

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
1050 First Street, NE, 3rd Floor  
Washington, DC 20002

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OSSE  
Office of Dispute Resolution  
April 01, 2019

PUBLIC CHARTER SCHOOL,

Petitioner,

v.

PARENT,  
on behalf of STUDENT,<sup>1</sup>

Respondent.

Date Issued: April 1, 2019

Hearing Officer: Peter B. Vaden

Case No: 2019-0043

Hearing Date: March 27, 2019

Office of Dispute Resolution, Room 112  
Washington, D.C.

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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 Petitioner PUBLIC CHARTER SCHOOL (PCS), 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.”). PCS seeks a determination that Student requires placement in a more restrictive environment than PCS, specifically a nonpublic special education day school.

Student, an AGE youth, is a resident of the District of Columbia. PCS’ Due Process Complaint, filed on February 11, 2019, named the parent (Parent or MOTHER) as Respondent. The undersigned Hearing Officer was appointed on February 12, 2019. Mother did not file a formal response to PCS’ complaint. On February 19, 2019, I convened a telephone prehearing conference with PCS’ COUNSEL and Mother to

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<sup>1</sup> Personal identification information is provided in Appendix A.

discuss the hearing date, issues to be determined and other matters. Because the complaint in this case was brought by the local education agency, not by the parent, there was no provision for a resolution period. *See* 34 CFR § 300.510. My final decision is due by April 7, 2019.

The due process hearing was convened on March 27, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Petitioner PCS was represented by DIRECTOR and by PCS' Counsel. Mother, who appeared in person, was not represented by counsel. PCS' Counsel and Mother made opening statements.

PCS called as witnesses TEACHER, SCHOOL COUNSELOR, SPECIAL EDUCATION COORDINATOR (SEC) and Director. Mother testified and did not call additional witnesses. PCS' Exhibits P-2 through P-24 were admitted into evidence without objection. Exhibit P-1 was admitted over Mother's objection. Parent's Exhibit R-1, a photograph of a prescription medication container, was admitted into evidence without objection. PCS' Counsel made an oral closing argument. There was no request to file post-hearing briefs.

### **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**

The following issue for determination was certified in the March 4, 2019 Prehearing Order:

Whether the student requires placement in a more restrictive environment than PCS, specifically a nonpublic special education day school.

For relief, PCS seeks an order from the hearing officer requiring Parent to consent to the change in placement and change in location process so that the D.C. Office of the State Superintendent of Education (OSSE) can issue a location assignment for Student. Alternatively, PCS seeks an order overriding the parent's revocation of consent and authorizing OSSE to issue a location assignment. By an email to the hearing officer sent on March 5, 2019, PCS' Counsel supplemented the relief request to add that PCS seeks a determination by the hearing officer that Student requires a more restrictive placement in a separate, special education day school.

### **FINDINGS OF FACT**

After considering all of the evidence, as well as the argument of counsel and the parent, this hearing officer's Findings of Fact are as follows:

1. Student, an AGE youth, resides in the District of Columbia with Mother. Testimony of Mother. Student is eligible for special education as a student with Multiple Disabilities comprised of the underlying disabilities Emotional Disturbance (ED) and Other Health Impairment (OHI). Exhibit P-14.
2. Public Charter School (PCS) is an "LEA Charter," *i.e.*, serves as its own local education agency (LEA ) for purposes of Part B of the IDEA. *See* 5E DCMR § 923.3. Hearing Officer Notice.
3. Student has been enrolled in PCS since the 2014-2015 school year and is currently in GRADE. Testimony of Counselor.
4. Student's May 2, 2016 IEP reported that Student's disability causes Student to ■ highly hyperactive/impulsive, inattentive, defiant and aggressive. The May 2, 2016 IEP provided for Student to have 4 hours per week of Specialized

Instruction Services (SIS), including 2 hours outside general education, and 120 minutes per month of Behavioral Support Services. Exhibit P-1. The IEP was amended on June 3, 2016 to increase SIS to 10 hours per week, including 5 hours outside general education and to provide for a full-time dedicated aide. Exhibit P-2.

5. PCS' June 2016 Justification and Plan for Dedicated Aide stated that Student had a history of absconding from class without teacher permission several times throughout the school day; that Student ran throughout the school building with staff/security chasing [REDACTED]; that Student would hide in sections of the school building to avoid classroom work resulting in a safety concern; that Student's absconding resulted in temper tantrums with staff/peers, physical aggression towards staff/peers, and defiance of staff directives and that in addition, Student had missed a significant amount of classroom time during the 2015-2016 school year resulting in poor academic performance. Exhibit P-3.

