

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Dispute Resolution  
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<b>X PCS,</b>	)	
<b>Petitioner,</b>	)	<b>Room: 111</b>
	)	<b>Hearing: April 25, 2018</b>
<b>v.</b>	)	<b>Hearing Officer: Michael Lazan</b>
	)	<b>Case No.: 2018-0081</b>
<b>Parent, through Student,</b>	)	<b>Issue Date: May 9, 2018</b>
<b>Respondent.</b>	)	

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**HEARING OFFICER DETERMINATION**

**I. Introduction**

This is a case brought by the Local Educational Agency (“LEA”) involving a student (the “Student”) who is currently eligible for services. A Due Process Complaint (“Complaint”) was received by Respondent pursuant to the Individuals with Disabilities Education Act (“IDEA”) on March 22, 2018. This Complaint contained certain claims that must be “expedited” pursuant to 34 CFR Sect. 300.532.

No response was filed by the *pro se* parent (the “Parent” or “Respondent”). The resolution period expired on March 29, 2018.

**II. Subject Matter Jurisdiction**

This due process hearing was held, and a decision in this matter is being rendered, pursuant to the Individuals with Disabilities Improvement Act (“IDEIA”), 20 U.S.C. Sect. 1400 et seq., its implementing regulations, 34 C.F.R. Sect. 300 et seq., Title 38 of the D.C. Code, Subtitle VII, Chapter 25, and the District of Columbia Municipal Regulations, Title 5-E, Chapter 30.

### **III. Procedural History**

On April 10, 2018, this Hearing Officer held a prehearing conference. Attorney A, Esq., counsel for Petitioner, appeared. Respondent appeared *pro se*. Respondent was advised of her right to seek an attorney. A prehearing conference order was issued on April 16, 2018, summarizing the rules to be applied in this hearing and identifying the issues in the case.

There was one hearing date, April 25, 2018. This was a closed proceeding. Petitioner was represented by Attorney A, Esq. Respondent appeared *pro se*. Petitioner moved into evidence Exhibits 1-19. There were no objections. Exhibits 1-19 were admitted. At the close of testimony, both sides presented oral closing statements.

Petitioner presented as witnesses: Witness A, a Special Education Coordinator; and Witness B, Director of Student Support. Respondent presented herself as a witness.

### **IV. Credibility.**

The witnesses for Petitioner presented credible testimony that was consistent with documentation in the record. Respondent's testimony, while earnest, was sometimes difficult to understand and was less convincing than the testimony from the LEA.

### **V. Issues**

As identified in the Prehearing Conference Summary and Order and in the Due Process Complaint, the remaining issues to be determined are as follows:

1. Did Respondent unreasonably fail to give Petitioner consent to place the Student in an appropriate, more restrictive, therapeutic, nonpublic day school setting?
2. Should the Student remain in the interim alternative educational setting until the Student is placed in an appropriate therapeutic, nonpublic, special education day

school, pursuant to 34 CFR 300.532(b)(ii), because maintaining the Student's placement at X PCS is substantially likely to result in injury to the Student or others?

## **VI. Findings of Fact**

1. The Student is an X-year-old who is eligible for services as a Student with Other Health Impairment. The Student is in Z grade and below grade level in math and some reading areas. (P-2-1; P-4-1)

2. The Student began the 2017-2018 school year at X PCS, a charter school with 650 students, from pre-kindergarten through grade eight, across two campuses. (Testimony of Witness A)

3. The Student had significant behavioral issues early in the 2017-2018 school year. As a result, in or about October, 2017, an evaluation was initiated, and the Student was tested by a psychologist. Testing on the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition ("WPPSI-IV") showed that the Student was in the average range in all domains. Testing on the Wechsler Individual Achievement Test-Third Edition (WIAT-III) indicated that the Student was in the average range in listening and oral expression, and in some reading indicators. However, the Student was below level in reading comprehension, pseudoword decoding, and oral reading fluency. Math skills and written expression skills were deemed to be average. In terms of behavior, according to the Conners Comprehensive Behavior Ratings Scales, the Student scored in the "very elevated" level in regard to emotional distress, upsetting thoughts, separation fears, defiant/aggressive behaviors, hyperactivity/impulsivity, and violence potential. These ratings were based on the observations of the Student's teacher. (P-2)

