

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

PUBLIC CHARTER SCHOOL,¹

Date Issued: October 25, 2021

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2021-0161

v.

Online Video Conference Hearing

PARENT, on behalf of STUDENT,

Hearing Date: October 21, 2021

Respondent.

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), a District of Columbia local education agency, under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and District of Columbia Municipal Regulations (DCMR), Title 5-E, Chapter 5-E30. In its due process complaint, PCS seeks a expedited determination, under 34 C.F.R. § 300.532(b)(3)(ii), that Student requires an appropriate interim alternative educational setting because maintaining the current placement is, allegedly, substantially likely to result in injury to the child or to others. In addition, PCS seeks a determination that Student requires a change in placement to a nonpublic therapeutic day school.

¹ Personal identification information is provided in Appendix A.

In its October 6, 2021 Due Process Complaint Notice, PCS named Mother as respondent. Mother did not file an answer to the due process complaint.

The undersigned hearing officer was appointed on October 7, 2021. On October 12, 2021, I convened a prehearing video conference with PCS' COUNSEL and the parent to set the expedited hearing date and to discuss issues to be determined and other matters. The final decision in this case is due within 10 school days of the October 21, 2021 hearing date, by November 4, 2021.

Due to the closing of the hearing rooms at the Office of Dispute Resolution in the wake of the COVID-19 virus outbreak, with the parent's consent, the due process hearing was held on line and recorded, using the Microsoft Teams video conference platform. The hearing, which was closed to the public, was convened before the undersigned impartial hearing officer on October 21, 2021. Mother appeared on line for the hearing and was not represented by counsel. Petitioner PCS was represented by SR. INCLUSION MANAGER and by PCS' Counsel.

PCS called as witnesses INCLUSION COORDINATOR, TEACHER, CASE MANAGER, ABA THERAPIST, DIRECTOR OF STUDENT SERVICES and called Sr. Inclusion Manager as a rebuttal witness. PCS' Exhibits LEA-1 through LEA 35, LEA 37, LEA-38, LEA 40 through LEA 47, LEA-49, LEA-51, LEA-52, and LEA 54 through LEA-60 were all admitted into evidence without objection.² Mother testified. Mother did not call any other witnesses or offer any exhibits.

² During the hearing, PCS' exhibits were referred to interchangeably with "R-" and "LEA-" prefixes.

PCS' Counsel and Mother both made opening Statements and Closing Arguments. There was no request to file post-hearing brief, but PCS Counsel submitted citations to authority and copies of administrative determinations by another Impartial Hearing Officer deemed persuasive.

JURISDICTION

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

ISSUES AND RELIEF SOUGHT

The issues to be resolved in this case, and relief requested, as set forth in my October 12, 2021 Prehearing Order, are:

- a. Whether Student requires placement in a more restrictive environment, specifically a therapeutic, nonpublic, special education day school;
- b. Whether Student should remain in the interim alternative educational setting until he/she is placed in an appropriate therapeutic, nonpublic, special education day school, pursuant to 34 C.F.R. § 300.532(b)(ii), because maintaining Student's placement at PCS is substantially likely to result in injury to the student or others;

PCS request the following relief in this proceeding:

- a. An order requiring the 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 to an appropriate therapeutic, nonpublic, special education day school;
- b. Alternatively, an order overriding the parent's refusal to consent and authorizing OSSE to issue a location assignment to a therapeutic, nonpublic, special education day school;
- c. An order determining that maintaining Student's placement at PCS is

substantially likely to result in injury to the student or others and approving Student's placement in an interim alternative educational setting until he/she is placed in an appropriate therapeutic, nonpublic, special education day school.

FINDINGS OF FACT

After considering all of the evidence received at October 21, 2021 due process hearing in this case, as well as the argument of PCS Counsel and the parent, this hearing officer's findings of fact are as follows:

1. Student, AGE child, is a resident of the District of Columbia. Mother has full legal custody of Student. Student's father has visitation rights. Student spends every other week with the father at the paternal grandmother's home in Maryland. Testimony of Mother. Student is eligible for special education and related services under the IDEA disability classification, Autism Spectrum Disorder (ASD). Exhibit LEA-16.

2. Since September 2019, Student has been enrolled at PCS, which serves as its own local education agency (LEA). Testimony of Inclusion Coordinator.