6. Student's April 25, 2017 PCS IEP changed Student's SIS instruction to 15 hours per week, all in general education. The IEP provided for Student to have a full-time dedicated aide. Exhibit P-4. For the 2017-2018 school year, Student was placed in a classroom co-taught by a general education teacher and a special education teacher. This model did not work for Student. Testimony of Director.

7. On September 29, 2017, Student's IEP was revised to place Student full-time in a self-contained classroom with 3 to 5 students. Student had become very confrontational with the dedicated aides "attached" to Student and was not able to connect with them. The provision for a dedicated aide was removed from Student's IEP. An aide was still assigned to Student's new classroom. Director instructed that the aide

would be introduced as a teaching assistant for the self-contained classroom. Exhibits P-6, P-7; Testimony of Director.

8. In spring 2018, Student was referred for a Psychoeducational and Psychological Evaluation, as part of Student's triennial special education reevaluation. Special Education Teacher reported to the assessor, INDEPENDENT PSYCHOLOGIST, that behaviorally, Student was not cooperative during group assignments and Student's behaviors were consistent across settings. She reported that Student was often disruptive and noncompliant and Student never attended specials classes. Socially, Special Education Teacher reported that Student would only interact with peers during recess when they were playing sports. She described Student's interactions with teachers and other adults as noncompliant, disrespectful, and verbally aggressive. Student would curse and run out of class and would demonstrate noncompliance when being redirected by others. The instructional assistant in Student's classroom, reported that it was difficult for Student to fit in with peers because of Student's maturity level. The assistant reported that Student had difficulty establishing and maintaining friendships and that Student did not eat lunch in the cafeteria with peers, but preferred to eat with adults or alone. The assistant reported Student's behaviors commonly observed in the classroom to include defiance, noncompliance, verbal and physical aggression, and elopement. The assistant reported that Student had a low frustration level with class work and would completely "shut down" if Student did not understand how to solve one problem. When Student would shut down, Student would curse, go underneath the table, throw chair cushions, or leave the classroom. Exhibit P-13.

9. In addition to interviewing Mother, Student's teachers and Student,

Independent Psychologist conducted a classroom observation and administered a battery of cognitive and educational assessments and behavioral rating scales. She reported, *inter alia*, that Student's social emotional functioning, based on rating scales completed by Mother, Student and Special Education Teacher, showed a moderate degree of school problems relating to attention problems, hyperactivity, and impulsivity, consistent with Student's diagnosis of ADHD and the behavioral concerns associated with it. Independent Psychologist diagnosed Student with Oppositional Defiant Disorder, Attention Deficit/Hyperactivity Disorder, Combined Type (By History), and Unspecified Anxiety Disorder. Exhibit P-13.

10. On June 1, 2018, the PCS eligibility team confirmed Student's special education eligibility under the IDEA disability classifications Multiple Disabilities/Emotional Disturbance, Other Health Impairment. Exhibit P-14.

11. On June 1, 2018, Student's PCS IEP team met for Student's annual IEP review. The June 1, 2018 IEP provided for Student to continue to receive full-time SIS outside general education and 30 minutes per week of Behavioral Support Services. The IEP team put back the dedicated aide in Student's IEP. Director instructed the assigned aide to keep some distance from Student because of Student's resistance to having an "attached" dedicated aide. Exhibit P-13, Testimony of Director.

12. In the 2018-2019 school year, Student has a dedicated aide in the self-contained classroom. Student's behaviors in the classroom have become more difficult to manage. Student has very intense mood swings and Student's behavior would become intense so quickly that Student became a danger in the classroom. Student would be noncompliant with every person engaged with. Student could have 3-5

aggressive behaviors every day. Other students began separating from Student because of the way Student treated them. The situation became very dangerous. The self-contained classroom was “falling apart.” Testimony of Director.

13. Based on Student’s Behavior Intervention Plan, in the 2018-2019 school year, Student spends some 3.5 hours per week sitting with Counselor in Counselor’s office or in the gym. Student stays with Counselor during most scheduled specials classes because Student struggles in low-structured environments. Student can usually handle gym class, but not music or art class. Counselor is supposed to check in with Student on arrival in the mornings, but most of the time that does not happen because Student typically arrives at school tardy, between 10:00 and 11:00 a.m. Testimony of Counselor, Testimony of Special Education Teacher.

