**DISTRICT OF COLUMBIA**
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

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| PETITIONERS,[1] on behalf of STUDENT, | Date Issued: January 12, 2013 |
| Petitioners, | Hearing Officer: Peter B. Vaden |
| | Case No: 2012-0732 |
| v. | Hearing Date: January 9, 2013 |
| DISTRICT OF COLUMBIA PUBLIC SCHOOLS, | Student Hearing Office, Room 2009 Washington, D.C. |
| Respondent. | |

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STUDENT HEARING OFFICE
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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 Petitioners (the "Petitioners" or "Parents"), 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 their Due Process Complaint, Petitioners allege that Respondent District of Columbia Public Schools ("DCPS") denied Student a free appropriate public education ("FAPE") by failing to place her at NON-PUBLIC SCHOOL for the 2012-2013 school year. DCPS agrees that Non-Public School is an

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[1] Personal identification information is provided in Appendix A.

appropriate location of services for Student, but contends that, because Non-Public School does not have a full Certificate of Approval from the D.C. Office of the State Superintendent of Education ("OSSE"), it cannot place Student at Non-Public School unless ordered to do so by a special education hearing officer or a competent court of law.

Student, an AGE girl, is a resident of the District of Columbia. Petitioners' Due Process Complaint, filed on October 17, 2012, named DCPS as respondent. The case was assigned to the undersigned Hearing Officer on October 19, 2012. The parties met for a resolution session on November 20, 2012 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on November 18, 2012. On November 23, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters. On December 1, 2012, the Chief Hearing Officer granted Petitioners' unopposed motion for a 29-day continuance, resulting in an extension of the due date for this decision to January 29, 2013.

The due process hearing was held before the undersigned Impartial Hearing Officer on January 9, 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. Both Parents appeared in person and were represented by PETITIONERS' COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioners called as witnesses CHILD PSYCHIATRIST, MOTHER and DCPS NON-PUBLIC UNIT MANAGER. DCPS called no witnesses. Petitioners' Exhibits P-1 through P-34 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.

## ISSUES AND RELIEF SOUGHT

- WHETHER DCPS DENIED STUDENT A FAPE BY CHANGING HER PLACEMENT/LOCATION OF SERVICES FROM NON-PUBLIC SCHOOL TO APPROVED PRIVATE SCHOOL IN SEPTEMBER 2012, BECAUSE MOVING STUDENT FROM NON-PUBLIC SCHOOL AT THIS TIME WOULD BE HARMFUL TO HER; and

- WHETHER DCPS DENIED STUDENT A FAPE BY CHANGING HER PLACEMENT/LOCATION OF SERVICES TO APPROVED PRIVATE SCHOOL BECAUSE THAT SCHOOL IS UNABLE TO PROVIDE A FAPE TO STUDENT.

For relief, Petitioners seek an order for DCPS to fund Student's continued enrollment at Non-Public School for the 2012-2013 school year.

## 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, where she resides with Petitioners and a sibling. Testimony of Mother.

2. Student, who was born in eastern Europe, was adopted by Petitioners and came to this country at the age of 15 months. Exhibit P-12.

3. Student is eligible for special education and related services under the primary disability classification, Multiple Disabilities ("MD"). Exhibit R-2. In a September 2011 neuropsychological evaluation, NEUROPSYCHOLOGIST diagnosed Student with Multiple Handicaps/Multiple Disabilities, based on Other Health Impairment (Fetal Alcohol Spectrum Disorder/Traumatic Brain Injury/Static Encephalopathy); Severe Mixed Receptive-Expressive

Language Disorder; Severe neuropsychologically-based Dyslexia; Severe auditory and, primarily, visual-perceptual processing deficits; Bilateral sensorineural hearing loss; Organic Mood/Affective/Anxiety Disorder; Pervasive Developmental Disorder Not Otherwise Specified; and Hearing impaired. Exhibit P-12.

4. Parents noted an intensification of Student's behavior difficulties during the 2010-2011 school year, when Student attended CITY ELEMENTARY SCHOOL. In the summer of 2011, Student began attending FIRST PRIVATE SCHOOL. Exhibit P-9.

5. In December 2011, Student was admitted to the inpatient child unit at PSYCHIATRIC HOSPITAL, secondary to increased auditory and visual hallucinations to hurt herself and others. She was provided psycho-pharmacological treatment and discharged after 17 days to the hospital "partial day" school program. Student's discharge diagnosis was Mood disorder, psychotic. Exhibit P-11.

6. Student returned to First Private School after the 2011-2012 winter break, but was unable to remain at the school due to her disorder. She was readmitted to Psychiatric Hospital as an inpatient on January 12, 2012. Exhibit P-10.

