able to earn regular DCPS high school diplomas in this program. Student may choose to enroll in the new program. In the opinion of Special Education Coordinator, Student would be successful in the program because it is closer to what he was used to at the Utah Residential School with less distractions and fewer students. Testimony of Special Education Coordinator.

15. Student has been accepted for the Learning Disabled ("LD") program at Non-

Public School. Prior to deciding to accept Student, Admissions Director interviewed him and reviewed Student's DCPS IEP and his 2012 comprehensive psychological evaluation.

16. Non-Public School, located in the District of Columbia., has an enrollment of 64 students and is fully certified by the D.C. Office of the State Superintendent of Education ("OSSE"). Non-Public School has block scheduling, offering four daily classes through a changing daily cycle. In addition to academic courses, students may take trade courses such as carpentry or barbering. In Student's classroom, there would be a maximum of 8 students, taught by a teacher and teaching assistant. All teachers are certified. Non-Public School also provides counseling services as required by a student's IEP. All students are on a point-system behavior plan. At Non-Public School, students have no interaction with non-disabled peers. The school's annual tuition is approximately \$40,000. Testimony of Admissions Director.

CONCLUSIONS OF LAW

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

Legal Standard for Prospective Non-Public Placement

In this case, Petitioner asserts that under the IDEA, Student is entitled to placement at Non-Public School, at public expense, because City High School cannot provide Student with the small, structured therapeutic educational setting which Petitioner believes that Student requires. The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for future education." 20 U.S.C. § 1400(d)(1)(A). *Johnson v. District of Columbia*, 873 F.Supp.2d 382, 384 (D.D.C.2012). To achieve this purpose, the IDEA extends federal funding to the states to provide disabled

schoolchildren with a FAPE. 20 U.S.C. § 1412(a)(1)(A). To provide a FAPE, the school district is obligated to devise an IEP 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* 20 U.S.C. §§ 1412(a)(4), 1414(d), 1401(a)(14); *School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985); *Jenkins v. Squillacote*, 935 F.2d 303, 304 (D.C. Cir.1991); *District of Columbia v. Doe*, 611 F.3d 888, 892 n.5 (D.C. Cir.2010). If no public school is available to provide sufficient support services to ensure a FAPE for the child, then DCPS "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, 518-19 (D.C.Cir.2005) (quoting *Jenkins, supra*, 935 F.2d at 305); *Branham v. Gov't of the District of Columbia*, 427 F.3d 7, 8-9 (D.C. Cir.2005); *L.R.L. ex rel. Lomax v. District of Columbia*, 2012 WL 4789532 (D.D.C.2012). A hearing officer may award appropriate equitable relief, including a prospective private placement, when there has been an actionable violation of IDEA. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia, supra*, 427 F.3d at 11-12.)

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

ANALYSIS

HAS DCPS DENIED STUDENT A FAPE BY PLACING HIM AT CITY HIGH SCHOOL, WHICH ALLEGEDLY IS NOT A SCHOOL CAPABLE OF FULFILLING STUDENT'S NEED FOR ACADEMIC AND BEHAVIORAL SUPPORT IN A HIGHLY STRUCTURED PROGRAM?

In this case, Petitioner has stipulated that Student's March 23, 2012 IEP is appropriate – which establishes for purposes of this decision that, (1) DCPS has complied with IDEA's administrative procedures and (2) the IEP was reasonably calculated to provide some educational benefit to Student. *See J.N. v. District of Columbia*, 677 F.Supp.2d 314, 322 (D.D.C. 2010). Designing an appropriate IEP for Student was 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). *See O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 53 (D.D.C.2008). Petitioner challenges DCPS' placement of Student at City High School, alleging that City High School is not capable of fulfilling Student's need for academic and behavioral support in a small, structured therapeutic setting. DCPS responds that City High School can implement Student's IEP, as written.

Petitioner's opposition to Student's placement at City High School appears to have more to do with dissatisfaction with the March 23, 2012 IEP, *i.e.*, the IEP's omission of any requirement for a small, structured therapeutic setting, than with City High School's ability to implement the IEP, as written. However, Petitioner is bound by her prehearing stipulation that the IEP is appropriate. *See, e.g., Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez*, 130 S.Ct. 2971, 2974 (2010) (Parties are bound by, and cannot contradict, their stipulations.) Because the IEP is deemed appropriate, it follows that the educational placement is also appropriate, provided that City High School is able to implement

the terms and conditions of the IEP. *Cf., O.O., supra*, 573 F.Supp.2d at 55 (Where IEP is adequate, school capable of implementing the IEP is an appropriate placement.)

DCPS' March 23, 2012 IEP provides that Student shall receive 26 hours per week of Specialized Instruction and 1 hour per week of Behavioral Support Services. As reported in the IEP's Least Restrictive Environment statement, Student needs Specialized Instruction, outside of the general education setting, to address his academic deficits and behavior. The IEP does not further address Student's classroom environment requirements, except to report that in the mathematics classroom, Student participates in instruction and is able to stay focused. The IEP does not endorse Student's need for a small, structured, therapeutic educational setting, as now alleged by Mother.

Petitioner has not shown that City High School is unable to implement the March 23, 2012 IEP as written. After an initial scheduling problem at the beginning of the 2012-2013 school year, Student was placed in special education resource room classes, as required by the IEP. Since September 20, 2012, the school social worker has attempted to provide Student his IEP Behavioral Support Services. However, Student testified that he refused the services and he has missed most of the scheduled counseling sessions.

Petitioner points to Student's lack of educational progress at City High School as evidence of his inappropriate placement. The hearing evidence does establish, convincingly, that for most of the fall 2012 semester, Student did not make educational progress. However, the appropriateness of an IEP placement is judged prospectively, not by the effectiveness of the program in hindsight. *See, e.g., S.S. ex rel. Shank v. Howard Road Academy*, 585 F.Supp.2d 56 (D.D.C. 2008):

“[B]ecause the question ... is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so, ... the measure and

adequacy of an IEP can only be determined as of the time it is offered to the student.... Neither the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.”

Id. 66-67 (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir.2008) (internal quotation marks and citation omitted).²

In summary, having stipulated to the appropriateness of Student’s March 23, 2012 IEP, Petitioner’s burden of proof was to show that Student has been denied a FAPE because City High School is not able to implement the terms and conditions of the IEP as written. I find that Petitioner has not met that burden.

ORDER

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

All relief requested by the Petitioner in this matter is denied.

Date: February 8, 2013

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

² Although the appropriateness of a child’s special education placement must be evaluated from the perspective of the time when the IEP was developed, the implementation of the program is an on-going, dynamic activity. “[A] school district [cannot] ignore the fact that an IEP is clearly failing, nor can it continue to implement year after year, without change, an IEP which fails to confer educational benefits on the student.” *O’Toole By and Through O’Toole v. Olathe Dist. Schools Unified School Dist. No. 233*, 144 F.3d 692, 702 (10th Cir.1998). In this case, City High School has not ignored Student’s lack of educational progress. Effective January 28, 2013, City High School was inaugurating a new program for students with behavior issues. this program provides small class size, a low student-to-teacher ratio and intensive behavioral support in a less distracting school environment. Student may enroll in this program. *Cf. N.T. v. District of Columbia*, 839 F.Supp.2d 29, 35 (D.D.C.2012) (Because DCPS can craft an appropriate IEP to provide a FAPE, it is not required to pay for child’s placement at private school.)

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).