14. On January 4, 2019, PCS submitted a change of placement request for Student to OSSE. In its justification statement, PCS wrote that Student’s academic performance and behaviors are significantly impacting Student; that Student had made little to no progress for the past two years in spite of supports and services and changes to the least restrictive environment (LRE); that Student needs constant redirection and support from an adult to stay on task and complete work; that Student needs a class with few students that allows Student to take breaks; that Student needs few transitions and frequent breaks; that when Student is attentive and engaged, Student is able to quickly grasp concepts; that according to assessment testing, Student is in the low Growth and low Achievement Range for both Math and Reading; that Student made gains last year but regressed this, 2018-2019, school year; that Student’s Partnership for Assessment of Readiness for College and Careers (PARCC) score went from 2 to 1 in

both reading and writing in spite of additional accommodations; that Student is in need of a therapeutic setting to support and teach social and emotional, problem-solving skills, on task behaviors, self regulation and making safe choices; that Student is very impulsive and on a daily basis has negative interactions with peers and adults whether or not Student knows them; that Student gets anxious and frustrated with the school work as tasks increase in demand and complexity; that Student has difficulties with boundaries and pragmatics when talking to adults; that Student is not able to finish assignments independently; that Student requires frequent breaks for testing and one to one testing; that Student needs special transportation because Student initiates interactions with students and adults that often lead to physical altercations on and off campus after school; that Student needs more behavioral support in the form of therapy, monitoring, responding to emotional needs and medication management; that Student requires small group instruction, with frequent reinforcers and monitoring by specialists; that positive peer, adult, and family relationship support is needed; that when Student becomes anxious and frustrated, Student cries, elopes and uses profanity; that Student is inconsistent with behavior and there are days that Student behaves tired and wants to sleep and cries and there are days that Student can get some work done with the supports at school; that Student has incidents on a daily basis, but the intensity, frequency and duration varies from day to day; that some of Student's problem solving and reaction to situations is developmentally younger than for Student's age and that Student had recently started taking medication, but the parent had expressed needing support with medication. Exhibit P-18.

15. On January 28, 2019, PCS convened a change of placement meeting for



Student. Mother attended, as did OSSE's Change in Placement Coordinator (OSSE COORDINATOR). The PCS representatives all agreed that Student required a more restrictive environment than PCS could provide. This was based on safety concerns and Student's lack of progress. Director stated that Student was doing "zero" work and that emotionally, Student's behaviors were impacting Student, other children and adults.

Testimony of Director. Mother objected that Student was in the trial stage on medications and that more time was needed to get results. OSSE Coordinator closed the change in placement case because, with Mother's opposition, Student's IEP team was not in consensus that Student needed a more restrictive environment. Exhibit P-20.

16. On January 29, 2019, OSSE Coordinator issued OSSE's State Recommendation on PCS' change in placement request. OSSE's recommendation was that a change in placement into a more restrictive environment was warranted for Student. OSSE also recommend that PCS be provided technical assistance in effective documentation demonstrating implementation of modifications/accommodations needed for students with specialized instructional needs. Exhibit P-22.

17. After the January 28, 2019 change of placement meeting, Director attempted to set up visits to OSSE-approved nonpublic special education day schools for Student, but Director never heard back from Mother. Testimony of Director.

18. In fall 2018, Mother had Student seen by a psychiatrist who prescribed Amphetamine salts used for treating attention deficit-hyperactivity disorder. Testimony of Mother, Exhibit R-1. Student started taking the medication shortly before PCS made its change of placement request for Student. Director has observed some decrease in Student's impulsivity and aggressive behaviors and an increase in Student's ability to

complete work. Student's ability to stay on task has increased from 5 to 10 minutes to 15 to 20 minutes at a stretch. Director has not seen any big difference with Student, as she has observed in the past for other children with ADHD conditions only, who are started on medications. Testimony of Director. Since starting medications, Student's explosivity has not been at the same level and there has been a decrease in profanity. Once Student reaches an emotional threshold, Student is still not able to get past it. Student still absconds from the classroom. It is not substantially easier than before to redirect Student when needed. Testimony of Counselor. Student still has very aggressive behaviors, but with medications, it is verbal abuse – not touching other students. Testimony of Special Education Teacher.

### **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**

As provided in the D.C. Special Education Students Rights Act of 2014, except where there is a dispute about the appropriateness of the child's IEP or placement, or of the program or placement proposed by the local education agency, the party who filed for the due process hearing bears the burden of production and the burden of persuasion. As the Petitioner, PCS has the burden of persuasion in this case. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

### Analysis

Does Student require placement in a more restrictive environment than PCS, specifically a nonpublic special education day school?

Pursuant to the IDEA, as an independent local education agency (LEA), PCS must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. These alternative placements shall include instruction in:

- (a) Regular classes;
- (b) Special classes;
- (c) Special schools;
- (d) Home instruction; and
- (e) Instruction in hospitals and institutions.

*See* 5E DCMR § 3012. The D.C. Regs. require informed, written parental consent before making any change in the student's educational placement. *See* 5-E DCMR § 3026.1(b).<sup>2</sup>

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<sup>2</sup> 5E DCMR § 3026 provides:

#### PROCEDURAL SAFEGUARDS - CONSENT

3026.1 The LEA shall obtain informed written parental consent before:

- (a) Conducting an initial evaluation or reevaluation; and
- (b) Initial provision of special education and related services to a child with a disability and any change in the child's placement.