7. On April 13, 2012, Petitioners' Counsel submitted a Request for Mediation to the Student Hearing Office, seeking, *inter alia*, a revision to Student's IEP and her placement in an appropriate school program. In the Request for Mediation, Parents asserted that Student had withdrawn from First Private School after she was hospitalized in January 2012 and that the only educational services Student had since received was the one-hour per day educational component of the Psychiatric Hospital's partial day program. Exhibit P-2.

8. In an April 24, 2012 Physician's Verification Form for DCPS Visiting Instruction Service, TREATING PSYCHIATRIST reported Student's mental health conditions, which

prevented her from attending school, as Mood disorder with psychotic features (paranoia); anxiety disorder leading to impaired attention and information processing; and impaired impulse control. Exhibit P-13.

9. In a May 14, 2012 Mediation Agreement with Parents, DCPS agreed, *inter alia*, to reimburse Parents for the costs associated with Student's enrollment at Non-Public School for the period May 16, 2012 through July 27, 2012, and to convene an IEP meeting to review and revise, as appropriate, Student's IEP. Exhibit R-1.

10. Student's May 18, 2012 DCPS IEP provides, *inter alia*, that Student will receive 27.5 hours per week of Specialized Instruction, 4 hours per month of Speech-Language Pathology, 4 hours per month of Behavioral Support Services and 360 minutes per month of Occupational Therapy, all outside of the general education setting. Exhibit R-2.

11. On May 22, 2012, DCPS issued a Prior Written Notice placing Student at Non-Public School for the 2012-2013 school year, "per the 5-14-2012 Mediation Agreement." Exhibit P-17.

12. Since May 16, 2012, Student has been enrolled at Non-Public School. Exhibit P-19. Student has made slow progress at Non-Public School where she has established a trusting relationship with clinical staff and is benefitting from daily individual therapy. As of the hearing date, Student can now tolerate a very small group setting and has started to engage in academic learning activities. She is able to remain in the classroom most of the time. Exhibit P-34, Testimony of Child Psychiatrist.

13. DCPS and the Petitioners agree that Non-Public School can implement Student's IEP and that Non-Public School is an appropriate location of services for Student for the 2012-2013 school year. Stipulation of counsel on the record (1/9/2013).

14. Non-Public School, which formerly had a full Certificate of Approval from OSSE, currently has a probationary Certificate of Approval. On August 15, 2012, OSSE approved a 90-day Corrective Action Plan for Non-Public School. Exhibit P-32. As of the date of the due process hearing, OSSE had not yet restored Non-Public School to full approval status. Testimony of Non-Public Unit Manager.

15. DCPS believes that it is not allowed to enroll Student at a private school that has only a probationary Certificate of Approval from OSSE. Despite issuing the May 22, 2012 Prior Written Notice placing Student at Non-Public School, DCPS never "enrolled" Student at Non-Public School because Non-Public School lacked a full Certificate of Approval. Testimony of Non-Public Unit Manager.

16. In an August 2, 2012 email, Program Director (Interim) of DCPS' Office of Special Education-Resolution informed Petitioners' Counsel that at the time DCPS issued the May 22, 2012 Prior Written Notice, the DCPS Resolution team had been unaware that Non-Public School was unable to accept or enroll any additional students from the District due to the school's probationary Certificate of Approval status. Exhibit P-31.

17. On September 25, 2012, OSSE issued to Parents a Notice of Location Assignment changing Student's location assignment to Approved Private School. Exhibit P-21.

18. In the opinion of Child Psychiatrist, whom I found to be a credible witness, Student needs structure, stability and a relationship of trust with school staff. If Student had to change schools at this juncture, it could significantly set her back, because of the anxiety and stress associated with meeting new teachers, staff, clinicians and physicians and with the change in physical environment. If highly agitated, Student would have "incredible" difficulty obtaining access to learning and could be put at great risk for regression. Considering Student's recent

psychiatric history, there would be a likely increased risk of her requiring re-hospitalization. Testimony of Child Psychiatrist, Exhibit P-34.

19. During the pendency of this due process proceeding, Student has remained in her educational placement at Non-Public School, at public expense, pursuant to the IDEA's stay-put provision, 20 U.S.C. § 1415(j). Exhibit P-5.

## 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

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioners 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

- Did DCPS deny Student a fape by changing her placement/location of services from Non-Public School to Approved Private School in September 2012 because moving Student from Non-Public School at this time would be harmful to her?

In their request for due process, Petitioners complain of OSSE's September 25, 2012 Notice of Location Assignment, which notified Parents that it had issued a location assignment for Student to Approved Private School.[2] The purpose of the IDEA is "to ensure that all children

[2] OSSE's Notice of Location Assignment does not implement a child's placement at the identified location. According to the notice, that occurs when the sending LEA issues a Prior Written Notice of placement. In this case, DCPS has not issued a Prior Written Notice changing Student's placement or location of services from Non-Public School. However Non-Public Unit Manager testified that DCPS had not "enrolled" Student at Non-Public School or any other school for the 2012-2013 school year. Despite DCPS' omission to issue a Prior Written Notice, for purposes of this HOD, I will assume that DCPS proposes to change Student's placement or

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). "[C]ourts review the IEP – including the child's placement – to determine if it is 'reasonably calculated to enable the child to receive educational benefits.'" *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp.2d 32, 39 (D.D.C.2006) (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). *See, also, Schoenbach v. District of Columbia*, No. 05-1591, 2006 WL 1663426, at *4 n. 3 (D.D.C. June 12, 2006) (stating that reviewing the IEP includes evaluating the student's placement.)