3. Student's October 7, 2019 PCS IEP provided for Student to receive 6 hours per week of Specialized Instruction Services, including 2 hours outside the general education setting, 10 hours per week of Behavioral Support Services in general education and 1 hour per week of Speech-Language Pathology outside general education. For Other Classroom Aids and Services, the IEP team reported, *inter alia*, that Student continuously needed to be monitored for safety throughout the school day and required the service of a dedicated aide. It was also reported that a Behavior Intervention Plan (BIP) was being developed and that passive physical restraint was to be used as a last

resort, when Student presented serious, imminent danger to self and/or others. Exhibit LEA-11.

4. During the 2019-2020 school year, Student was pretty dysregulated. Student initially eloped a lot from the classroom and ran around inside the school building. Student also screamed a lot. There were some incidents of aggression by Student, but these incidents were not extreme. After a dedicated aide was provided, with staff support, Student gradually became more regulated and acclimated to PCS. Student's challenging behaviors decreased. Testimony of Inclusion Coordinator.

5. Student's PCS IEP was amended on February 10, 2021. The February 10, 2021 IEP provided for Student to receive 5 hours per week of Specialized Instruction including 2 hours per week outside general education, 1 hour per week of Speech-Language Pathology outside general education, 10.5 hours per week of Behavioral Support Services, including 30 minutes per week outside general education, 45 minutes per week of Occupational Therapy, including 30 minutes per week outside general education as well as consultative services for Occupational Therapy, Behavioral Support, and Speech and Language. The February 10, 2021 IEP provided for Student to have extensive Other Classroom Aids and Services, including Applied Behavior Analysis (ABA) therapy and for Student to have a dedicated aide for 6.5 hours per day. Exhibit LEA-30.

6. In-person classes were suspended at PCS in March 2020 due to the COVID-19 pandemic. From March 2020 until June 2021, Student attended on line

virtual classes. Mother sought to enroll Student in PCS' hybrid in-person program beginning February 2021, but Mother was stymied because according to Mother, Student's father had unlawfully taken Student from Mother's custody. Testimony of Mother.

7. In June 2020, according to Mother, Student's father or paternal grandmother, took Student to live at the grandmother's home in Maryland without Mother's consent. From June 2020 through August 2021, Student resided, separate from Mother, at the grandmother's home in Maryland. Student was returned to Mother in August 2021. Testimony of Mother.

8. From March 2020 through the end of the 2020-2021 school year, with on-line virtual programming provided by PCS, Student made progress academically and made progress on IEP goals. Testimony of Case Manager.

9. At the start of the 2021-2022 school year, Student transitioned back to in-person classes at PCS. From the first day of the school year, Student has been very dysregulated. Student has repeatedly eloped from the classroom and run out of the school building. Student has shown a lot of physical aggressiveness to staff members. Staff have major concerns about Student's running into the street and being hit by a vehicle. Student has hurt staff members, by punching them, throwing things, biting, spitting and has used threatening language. One staff member had to receive healthcare treatment after an injury suffered trying to stop Student from eloping from the school building. Testimony of Inclusion Coordinator, Teacher, Testimony of Case Manager.

Testimony of ABA Therapist, Exhibit LEA-44.

10. On September 7, 2021, Student was suspended for one-half day as a consequence of several incidents in which Student allegedly hit and kicked at least four staff members, eloped multiple times, threw objects at multiple staff members, and climbed on furniture. Exhibit LEA-45.

11. On September 13, 2021 Student was suspended for one day as a consequence of several incidents in which Student allegedly hit and kicked at least two staff members, bit a staff member several times, eloped at least two times and climbed on furniture. Exhibit LEA-45.

12. Student's PCS IEP Team met to conduct an annual review of Student's IEP on September 17, 2021, September 20, 2021, and October 7, 2021 via Zoom video conference. For updated special education and related services, the IEP Team proposed 25 hours per week of Specialized Instruction, 1 hour per week of Speech-Language Therapy, 1 hour per week of Occupational Therapy, 1 hour per week of Behavior Support Services counseling therapy, 10 hours per week of Behavior Support Services ABA therapy, Consult services for Occupational Therapy, Speech-Language Therapy, Behavior Support Services Counseling and ABA, 20 minutes per month of parent counseling and training, and a Dedicated Aide for 7 hours per day. PCS proposed that Student's educational placement be changed to a nonpublic special education day school to be identified by OSSE, with an interim alternative placement in virtual learning during the change in placement process. At the meeting, Mother did not agree to the change in

educational placement or interim alternative placement proposal. Exhibits LEA-33, LEA-34, LEA-37.