3026.2 If a parent refuses consent for initial evaluation or a reevaluation, the LEA may pursue those evaluations through mediation or due process consistent with this Chapter.

3026.3 The LEA is not required to obtain parental consent for assessment procedures as part of a reevaluation, if the LEA can demonstrate that reasonable measures have been taken to obtain consent and the parent has failed to respond.

3026.4 To demonstrate reasonable measures, the LEA shall maintain a record of its attempts to obtain informed parental consent, such as:

- (a) Detailed records of telephone calls made or attempted and the results of those

PCS initiated this administrative due process proceeding because it was unable to secure Mother's consent to the MDT team's decision at the January 28, 2019 change in placement meeting, that Student needs a special school placement, which would mean that Student would no longer be served at PCS.

The D.C. Regs. do not address what recourse an LEA has, if a parent refuses to consent to a change in her child's placement. It appears that this question is answered by reference to the federal IDEA regulation, 34 CFR § 300.300(b)(3), which 5-E DCMR § 3026.1(b) tracks. The federal regulation addresses a parent's refusal to consent to the initial provision of special education and related services to her child. In that circumstance, the public agency may *not* use due process procedures in order to obtain agreement or a ruling that the services may be provided to the child. However, the public agency,

- Will not be considered to be in violation of the requirement to make [a free appropriate public education (FAPE)] available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and

- Is not required to convene an IEP Team meeting or develop an IEP under 34 CFR §§300.320 and 300.324 for the child.

*See* 34 CFR § 300.300(b)(3).

By analogy, it follows that if an LEA in the District of Columbia establishes that a

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attempts;

- (b) Copies of correspondence sent to the parent and any responses received; and
- (c) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

*Id.*

student with a disability requires instruction in a more restrictive placement than the student's current educational setting, and the parent refuses to consent to the change in her child's placement, the LEA will not be considered to have denied the student a FAPE for failure to provide the student with ongoing special education and related services or for failure to convene an IEP team meeting to develop a revised IEP for the student.

The IDEA regulations provide that, in determining the educational placement of a disabled child, the public agency must ensure that the placement "[i]s based on the child's IEP." 34 C.F.R. § 300.116(b)(2). Courts have held that "the placement decision must be based on the IEP produced by the IEP team and cannot be made before the IEP is produced." *Board of Educ. of Tp. High School Dist. No. 211 v. Michael R.*, 2005 WL 2008919, at 14 (N.D.Ill. Aug. 15, 2005) (citing *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258–59 (4th Cir.1988)). *See, also, e.g., Roark ex rel. Roark v. District of Columbia*, 460 F. Supp. 2d 32, 43 (D.D.C. 2006) (Federal and D.C. regulations require placements to be "based on the child's IEP.")

Student's IEP, last revised on June 1, 2018, provides for Student to receive full-time Specialized Instruction as well as Behavioral Support Services outside general education – but not at a special school. On January 28, 2019, PCS convened the change in placement meeting for Student, but there was no evidence at the due process hearing that Student's IEP team has yet revised Student's June 1, 2018 IEP to change Student's educational placement.

In this proceeding, PCS is asking the hearing officer to determine that Student requires a more restrictive placement in a separate, special education day school – before Student's IEP team has met to review and revise Student's current IEP.

Procedurally, this is putting the cart before the horse. The preliminary step is for the IEP team to meet, pursuant to 34 CFR § 300.324(b), to review and revise, as appropriate, Student's June 1, 2018 IEP. If Student's IEP team revises Student's IEP to provide for a more restrictive educational setting and Mother were to refuse to consent to a change in Student's placement, then PCS could potentially seek due process relief under 34 CFR § 300.507(a)<sup>3</sup> as well as look to the safeguards of 34 CFR § 300.300(b)(3). Because Student's IEP team has not yet revised the June 1, 2018 IEP, PCS' complaint in this case is premature.

For the foregoing reasons, the relief requested by Petitioner herein must be denied.

### **ORDER**

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

This case is dismissed without prejudice to Petitioner's right to convene Student's IEP team to review Student's IEP and to revise, as appropriate, Student's IEP educational placement and, if warranted, to seek relief in a new administrative proceeding pursuant to federal and District of Columbia law.

Date: April 1, 2019

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

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<sup>3</sup> *Cf. Yates v. Charles Cty. Bd. of Educ.*, 212 F. Supp. 2d 470, 472 (D. Md. 2002) (Parent or a public agency may initiate a hearing when there is a dispute about a child's educational placement.)

### **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).

cc: Counsel of Record  
Office of Dispute Resolution  
OSSE Division of Specialized Education  
PCS Resolution Team