

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street, NE, 2nd Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
April 05, 2013

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PETITIONER,<sup>1</sup>  
on behalf of STUDENT,

Date Issued: April 4, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

Case No: 2013-0053

v.

Hearing Date: March 25, 2013

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Student Hearing Office, Room 2009  
Washington, D.C.

Respondent.

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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 Petitioner (“Petitioner” or “Mother”), 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 her Due Process Complaint, Petitioner alleges that DCPS has denied Student a free appropriate public education (“FAPE”) by failing to provide him an appropriate educational placement.

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<sup>1</sup> Personal identification information is provided in Appendix A.

Student, an AGE adolescent, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on January 30, 2013, named DCPS as respondent. The case was assigned to the undersigned Hearing Officer on February 1, 2013. The record does not establish whether the parties met for a resolution session. The 45-day deadline for issuance of this Hearing Officer Determination began on March 2, 2013. On February 25, 2013, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on March 25, 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. The Petitioner appeared in person and was represented by PETITIONER'S COUNSEL. Respondent DCPS was represented by PCS SPECIAL EDUCATION COORDINATOR and by DCPS COUNSEL.

The Petitioner testified and called as witnesses, EDUCATIONAL ADVOCATE and INDEPENDENT PSYCHOLOGIST. DCPS called as witnesses, PCS Special Education Coordinator and LEA REPRESENTATIVE at CITY ACADEMY. Petitioner's Exhibits P-1 through P-8 were admitted into evidence without objection, with the exception of Exhibits P-4, P-7, and P-8 which were admitted over DCPS' objections. DCPS' Exhibits R-1 and R-2 were admitted without objection, with the exception of Exhibit R-4, which was admitted over Petitioner's objection.

At the end of Petitioner's case in chief, DCPS make an oral motion for a directed finding in its favor, on the basis that Petitioner has not made a *prima facie* case that Student's January 22, 2013 IEP could not be implemented at City Academy. I took the motion under advisement.

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 has denied Student a FAPE by failing to change his placement from PUBLIC CHARTER SCHOOL (“PCS”) and by failing to identify a school placement capable of fulfilling his current IEP needs for full time special education and related services outside of the general education setting.

In her original prayer for relief, Petitioner requested an order for DCPS to fund Student’s nonpublic placement for the remainder of the 2012-2013 school year at an appropriate private school. As of the date of the due process hearing, Student had not yet been accepted for admission by a private school. The relief now requested by Petitioner is a finding that City Academy, which has been identified by DCPS as Student’s location of services, is not an appropriate placement for Student.

### **PARTY STIPULATIONS**

The parties, by counsel agreed to the following stipulations at the February 25, 2013 prehearing conference:

- i. Student’s IEP team met on January 23, 2013<sup>2</sup> and revised Student’s IEP.
- ii. At the January 23, 2013 IEP meeting, the IEP team agreed that Student’s appropriate placement was a full-time special education program outside of the general education setting, providing 28 hours per week of specialized instruction and 2 hours per week of behavior support services. Petitioner agrees with the content of the revised IEP, except to the extent that the IEP does not specify

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<sup>2</sup> Although PCS LEA Representative signed the IEP on January 23, 2013, it appears that the IEP meeting was held on January 22, 2013 – not January 23, 2013. See Exhibit R-1. The IEP will be referred to in this decision as the “January 22, 2013 IEP.”

Student's need for a "therapeutic" setting; and

- iii. DCPS has notified Petitioner that PCS is unable to implement the January 23, 2013 IEP and that City Academy would be the ongoing location of services for Student. DCPS issued a Prior Written Notice ("PWN") for Student's placement at City Academy on February 6, 2013.

See Prehearing Order, Feb. 25, 2013.

### **FINDINGS OF FACT**

After considering all of the evidence<sup>3</sup>, 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. Testimony of Mother.
2. Student is eligible for special education and related services under the primary disability classification, Emotional Disturbance ("ED"). Exhibit R-1. Student also has an Other Health Impairment ("OHI") disability due to Attention Deficit Hyperactivity Disorder ("ADHD") and Oppositional Defiant Disorder ("ODD"). Testimony of Mother.
3. Student has received special education services since kindergarten. Testimony of Mother.
4. Student, formerly a resident of [REDACTED] enrolled in DCPS schools when he was in the 4<sup>th</sup> grade. In a June 11, 2010 psychological evaluation, a DCPS psychologist reported that teachers' responses on the Behavior Assessment Scale for Children ("BASC-2") indicated that Student was At-Risk for hyperactivity, exhibited a high level of aggression and was At-Risk for conduct problems. Other areas of concern included depression, withdrawal, anxiety and atypicality. The DCPS psychologist opined that Student met the IDEA criteria for special education services under the classifications of both ED and OHI, based upon his then-current

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<sup>3</sup> The relevant factual evidence in this case is not in dispute and I find it unnecessary to assess the credibility of the respective witnesses. With respect to the services available at City Academy, I discount the testimony of Educational Advocate, whose information was based upon a very limited observation she made of another student early in the school year.

social-emotional functioning, Exhibit P-8.

