

**DC Office of the State Superintendent of Education
Office of Review & Compliance
Student Hearing Office
1150 5th Street, S.E.
Washington, D.C. 20003**

CONFIDENTIAL

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STUDENT HEARING OFFICE

<p>STUDENT, by and through PARENT,</p> <p>Petitioners,</p> <p>v.</p> <p>DISTRICT OF COLUMBIA PUBLIC SCHOOLS</p> <p>Respondent.</p>	<p>Case Number</p> <p>HEARING OFFICER'S DETERMINATION</p> <p>January 11, 2010</p> <p><u>Representatives:</u></p> <p>Ellen Douglass Dalton, Esq. Dalton & Dalton, P.C. For Petitioners</p> <p>Tanya Chor, Esq. Nia Fripp, Esq. Office of the General Counsel For Respondent</p> <p><u>Impartial Hearing Officer:</u> Peter B. Vaden</p>
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I. PROCEDURAL BACKGROUND

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner PARENT (“the Parent”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. §1400 et seq., and Title 5, Chapter 30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). This due process complaint arises out of the alleged denial of a Free Appropriate Public Education (“FAPE”) to STUDENT (“Student”) by reason of DCPS’s alleged failure to implement the October 5, 2009 placement decision of the Student’s Multidisciplinary Team (“MDT Team”) at CHARTER SCHOOL.¹ The Parent seeks an order requiring that DCPS fund the Student’s private placement at PRIVATE DAY SCHOOL (“PDS”), a day school in the District of Columbia, for the remainder of the 2009-10 school year.²

The due process hearing was held before the undersigned impartial hearing officer on January 5, 2010 at the Student Hearing Office in Washington, D.C. The hearing, which was opened to the public, was recorded on an electronic audio recording device. The Parent and Student appeared for the hearing and were represented by counsel. DCPS was represented by counsel. Counsel for both sides made opening and closing statements.

¹ Charter School, a public charter school, has elected to have DCPS serve as its Local Education Agency (“LEA”).

² In his due process complaint, the Parent also requested that DCPS be ordered to provide compensatory education to address alleged failure to provide the specialized instruction services specified in the Student’s June 2, 2009 Individualized Education Program. Counsel for the Parent stated that this issue was resolved before the hearing.

II. ISSUE

Whether the Student was denied a Free Appropriate Public Education (“FAPE”) by DCPS’ alleged failure to offer a placement based on the Student’s October 5, 2009 Individualized Education Program (“IEP”).

III. BURDEN OF PROOF

The burden of proof in this matter is the responsibility of the Parent, as the party seeking relief. *See* D.C. Regs. § 5-3030.3.

IV. FINDINGS OF FACT

The Parent called as witnesses himself, the Student, SPECIAL EDUCATION COMPLAINT SPECIALIST, SPECIAL EDUCATION/READING CONSULTANT and PDS ADMISSIONS DIRECTOR. DCPS called as its only witness SPECIAL EDUCATION COORDINATOR at NEIGHBORHOOD HIGH SCHOOL (“NHS”). Both parties offered school records and other documents which were admitted into evidence.³ I make the following findings of fact based upon the preponderance of the evidence.

1. The Student, years old, has attended Charter School, a District of Columbia public charter school, since the 2007-08 school year.
2. The Student was most recently found eligible for special education and related services in 2008, by the DCPS MDT/IEP Team, based upon the disability Speech or Language Impairment (“SLI”).

³ Parent’s Exhibit 20, a duplicate of a DCPS exhibit, was not offered.

3. The Student failed all of his Grade classes in his 2008-09 school year at Charter School. He was retained in the Grade for the 2009-10 school year.
4. The Student's June 2, 2009 IEP at Charter School provided for instruction in the regular classroom for all but 7 hours per week. He was to receive 5 hours per week of pull-out/resource support, 1 hour per week of Speech-Language Pathology and 1 hour per week of Behavioral Support.
5. At Charter School, the Student's regular classroom size is 20 students.
6. In an August 12, 2009 Hearing Officer Determination, Hearing Officer H. St. Clair awarded the Student 250 hours of tutoring in reading and speech/language services by a provider to be selected by the Parent.
7. The Student's MDT/IEP Team at Charter School met on October 5, 2009. At that time the Student was failing three of his classes. The MDT/IEP Team determined that the Student required "a small, structured setting in a Full-time separate school in order to be academically successful." (Exhibit P-13, p. 93) The Team requested that the Student's placement process be expedited so that he could get into a new setting as soon as possible.
8. After the October 5, 2009 MDT/IEP Team meeting, DCPS offered to place the Student only at Neighborhood High School, the Student's neighborhood school. At NHS, the Student would be placed in the regular classroom for all of his classes, except that he would be pulled out for one class per day in the special education resource room and would receive

one-on-one instruction for speech (1 hour per week) and counseling (1 hour per week). There would be 25 to 30 students in the regular classroom setting. They would be taught by the regular education teacher, assisted by a special education aide who would be present on a daily basis. The role of the special education aide would be to provide accommodations and modifications for the Student to enable him to access the same curriculum as his non-disabled peers.

