

STATE EDUCATIONAL AGENCY FOR THE DISTRICT OF COLUMBIA
STATE ENFORCEMENT AND INVESTIGATION DIVISION (SEID)
SPECIAL EDUCATION PROGRAMS

on behalf of,

Student,
(DOB STARS

Petitioner,

Case No.
Bruce Ryan, Hearing Officer

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Hearing: April 30, 2009
Decided: May 10, 2009

Respondent.

OSSE
STUDENT HEARING OFFICE
2009 MAY 11 AM 7:47

HEARING OFFICER DECISION

I. PROCEDURAL BACKGROUND

This Due Process Complaint was filed on March 26, 2009, on behalf of an _____ year old student (the "Student") who resides in the District of Columbia and attends _____ School. Petitioner is represented by Donovan Anderson, Esq., and Respondent District of Columbia Public Schools ("DCPS") is represented by Tanya Chor, Esq., Assistant Attorney General for the District of Columbia.

The complaint was brought pursuant to the Individuals with Disabilities Education Act ("IDEA"), as amended, 20 U.S.C. §§1400 *et seq.*, and its implementing regulations, as well as relevant provisions of the District of Columbia Code and the Code of D.C. Municipal Regulations. The complaint alleges, *inter alia*, that the school program at _____ is not appropriate for the Student, and that DCPS has thereby denied the Student a free appropriate public education ("FAPE"), as discussed further below. DCPS filed a response on April 6, 2009, which denies that the Student is currently in an inappropriate educational placement and asserts that there has been no educational harm to the Student.

A Prehearing Conference ("PHC") was held on April 15, 2009, and a Prehearing Order was issued the same date clarifying the issues and requested relief. Five-day disclosures were filed by both parties as required, on or about April 23, 2009.

The Due Process Hearing convened on April 30, 2009. At the hearing, five documentary exhibits submitted by Petitioner (identified as ' 1' through ' 5') and 20 documentary exhibits submitted by DCPS (identified as "DCPS-1" through "DCPS-21"¹) were admitted into evidence without objection. Petitioner presented four witnesses – parent (Petitioner); _____ (the Student's general education teacher at _____ since September 2008); Nicole Reed (Community Connections counselor); and _____ (Admissions Director,

¹ The series of DCPS exhibits submitted at hearing included an exhibit 7A, but omitted numbers 10 and 15.

Academy). DCPS presented no witnesses and chose to rest on the record at the close of Petitioner's case.

This decision constitutes the Hearing Officer's determination pursuant to 20 U.S.C. §1412 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures* ("SOP").

II. ISSUE(S) AND REQUESTED RELIEF

As indicated in the Prehearing Order, and as discussed further at the outset of the Due Process Hearing, the following two overlapping issues were presented for determination:²

- a. ***Inappropriate educational placement*** - Whether DCPS has failed to provide an appropriate placement/location for the Student because the current school program at _____ does not provide the full-time behavioral and therapeutic supports the Student requires; and
- b. ***Inappropriate IEP*** - Whether DCPS has failed to develop an appropriate IEP for the Student in that, *inter alia*, the current 14 hours per week of specialized instruction and related services in a combination setting is insufficient to meet the Student's academic and behavioral needs.

As relief, the complaint primarily seeks to have DCPS place and fund the student to attend a school program that includes a full-time therapeutic setting that can address her particular academic and behavioral needs.³

III. FINDINGS OF FACT

1. The Student is an _____-year old resident of the District of Columbia whose date of birth is November 20, 2000. *See* _____-1; Parent Testimony.
2. The Student currently attends _____ where she is in the _____ grade. *See* _____-1; Parent Testimony.
3. The Student has been determined to be eligible for special education and related services as a child with a disability, classified as having an Emotional Disturbance ("ED"). *See* _____-2 (11/13/08 IEP); DCPS-3 (4/20/09 IEP).
4. At the time the complaint was filed, the Student had a current Individualized Education Program ("IEP") dated November 13, 2008, which calls for 12 hours per week of specialized instruction outside the general education setting, as well as 60 minutes per week of Behavioral Support Services and 60 minutes per week of Speech-Language Pathology, also outside the general education setting. _____-2.