I find that Student's placement at Approved Private School, as provided in the September 25, 2012 Notice of Location Assignment, was not reasonably calculated to enable Student to receive educational benefits. Student, who was repeatedly hospitalized in 2011 and 2012 for a mood disorder with psychotic features, was, for weeks, unable to attend school or benefit educationally from her IEP. In May 2012, Parents enrolled Student in Non-Public School. In a

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location of services from Non-Public School to Approved Private School.

May 14, 2012 Mediation Agreement, DCPS agreed to reimburse Parents for Student's first 10 weeks of attendance at Non-Public School. Since enrolling in Non-Public School, Student has established a trusting relationship with clinical staff and is benefitting from daily individual therapy. She has made slow educational progress and has started to engage in academic learning activities.

Assuming, without deciding, that Approved Private School is otherwise capable of fulfilling Student's IEP needs[3], I find it would be too disruptive for this Student, and not meet her unique needs, to require her to change schools at this time. *Cf. Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 12-13 (D.C. Cir. 2005) (Asking whether setting aside placement order might disrupt child's education.) In the opinion of Child Psychologist, if Student had to change schools at this juncture, the anxiety and stress associated with meeting new teachers, staff, clinicians and physicians and with the change in physical environment could significantly set her back. She would risk "incredible" difficulty obtaining access to learning and could be put at great risk for regression. DCPS agrees that Non-Public School can implement Student's IEP and that Non-Public School is an appropriate location of services for Student for the 2012-2013 school year. I find, therefore, that by not continuing Student's placement at Non-Public School, DCPS has denied Student a FAPE.[4]

## REMEDY

Petitioners request that I order DCPS to fund Student's private placement at Non-Public School for the remainder of the 2012-2013 school year. "[W]here a public school system has

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[3] Because of my disposition of the first issue in this matter, I do not reach the second issue asserted by the Petitioners, whether Approved Private School is unable to provide a FAPE to Student.

[4] I note that DCPS has acted in good faith throughout this proceeding. DCPS' decision not to continue Student's placement at Non-Public School, without an order from a special education hearing officer, was based upon its reasonable interpretation of the requirements of 5 DCMR A § 2803.6.

defaulted on its obligations under the IDEA, a private school placement is 'proper under the Act' if the education provided by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994) (quoting *Rowley, supra*, 458 U.S. at 176., 102 S.Ct. at 3034.)[5] In this case, the parties agree that the education provided by Non-Public School is reasonably calculated to enable Student to receive educational benefits. DCPS stipulates that Non-Public School can implement Student's IEP and that Non-Public School is an appropriate location of services for Student.[6] I conclude, therefore, that Student's private placement at Non-Public School is proper under the IDEA.

ORDER

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

1. DCPS shall place Student, at public expense, at Non-Public School for the 2012-2013 school year, effective the beginning of the school year;

2. Within 15 school days of entry of this order, DCPS shall initiate and conduct an IEP meeting to revise, as needed, Student's IEP and to effect her placement at Non-Public

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[5] At the due process hearing, DCPS' Counsel stipulated that Non-Public School placement was appropriate for Student under the set of conditions identified by the D.C. Circuit in *Branham v. Gov't of the District of Columbia*, 427 F.3d 7 (D.C. Cir.2005). *See id.* at 8-9.

[6] DCPS believes its "hands are tied" by the requirements of 5 DCMR A § 2803.6 because Non-Public School has only a probationary Certificate of Approval. This provision of the DCMR provides,

> A nonpublic special education school or program with a probationary certificate of approval may not accept or enroll any additional students from the District of Columbia until OSSE issues a certificate of approval with full approval status, or a student placement at the school or program is ordered by a court of law or a hearing officer decision pursuant to 34 C.F.R. 300.513.

*Id.* By its terms, Section 2803.6 acknowledges the authority of a hearing officer to order that a child be placed at a nonpublic special education school with a probationary Certificate of Approval. *Cf. Florence County School Dist. Four v. Carter*, 510 U.S. 7, 12-13, 114 S.Ct. 361 (1993) (Parents not barred from reimbursement where private school, not on state's approved list, provided an education otherwise proper under IDEA.)

School. DCPS shall ensure that a Non-Public School representative attends the IEP meeting pursuant to 34 CFR § 300.325(a)(2); and

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

Date: January 12, 2012

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).