4. Thereafter, in October, 2017, an eligibility meeting was held, in which the Student was determined to be eligible for services. (Testimony of Witness A)

5. By November, 2017, the Student's teacher reported that the Student was making some improvement in behavior with more frequent attention. However, the teacher was still concerned about the Student's poor attention and concentration, excessively high activity level, difficulty following directions, extreme mood swings, and difficulties staying on task. The Student was not making progress in schoolwork. (P-2-3)

6. By the end of November, 2017, the Student had an active IEP calling for 150 minutes per week of specialized instruction, with thirty minutes per week of behavioral support services and an aide for three hours per day. (Testimony of Witness A; P-4)

7. A Behavior Intervention Plan ("BIP") was created for the Student on or about December 12, 2017. The school began to support the Student with breaks, snacks with preferred adults, a token economy system, and incentive systems, but these interventions did not work. The Student would not return to task after receiving the positive reinforcements and would sometimes throw a tantrum as a result of the interventions. (Testimony of Witness A; Testimony of Witness B; P-6)

8. The Student continued to misbehave, resulting in school suspensions. By December, 2017, the Student's IEP was amended to provide for 12.5 hours of specialized instruction outside general education and 2.5 hours of specialized instruction inside general education, with a full-time aide. (Testimony of Witness A; Testimony of Respondent; P-8)

9. These interventions did not sufficiently help the Student. As a result, in or about February, 2018, the Student's specialized instruction hours were increased to 25 hours per week outside general education. These classes were with students from multiple grade levels who rotated in and out of the classroom. When the classes had children who were the same age as the Student, the Student might participate in the instruction. The Student was given grade-level to slightly below grade-level work. Much of the time, the Student would not do the work in these "resource room" classes, which ranged from four to nine students. The Student's behaviors continued to worsen, especially outside the resource room. The Student was engaging in physical altercations with adults and getting physical with classmates. Two adults from the school were kicked or bitten by the Student, and the Student also tried to choke an adult in the school. (Testimony of Witness A; Testimony of Witness B; P-9)

10. By February, 2018, the Student was saying that he/she wanted to hurt him/herself and wanted to die. The Student was hitting his/her head against a wall. When a police officer arrived at the school as a result of the Student's behavior, the Student reached for the officer's gun. The school had to change aides because the Student was violent with the first aide. After the second aide arrived, the Student bit the second aide. (Testimony of Witness B)

11. The school then scheduled a change of placement meeting with the Office of the State Superintendent of Education ("OSSE"). At the close of the meeting, the team decided to move forward with a change of placement because of the safety concerns posed by the Student. The team felt that "a number of very good private programs" could address many of the Student's needs. OSSE issued a letter on February 26, 2018,

recommending a change in placement. However, the Parent refused to consent to the change in placement, even though the Parent has indicated that X PCS is not an appropriate placement for the Student. (Testimony of Witness A; Testimony of Respondent; P-12)

12. The LEA then contacted nonpublic schools to place the Student temporarily, as an Interim Alternative Educational Setting (“IAES”). Though two schools expressed a willingness to accept the Student, the Parent did not consent to the placements. The schools indicated that they could not move forward without parent consent. As a result, Petitioner contacted School A, which offered the Student homebound tutoring services. (Testimony of Witness A)

13. At this time, the Student no longer attends X PCS. Instead, School A sends the Student’s work home. (Testimony of Witness A)

14. The Student requires a more therapeutic setting with a specialized curriculum, with work on adaptive and social skills built into the framework of the school. The Student needs teachers who are trained to work with a student who is given to extreme maladaptive behavior such as biting adults. (Testimony of Witness A)

## **VII. Conclusions of Law**

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

There is no dispute that the LEA can bring this Due Process Complaint. In fact, a public agency may file a due process complaint on matters relating to the

identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child. 34 CFR Sect. 300.507(a)(1).