² While in most cases discussion of appropriateness of the IEP would logically precede discussion of the appropriateness of a placement/location to implement the IEP, the issues are discussed here (as in the PHO) in the order they were alleged in the complaint and addressed by both counsel. As the discussion reflects, this order of consideration may well be appropriate under the particular circumstances of this case.

³ At the PHC, Petitioner's counsel withdrew the compensatory education claim alleged in the complaint.

5. The Student has had a significant amount of behavioral concerns at See -5 and DCPS-14 (Memorandum from to Ms. Todd, SEC); DCPS-5 (Anecdotal Behavioral Log); *see also* -1; Parent Testimony; Testimony. Behavioral incidents this school year have included: violent outbursts; destruction of school property; physical attacks on other students; and physical attacks on teachers (including biting, punching and kicking). *See* DCPS-5; 5. She has been suspended numerous times, and school security and/or police have been called to remove her from the school on several occasions. *Id.*; *see also* DCPS-6 through DCPS-9. In addition, she often has refused to complete classroom assignments. 5; DCPS-5; Parent Testimony; Testimony.

6. On March 5, 2009, the Student's general education teacher wrote a memorandum to Special Education Coordinator ("SEC") to inform her of the concerns about the Student's behavior. wrote that the Student's behavior posed "an imminent threat to the students and teachers of school." 5; DCPS-14. The teacher stated: "I seriously believe that is not the place for [the Student]. Her needs are beyond what we have to offer." *Id.*, p. 3. She noted that despite numerous strategies that had been put in place in an effort to help the Student with her behavioral problems over a significant period of time, the Student "continues to display unacceptable behavior on a regular basis." *Id.*

7. At the hearing, further testified that she believed that the services provided to the Student at were not appropriate to meet her needs, and that she saw little positive change in her academics or behavior from November 2008 to March 2009. *See* Testimony.

8. In March 2009, the Student's functional behavior assessment ("FBA") also noted a variety of behavioral issues and incidents that were impacting her academic functioning; and the MDT determined to add a one-to-one aide to the Student's educational program. *See* Parent Testimony; Testimony; DCPS-7A; DCPS-16.

9. Even after the one-to-one aide was added, the Student continued to experience behavioral problems, including an incident in which she struck a teacher. *See* Parent Testimony. As a result, the Student was hospitalized at The Psychiatric Institute of Washington ("PIW") for approximately 14 days. *Id.*

10. The Student was discharged from PIW on or about March 30, 2009. DCPS-17; Parent Testimony. Behavioral problems have continued to occur since that time, including an incident with a teacher during lunch that required school officials to call police. *Id.*; *see* DCPS-6.

11. Subsequent to the filing of the complaint and the PHC, the Student's Multi-disciplinary Team ("MDT") met on April 20, 2009, to discuss the Student's behavior and any further changes required to her behavioral plan. *See* DCPS-4 (MDT meeting notes). The team noted some progress regarding behavior within the classroom, but found that the Student "has exhibited disruptive behaviors as well as combative behaviors during lunch." *Id.* As a result of an incident the week prior to the meeting, the Student's schedule was modified to permit additional, intensified counseling services (from Community Connections). *Id.* Speech therapy services were also increased to 90 minutes weekly, and a revised IEP was adopted incorporating this change. DCPS-3; DCPS-4.