13. On October 8, 2021, PCS issued Prior Written Notices (PWNs) to Mother giving notice that PCS would implement the IEP completed at the October 7, 2021 IEP team meeting and would implement an alternative educational setting while the present due process proceeding was pending. According to the PWN, the interim alternative educational setting would be virtual instruction and consist of 15 hours per week of specialized instruction, 1 hour per week of speech-language therapy, 1 hour per week of occupational therapy and 1 hour per week of counseling therapy. According to the PWN, the IEP Team determined that Student did not require ABA services during the interim alternative educational setting, because ABA therapy was not warranted when Student was in the home environment. Exhibits LEA-37, LEA-38. On October 13, 2021, upon Mother's request, PCS' Counsel advised that PCS would provide virtual ABA services for Student as part of the interim alternative services. Exhibit LEA-58.

14. PCS started implementing the interim alternative placement for Student, in the form of home-based virtual learning on or about October 7, 2021. Testimony of Director of Student Services. PCS has not provided an in-person aide to assist Student with virtual learning from home. Since PCS placed Student on home-based virtual learning, Mother has had to remain home with Student and has had to mostly curtail working. Due to Mother's lost income, Mother's partner has had to work double shifts. Testimony of Mother.

CONCLUSIONS OF LAW

Based upon the above findings of fact and 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:

Burden of Proof

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, PCS in this case, shall bear the burden of production and the burden of persuasion. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

Analysis

A.

- Does Student require an educational placement in a more restrictive environment, specifically a therapeutic, nonpublic, special education day school?
- Should the hearing officer issue an order requiring the parent to consent to the change in placement and change in location process, so that OSSE can issue a location assignment for Student to an appropriate therapeutic, nonpublic, special education day school?

Student, who receives special education as a child with Autism Spectrum Disorder (ASD), has been enrolled in Public Charter School (PCS) since the start of the 2019-2020 school year. Due to the suspension of in-person classes, beginning March 2020 due to the COVID-19 pandemic, Student participated in PCS' distance learning program from

March 2020 through the end of the 2020-2021 school year. In September 2021, Student returned to in-person classes at PCS.

From the first day of the current school year, Student has been extremely dysregulated at school as a result of his/her ASD disability. Student has repeatedly eloped from the classroom and has, on occasion, run out of the school building. Student has shown a lot of physical aggressiveness to staff members. Student has hurt staff members, by punching them, throwing things, biting and spitting and has used threatening language. One staff member had to receive healthcare treatment after an injury suffered trying to stop Student from eloping from the school building. School staff have major concerns about Student's running into the street and being hit by a vehicle.

PCS' experts, Director of Student Services and ABA Therapist, as well as other testifying PCS staff, opined persuasively that PCS is not able to support Student with his/her current level of needs and that Student requires placement in a specialized special education day school, which has the capability to provide a higher level of behavioral support. In her hearing testimony, Mother did not disagree with Student's immediate need for a more restrictive placement and voiced her openness to Student's being placed in a special education day school for the rest of the 2021-2022 school year. I conclude that PCS has met its burden of persuasion that Student requires placement in a more restrictive environment than PCS is able to provide, namely a special education day school capable of meeting the behavioral support and intervention needs of severely

dysregulated children with ASD disabilities.

PCS has not cited and I have not found persuasive authority that, under the IDEA or District of Columbia law, an impartial hearing officer is empowered to issue an order requiring the parent to consent to a change to a more restrictive placement or to a change in services location. I decline to order Mother to consent to a change in placement or to override the parent's alleged refusal to consent. However, Mother testified at the due process hearing that she would agree to PCS' moving forward with the change in location process, so that OSSE can issue a location assignment for a more restrictive placement for Student for the current school year. Based on the hearing evidence, I find that PCS should be authorized to proceed with requesting OSSE to place Student in an appropriate more restrictive school location.

B.

Should the hearing officer order a change in Student's placement to the interim alternative educational setting designated by PCS, namely Student's home, because Student's placement at PCS is substantially likely to result in injury to the child or to others?

On October 8, 2021, PCS issued a Prior Written Notice to Mother that, effective on or about October 7, 2021, Student would be placed in an interim alternative educational setting (IAES), which would be virtual instruction in the home, consisting of 15 hours per week of specialized instruction, 1 hour per week of speech-language therapy, 1 hour per week of occupational therapy and 1 hour per week of counseling therapy. Presumably, PCS would not allow Student to return to in-person classes until he/she

could start at a special education day school to be identified by OSSE.