1. Interim Alternative Educational Setting for the Student.

If a hearing officer decides that a child's current placement is substantially likely to result in injury to the child or others, the hearing officer may order a change of placement of the child with a disability to an appropriate Interim Alternative Educational Setting for not more than 45 school days. 34 CFR Sect. 300.532(b)(ii). A student's IEP team should determine the student's IAES. 34 CFR Sect. 300.531. While the IDEA does not specify the alternative setting in which educational services must be provided, the alternative educational setting must be selected "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." 34 CFR Sect. 300.530(d)(1). The United States Department of Education interprets the word "setting" to be the environment in which the child will receive services, such as an alternative school, alternative classroom, or home setting. What constitutes an appropriate IAES will depend on the circumstances of each individual case. 71 Fed. Reg. 46,722 (2006).

There is a substantial amount of evidence in the record, from testimony and documentation, that the Student has been engaging in violent outbursts at X PCS, including biting and attacks on staff. There is also testimony that the Student has threatened violence against him/herself during the 2017-2018 school year while at X PCS. The Student also has not been benefitting from instruction at X PCS as a result of

behavioral issues. There is no clear opposition to this from the Parent, who conceded that X PCS is not an appropriate setting for the Student.

The only question is whether the existing IAES, apparently consisting of School A sending schoolwork home to the Student, is sufficient for the Student. There is nothing in the record to suggest that the Student is deriving any educational benefit from this approach, or that the IAES is designed to enable the child to participate in the general curriculum or to meet IEP goals. Additionally, while it is permissible for the LEA to use home instruction as an IAES, the LEA has presented no authority to the effect that merely sending work home is sufficient in this regard. It is not clear from the record that a teacher is actually entering the home to provide any instruction to the Student.

Accordingly, the IEP team must immediately reconvene and establish an IAES that includes *at least the formal offer* of provision of services in the home by a certified special education teacher. Under the circumstances, the IEP team must, at a minimum, provide for at least ten hours of home instruction weekly so that the Student may be able to participate in the general curriculum and make progress on the Student's goals. If the parent refuses to allow the teacher into the home, alternative means of instruction may be considered and offered, including providing instruction through "Skype" or similar online services.

2. Consent.

5-E DCMR 3026.1(b) requires an LEA to obtain parental consent before any change in a child's placement. Since Respondent has refused to consent to changes in the Student's placement, the LEA is seeking a hearing officer's order to override that refusal

to consent and to place the Student in a school, in this case a therapeutic day school to be determined. This consent requirement is not contained in the IDEA.

It is not entirely clear from the DCMR whether a hearing officer has the authority to override a parent's refusal to grant consent for a change of placement. 5-E DCMR 3026.2 specifically provides that due process may be used to override a parent's refusal to consent to an initial evaluation or a reevaluation, but the DCMR does not specifically provide a hearing officer with the same authority relating to change of placement.

Nor does the DCMR specifically *forbid* a hearing officer from overriding an unreasonable parental refusal to consent to a placement. In the circumstances of this case, where OSSE has determined that the Student requires a change of placement to a more restrictive environment (P-12) and the testimony and evidence point to the appropriateness of a therapeutic placement, parental consent should be compelled to allow for placement of this Student in a school rather than at home. Although the Student's transition from general education to a restrictive placement occurred relatively rapidly, there is no need to go gradually through the continuum when it is obvious that the Student needs a self-contained setting. Accordingly, X PCS's request for an order requiring the parent to consent to the change in placement and change in location, so that OSSE can issue a location assignment to an appropriate therapeutic, nonpublic, special education day school, must be granted.

### **VIII. Order**

As a result of the foregoing:

1. The LEA shall reconvene its IEP team within five school days to provide for an IAES for the Student that will allow the Student to continue to participate in the

general curriculum and to progress on the goals in the Student's IEP in compliance with this decision;

2. Respondent is hereby required to provide consent to the change of placement and change of location recommended by the LEA and OSSE so that OSSE can issue a location assignment to an appropriate therapeutic, nonpublic, special education day school.

Dated: May 9, 2018

*Michael Lazan*  
Impartial Hearing Officer

cc: Office of Dispute Resolution  
Attorney A, Esq.  
Respondent  
OSSE Division of Specialized Education  
Contact.resolution@dc.gov

### **IX. Notice of Appeal Rights**

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 USC §1415(i).

Date: May 9, 2018

*Michael Lazan*  
Impartial Hearing Officer