12. The Student's schedule was also modified by DCPS to allow her to spend a portion of her school day in a pre-Kindergarten class, where she functions mainly as a "teacher's

helper.” Parent Testimony; DCPS-03-9. DCPS believes that this assists with the Student’s behavioral issues, by controlling her behavior in a “non-threatening environment.” Testimony (cross examination). However, the parent believes that placing the Student with younger children does not confer educational benefit, and in fact is detrimental to her progress both academically and socially. Parent Testimony. The revised schedule also appears to cause the Student to miss some of her regular 2d grade reading block. See Testimony.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. Burden of Proof

1. The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see also Weast v. Schaffer*, 126 S. Ct. 528 (2005) (burden of persuasion in due process hearing under IDEA is on party challenging IEP); *L.E. v. Ramsey Board of Education*, 44 IDELR (3d Cir. 2006). This burden applies to any challenged action and/or inaction, including failures to develop an appropriate IEP or make an appropriate placement.

2. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See* DCMR 5-3030.3. The standard generally is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008).

3. For the reasons discussed below, the Hearing Officer concludes that Petitioner has carried her burden of proving her claims under both of the stated issues by a preponderance of the evidence.

B. Issues/Alleged Violations by DCPS

(1) *Whether DCPS has denied a FAPE by failing to provide the Student an appropriate placement/location because the current school program at does not include the behavioral and therapeutic supports needed; and*

4. Petitioner’s primary claim is that the school program at is not appropriate for the Student. Specifically, Petitioner alleges that the Student “is having a significant amount of behavioral concerns at that the “school staff is unable to support her both academically and behaviorally in the setting,” and that it is “the view of the regular education teacher that the Student is an imminent threat to the students and teachers at -2, p. 3.

5. As noted in the Findings of Fact, Petitioner presented detailed testimony and other evidence supporting each of the above allegations at the hearing, and that evidence was not rebutted by DCPS. DCPS failed to offer any testimony from the SEC or Principal at or from any DCPS teacher or other staff official — contradicting the testimony presented by Petitioner.

6. Indeed, while DCPS argues that is an appropriate placement, DCPS presented as part of its own case a documentary exhibit authored by the Student’s regular

education teacher (DCPS-14), corroborating Petitioner's claims. Thus, the inappropriate placement issue is essentially undisputed.

7. The record developed at hearing indicates that the current school program/ placement at _____ is inappropriate and unable to meet the Student's unique special education needs. Among other things, it does not include the behavioral and therapeutic supports the Student needs to access her education. As a result, the inappropriate placement has caused a deprivation of educational benefit and constitutes a denial of FAPE to the Student. See 34 C.F.R. §300.513(a)(2).

(2) Whether DCPS has failed to develop an appropriate IEP for the Student in that, inter alia, the current 14 hours per week of specialized instruction and related services in a combination setting is insufficient to meet the Student's academic and behavioral needs.

8. In a related claim, Petitioner next alleges that "at the most recent MDT meeting, DCPS refused to increase the Student's IEP hours but instead added a one-to-one aide to her program." 2, p. 3. Petitioner claims that both the "regular education teacher and the parent disagreed with the appropriateness of the program even after the addition of this service"; and that "[s]ince the addition of the aide the Student continues to have the same behavioral concerns in the school as she had prior to her addition." *Id.*

9. As discussed above under the inappropriate placement issue, the record evidence supports these allegations. The evidence strongly suggests that the Student's current IEP (which includes only 12 hours per week of specialized instruction and one hour of counseling) is not reasonably calculated to enable the Student to receive meaningful educational benefit,⁴ given her documented history of severe emotional and behavioral challenges. Moreover, the only DCPS teacher who testified at the hearing agreed that this level of services is insufficient. Thus, the Hearing Officer concludes that Petitioner has also carried her burden of proving this claim by a preponderance of the evidence.

C. Relief

10. The IDEA authorizes district courts and hearing officers to fashion "appropriate" relief, e.g., 20 U.S.C. §1415(i)(2)(C)(iii), and such authority entails "broad discretion" and implicates "equitable considerations," *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15-16 (1993); *Reid v. District of Columbia*, 401 F.3d 516, 521-23 (D.C. Cir. 2005). As reflected in the Order below, the Hearing Officer has exercised his discretion to fashion appropriate equitable relief, based on the record developed in this proceeding and the particular violation(s) adjudicated herein.