The IDEA allows a hearing officer to order a change of placement of a child with a disability to an appropriate interim alternative educational setting (“IAES”) for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. *See* 34 C.F.R. § 300.532(b)(2)(ii). The appropriateness of the PCS IEP team’s IAES decision raises two questions: (1) Was Student’s continued in-person placement at PCS substantially likely to result in injury to the child or to others? (2) Is Student’s home an appropriate IAES?

As discussed in the preceding section, from the first day of the current school year, Student has been extremely dysregulated at school due to his/her ASD disability. As a result, Student’s placement at PCS has put both him/herself and staff members at risk of serious injury. I conclude that PCS has met its burden of persuasion that as of October 7, 2021, maintaining Student’s placement at PCS was substantially likely to result in injury to Student or to school staff. I conclude that a change of placement for Student to an appropriate IAES, initially for not more than 45 school days, may be ordered.

However, the IAES proposed by the LEA must be “appropriate.” In its 2006 guidance implementing changes to the IDEA statute, the U.S. Department of Education explained that the interim alternative educational setting must be determined by the child’s IEP team. What constitutes an appropriate interim alternative educational setting will depend on the circumstances of each individual case. Whether a child’s home would

be an appropriate IAES would depend on the particular circumstances of an individual case, such as the length of the removal and the child's individual needs and educational goals. *See* Department of Education, *Assistance to States for the Education of Children with Disabilities*, 71 Fed. Reg. 46540 at -722.

I find that the circumstances in this case do not support the IEP team's decision to provide Student virtual instruction in the home environment. First, no probative evidence on the length of the removal from in-person classes was offered at the hearing. Presumably that depends upon how long it will take OSSE to secure Student's admission to and enrollment in an appropriate non-public day school. At this point, that is an unknown factor.

Second, I find that PCS did not show that homebound virtual services, without the provision of an in-person aide or instructor was appropriate. As justification for this decision, PCS asserted that Student allegedly did well with virtual learning when PCS was closed during the COVID-19 pandemic. However, virtual instruction for children with disabilities was always considered a temporary option. The U.S. Department of Education has consistently made clear that "[o]nce school resume[d], the LEA must make every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP)." *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, Question A-1 (OSERS, March 2020). Now that PCS has resumed in-person education, the resort to virtual education for children with disabilities

is not appropriate unless warranted by the particular circumstances of the particular case.

In Student's case, the PCS IEP team has provided for the child to receive more than 17 hours per week of on-line specialized instruction and related services. At the present time, the child is extremely dysregulated due to his/her ASD disability. Assuming that Student is currently able to receive appropriate educational benefit from virtual learning, the child still requires direct, in-person, adult supervision to participate. Without that adult support, Student could not be reasonably expected to receive educational benefits from distance learning. *Cf. Bd. of Educ. Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (Courts review the IEP—including the child's placement—to determine if it is reasonably calculated to enable the child to receive educational benefits.)

PCS' designation of Student's home for the child's IAES assumes that the parent will provide the required in-person adult supervision for Student's distance learning program. But, if a child needs in-person supervision to benefit from distance learning, that is an IEP service which must be provided by the LEA. *See* 34 C.F.R. § 300.320(a)(4). (IEP must include statement of the supplementary aids and services to be provided to enable the child to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum.) Under PCS' IAES program, Student's access to education is dependent on Mother's staying home from work and supervising Student's virtual learning. That is not a FAPE. *Cf.*

Boose v. District of Columbia, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (If a child's access to appropriate education could depend on his parents' ability to pull him out of the deficient public program and front the cost of private instruction, the result would be manifestly incompatible with IDEA's purpose of ensuring that all children with disabilities have available to them a free appropriate public education.) I conclude that under the particular circumstances of this case, Student's home is not an appropriate IAES, where the LEA is not supplying a qualified instructor or aide to supervise Student during the distance learning and related services sessions. I find that PCS has not offered an *appropriate* interim setting Student. Hence, I deny PCS' request to approve Student's placement in home-based virtual learning as an appropriate interim alternative educational setting.

ORDER

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

ORDERED:

1. The hearing officer authorizes PCS to proceed with requesting OSSE to place Student in a more restrictive school location;
2. The hearing officer finds that at the present time, maintaining Student's in-person placement at PCS, pursuant to the pre-October 2021 IEP, is substantially likely to result in injury to Student or others;
3. PCS' request for an order approving Student's placement in the home-based virtual learning program as an appropriate interim alternative educational setting, under the current IAES program, is denied and
4. All other relief requested by the parties herein is denied.

Date: October 25, 2021

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).

cc: Counsel of Record
Mother
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