9. NHS's special education coordinator testified that NHS is not a full-time separate school for special education students. SPECIAL EDUCATION/READING CONSULTANT, an expert in programs for students with reading disabilities, visited NHS to make an observation in November 2009. He concluded that NHS did not offer a small, structured setting as required in the Student's October 5, 2009 IEP.
10. PDS is a private day school where DCPS has placed special education students in the past. All students at PDS are full-time special education students. At PDS, the Student would be placed in a classroom of 12 students taught by a special education teacher and a teaching assistant. PDS has a full-time reading specialist who would work with the student two times per week on a one-on-one basis.
11. The Parent's expert, Special Education/Reading Consultant, has made an observation at PDS. Special Education/Reading Consultant testified that the Student's evaluations showed he had a reading disorder. He opined

that PDS's small classroom environment and pull-out time with the reading instructor, would be beneficial for the Student's reading disorder.

V. CONCLUSIONS OF LAW

The only issue raised by the Parent in this due process proceeding is whether the Student has been denied a FAPE by DCPS' alleged failure to offer a placement to implement the requirements of the October 5, 2009 IEP, which specified that the Student required a "small, structured setting in a Full-time separate school." Under the IDEA DCPS has the duty to ensure that the Student receives a FAPE. 20 U.S.C. § 1412(a)(1)(A). Thus, DCPS must provide both an appropriate IEP and an appropriate placement for the Student. *See O.O. ex rel. Pabo v. District of Columbia*, 573 F.Supp.2d 41, 50 (D.D.C. 2008), citing 20 U.S.C. § 1401(9). In this case, the parties agree that DCPS/Charter School provided an appropriate IEP for the Student, in the October 5, 2009 IEP, but disagree over whether the proposed placement at NHS offered by DCPS was appropriate.

Placement decisions must be made "in conformity" with federal and D.C. regulations which require, *inter alia*, that placements be "based on the child's IEP." *See* 20 U.S.C. § 1401(9)(D); 34 C.F.R. § 300.552(b)(2); D.C. Mun. Regs. tit. 5, § 3013.1(e) (2007). The evidence in this case establishes that DCPS' proposed placement at NHS is starkly at odds with the Student's IEP. The Student's MDT/IEP Team met in October 2009. At the time, the Student was failing under his June 2, 2009 IEP, which provided that he would receive services mostly in the general education classroom. The MDT/IEP Team concluded that the Student needed a new setting as soon as possible – a small,

structured setting in a full-time separate school. At NHS, the Student would not be placed in a small, structured setting. He would be taught mostly in the regular classroom, which, at NHS, would have 25-30 students. NHS is a general education high school. It is not a separate school for special education students. I find therefore that by offering only a placement at NHS, DCPS has failed to provide an appropriate placement for the Student.

Where DCPS has failed to provide an appropriate public school placement, a private school placement is “proper under the [IDEA]” if the education provided by the private school is “reasonably calculated to enable the child to receive educational benefits.” See *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994), quoting *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982); *Blackman v. District of Columbia*, 277 F.Supp.2d 71, 81 (D.D.C. 2003); *School Comm. of the Town of Burlington v. Department of Educ.*, 471 U.S. 359, 369 (1985). In the present case, the evidence establishes that placement of the Student at PDS would be proper. DCPS already places students at PDS. PDS meets the specific requirements of the MDT/IEP Team that the Student be placed in a small, structured setting in a full-time separate school. The Parent’s expert, Special Education/Reading Consultant, visited PDS and opined, that the program there would be beneficial for the Student.

DCPS did not dispute that PDS could provide an appropriate education for the Student, except to contend that a placement at PDS, which has no regular education students, would not conform to the Least Restrictive Environment (“LRE”) Provisions of the IDEA. See 34 C.F.R. § 300.550, 554; D.C. Mun. Regs. tit. 5, § 3011 (2007).

However, all members of the Student's IEP Team, including the DCPS representative, were in agreement with the October 5, 2009 IEP, which specified that the Student required a full-time separate school. *See* Exhibit P-14. The appropriateness of the IEP, including whether it conformed to the IDEA's LRE requirement, is not at issue in this due process hearing.

Finally, DCPS argues that, should I find that NHS was not an appropriate placement, I should defer ruling on the Parent's private placement request to allow DCPS time to offer another placement that meets the requirements of the IEP. DCPS has cited no authority for this position. By failing to offer the Student a placement which was based on his IEP, DCPS and Charter School denied the Student a FAPE in violation of the IDEA and the D.C. Regulations. The Student's right to FAPE cannot be further delayed while DCPS revisits its placement decision. *Cf. Wirta, supra* at 5 (No authority which permits a school system a second opportunity to conduct evaluations and propose an alternative placement where its failure to do so in the first instance violated the requirements of the IDEA.)

VI. DECISION

For the foregoing reasons, I find that the Parent has established that the Student was denied a FAPE as a result of DCPS' and Charter School's failure to offer a placement which was based on the Student's October 5, 2009 IEP. I further find that the placement proposed by the Parent at PDS is appropriate and that DCPS should be required to fund the Student's placement at PDS for the rest of the 2009-10 school year.

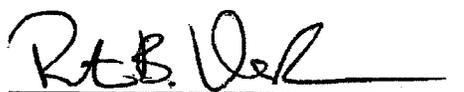
VII. ORDER

For the reasons set forth above, it is hereby ordered as follows:

1. The relief requested by the Petitioner, PARENT, herein is granted. DCPS is ordered to fund the Student's private placement at PDS for the remainder of the 2009-10 school year.

2. The Parent is the prevailing party in this due process hearing.

Dated this 11th day of January, 2010.



Peter B. Vaden
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).