11. First, because DCPS has failed to provide an appropriate placement for the Student, DCPS will be ordered to place the Student at _____ Academy, which is the parent's choice of private schools. The relevant considerations in determining whether a particular placement is appropriate for a student include:

⁴ See *Board of Education v. Rowley*, 102 S. Ct. 3034 (1982); *Kerkam v. McKenzie*, 862 F. 2d 884 (D.C. Cir. 1988).

“the nature and severity of the student’s disability; the student’s specialized educational needs; the link between these needs and the services offered by the private school, the placement’s cost, and the extent to which the placement represents the least restrictive educational environment.”

Branham, 427 F.3d at 12, citing *Board of Education v. Rowley*, 458 U.S. 176, 202 (1982).

12. Here, the uncontroverted evidence shows that [redacted] is an appropriate placement to meet the Student’s needs and otherwise fulfill the IEP. [redacted] has accepted the Student into its program, where she will become the 10th student in an existing class of ED students with a certified special education teacher and aide. See Clarke Testimony. There also are five licensed clinical social workers on staff. *Id.* The Admissions Director believes she is a “good fit” for the program due to the small class size, structuring of classrooms to reduce distractions, and other attributes of the program. *Id.*

13. The only criterion that DCPS seriously questions is whether such full-time out-of-general education placement would be consistent with DCPS’ obligations under IDEA’s “least restrictive environment” (LRE) requirement. DCPS argues (*inter alia*) that the Student’s exposure to younger general education students in the pre-K class is a positive factor, since “modeling” is critical. Considering the record evidence as a whole, however, the Hearing Officer concludes that Petitioner’s proposed placement has been shown to be consistent with LRE requirements. The undisputed evidence suggests that “the nature and severity of the [Student’s] disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily...” 20 U.S.C. §1412(a)(5)(A); see, e.g., *Oberti v. Board of Education*, 995 F. 2d 1204 (3d Cir. 1993); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036 (5th Cir. 1989). Moreover, the testimony indicated that interaction and role modeling with the much younger general pre-K students may well harm rather than benefit the Student. See, e.g., Parent Testimony. Finally, there is significant evidence of possible negative effects that the Student’s inclusion may have on the education of other children in the regular classroom, given the history of violent attacks and other disruptive behaviors. Cf. *Sacramento City Unified School District v. Holland*, 4 F. 3d 1398 (9th Cir. 1994); *Oberti, supra*, 995 F. 2d at 1217.

14. Second, since “IDEA continues to obligate DCPS to come forward with a plan that meets [the Student’s] needs” through the MDT/IEP process, *Branham v. District of Columbia*, 427 F.3d 7, 13 (D.C. Cir. 2005); see 20 U.S.C. §1412(a)(1)(A), DCPS will be ordered to convene a further MDT meeting within 30 days of placement at [redacted] to review and revise the IEP to address the Student’s unique needs consistent with the new placement.

V. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby ordered:

1. Within **10 school days** DCPS shall issue a Prior Notice of Placement authorizing and funding the full-time placement of the Student at [redacted] **Academy** for the appropriate program referenced in this HOD. The Student shall maintain a minimum attendance record of 90% attendance over the course of the school year, except to the extent that illness, hospitalization, or other incapacitation prevents the Student from attending classes.

2. Within **30 calendar days** of placement at _____ Academy, the Student's MDT/IEP team shall meet to review and revise, as appropriate, the Student's IEP to govern the provision of specialized instruction and related services in the program in which she becomes enrolled.
3. All written communications from DCPS concerning the above matters shall include copies to counsel for Petitioner, Donovan Anderson, Esq., via facsimile (202-610-1881), or via email (D.Anderson@donovananderson.com).
4. Any delay in meeting any of the deadlines in this Order caused by Petitioner or Petitioner's representatives (e.g., absence or failure to attend a meeting, or failure to respond to scheduling requests) shall extend the deadlines by the number of days attributable to such delay.
5. This case shall be, and hereby is, **CLOSED**.

Dated: May 10, 2009



/s/
Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to 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 Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).