5. At the beginning of the 2012-2013 school year, Student enrolled at PCS for GRADE. Student's PCS academic records indicate that his negative behavior presentation has increased significantly. He was reported to have displayed verbal and physical aggression toward school staff, non-compliance, manipulation, disrespect for authority and classroom rules, and elopement from class. According to September 28, 2012 Multidisciplinary Team ("MDT") notes, Student was described as a "physical threat" to staff. Exhibit P-5.

6. DCPS PROGRAM DIRECTOR observed Student at PCS on October 22, 2012. After observing Student in his biology class and conducting a post-observation interview with PCS staff, Program Director opined that Student requires therapeutic supports and services in a highly structured program implemented by staff appropriately trained and certified in behavioral principles, behavior modification, crises prevention intervention, passive physical restraint, and data collection and analysis. Program Director opined that anything short of these recommendations will not be sufficient to ensure Student's safety, the safety of others and Student's availability for learning. Exhibit P-7.

7. In December 2012, Independent Psychologist conducted a Functional Behavioral Assessment ("FBA") of Student. Following two observations at PCS and interviews with PCS staff and Mother, and collection of behavior assessment data from Mother and Student's teachers, Independent Psychologist concluded that it can be hypothesized that Student's behavioral presentation in the classroom is to avoid undesirable academic tasks or classroom activities and gain attention from adults. She recommended, *inter alia*, that Student would benefit from a highly structured and intensely therapeutic educational environment, to include intensive counseling services, consistent behavior supports in the classroom, small classrooms

with low student-teacher ratio, and one-on-one academic attention as needed. Exhibit P-5.

8. At an IEP meeting on January 22, 2013 at PCS, Student's IEP was revised to provide 28 hours per week of Specialized Instruction, outside general education; 2 hours per week of Behavioral Support Services, outside general education; and full-time support of a Dedicated Aide. In the IEP's Least Restrictive Environment ("LRE") commentary, the IEP team noted that Student needs support outside the general education setting due to his high levels of anxiety and inability to perform in a traditional learning environment and that he needs psychological counseling to address anxiety, social interactions, and managing emotions. Exhibit R-1. PCS was not able to implement the level of services specified in the January 22, 2013 IEP. Testimony of PCS Special Education Coordinator.

9. On February 6, 2013, PCS issued a PWN, giving written notice to Mother that PCS proposed to change the educational placement of Student to City Academy for the rest of the 2012-2013 school year. Exhibit R-2. This placement had been discussed at the January 22, 2013 IEP meeting and Mother then stated that she did not want the City Academy placement for Student. Testimony of PCS Special Education Coordinator.

10. City Academy is a program within CITY HIGH SCHOOL for students with ED disabilities. City Academy is physically separated from the rest of the school and has its own entrance. Students at City Academy do not have interaction at school with non-disabled peers. City Academy has an enrollment of 60 students, with typically 45 students attending regularly. Each classroom has a maximum of 7 students and is staffed by a general education teacher and a special education teacher. A number of students are also provided 1:1 aides. Testimony of LEA Representative.

11. City Academy has 4 behavior specialists on staff. In addition to the behavior

specialists, there are 2 social workers who provide psychotherapy. As a supplement to IEP behavioral support services, City Academy offers Structured Psychotherapy for Adolescents Responding to Chronic Stress (SPARCS), a program designed to address the needs of chronically traumatized adolescents. City Academy staff are trained in proper physical restraint methods. Testimony of LEA Representative.

12. All students at City Academy are placed on a behavior tracker program, by which the teacher monitors students' behavior on a day-to-day basis. Students may earn points for positive performance, leading to incentive rewards. Testimony of LEA Representative.

13. At the beginning of the 2012-2013 school year, Educational Advocate observed another student in two classes at City Academy, for a total of 60 to 90 minutes. On that day, she observed students running in and out of classrooms, who were redirected to their classrooms by behavior specialists in the hallway. Educational Advocate has not made any observations of, or for the benefit of, Student and not attended his IEP meetings. Testimony of Educational Advocate.

14. After the January 22, 2013 IEP meeting, Mother met with the dean of City Academy at the school. Mother was not allowed to visit classrooms while school was in session because of concerns that her visit would be disruptive to the students. Testimony of Mother. Testimony of LEA Representative.<sup>4</sup> Student has never been to City Academy. Testimony of LEA Representative.

15. Student was an inpatient at a local hospital from February 12 through 19, 2013 following an attempt by Student to commit suicide. Student's discharge diagnoses were ADHD,

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<sup>4</sup> DCPS Counsel stated in his closing argument that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g), prohibits a parent from observing a City Academy class in session, when her child is not yet enrolled in the school. Whether or not counsel's interpretation of FERPA is correct, the evidence does not establish that the City Academy dean told Mother that her request to observe the classrooms in session would violate FERPA.

ODD and mood disorder. Testimony of Mother, Exhibit P-4. He now receives services from a peer support coordinator, a family therapist and a community support worker. Testimony of Mother. Student's physician recommended that he receive school services at home until he is placed in a new school. Exhibit P-4.

16. As of the hearing date, Student was still enrolled at PCS, but not attending school. PCS has been providing school assignments for Student to work on at home. Testimony of PCS Special Education Coordinator.

### **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 normally the responsibility of the party seeking relief. *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). Petitioner's counsel argues for shifting the burden to DCPS in this case, because DCPS has not allowed Petitioner to observe at City Academy when classes are in session. Petitioner has not identified, and I do not find, any authority which requires DCPS to allow a parent to observe a proposed educational placement. In a 2004 policy letter, *Letter to Mamas*, 42 IDELR ¶ 10 (OSEP 2004), the U.S. Department of Education, Office of Special Education Programs ("OSEP") wrote,

One of the key purposes of the IDEA Amendments of 1997 is to strengthen and expand the roles of parents in the identification, evaluation, and educational placement of their child.

Neither the statute nor the regulations implementing the IDEA provide a general entitlement for parents or their professional representatives, to observe their children in any current classroom or proposed educational placement.

However, we encourage school district personnel and parents to work together in ways that meet the needs of both parents and the school, including providing opportunities for parents to observe their children's classrooms and proposed placement options.

*Id.* (emphasis supplied). In the absence of a showing that DCPS' refusal to allow Petitioner to observe classes at City Academy violated the IDEA or District of Columbia law, I find no basis for altering the burden of proof in this case. As the party seeking relief, Petitioner must shoulder the burden of proof.

#### ANALYSIS

HAS DCPS DENIED STUDENT A FAPE BY FAILING TO CHANGE HIS PLACEMENT FROM PUBLIC CHARTER SCHOOL AND BY FAILING TO IDENTIFY A SCHOOL PLACEMENT CAPABLE OF FULFILLING HIS CURRENT IEP NEEDS FOR FULL TIME SPECIAL EDUCATION AND RELATED SERVICES OUTSIDE OF THE GENERAL EDUCATION SETTING?

The core issue in this case is whether City Academy is capable of implementing Student's January 22, 2013 IEP, which provides for full-time special education services and for behavioral support services outside the general education setting.<sup>5</sup> The IDEA ensures that "all children 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 further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Under the Act, DCPS was obligated to devise an IEP for Student, "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." *Jenkins v. Squillacote*, 935 F.2d 303,

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<sup>5</sup> On February 6, 2013, a few days after Petitioner filed her complaint for due process, PCS issued its prior written notice changing Student's placement to City Academy. Student's placement at City Academy had been discussed at the January 22, 2013 IEP meeting. Petitioner's claim that DCPS failed to change Student's placement from PCS, is moot.

304-305 (D.C.Cir.1991). Once the January 22, 2013 IEP had been developed, DCPS was required to ensure that the student was provided an appropriate placement “based on the child’s IEP.” See *Hinson ex rel. N.H. v. Merritt Educational Center*, 579 F.Supp.2d 89, 103-104 (D.D.C.2008), citing 34 C.F.R. § 300.116. Petitioner contends that City Academy is not such an appropriate placement. DCPS maintains that Petitioner has not presented any evidence that City Academy is not capable of fulfilling Student’s IEP needs.

Before reaching the issue of whether City Academy is capable of implementing Student’s IEP, I address Petitioner’s contention that the January 22, 2013 IEP is inadequate to the extent it does not specify Student’s need for a “therapeutic” setting.<sup>6</sup> The IDEA mandates that every IEP include, *inter alia*,

A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

See 34 CFR § 300.320(a)(4). Although the January 22, 2013 IEP does not specify Student’s need for a therapeutic setting, it states that he will be provided 28 hours per week of Specialized Instruction, outside general education; 2 hours per week of Behavioral Support Services, outside

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<sup>6</sup> The term “therapeutic” is not found in the IDEA’s IEP provisions, except with respect to “therapeutic recreation services.” See 34 CFR § 300.34(b)(11)(ii). Neither have I found any federal court decisions which define the term “therapeutic” in the IDEA context. *Steadman's Medical Dictionary* defines therapeutic as: “Relating to therapeutic or to the treatment, remediating, or curing of a disorder or disease.” *Steadman's Medical Dictionary*, (26th ed.1995) (cited in *Searcy v. Texas University Health Plan, Inc.*, 2000 WL 655434, 6 (N.D.Tex.2000)).

general education; and full time support of a Dedicated Aide. The IEP also states that Student needs support outside the general education setting due to his high levels of anxiety and inability to perform in a traditional learning environment and that he needs psychological counseling to address anxiety, social interactions, and managing emotions. I find that these statements of services in Student’s IEP suffice to meet the requirements of 34 CFR § 300.320(a)(4) and that the absence of the term “therapeutic” is not legally significant.

Turning to Petitioner’s contention that City Academy is not an appropriate placement because it does not meet Student’s need for a full-time special education program in a therapeutic educational setting, Petitioner has not identified which, if any, requirements specified in Student’s IEP – 28 hours per week of Specialized Instruction, 2 hours per week of Behavioral Support and a full-time dedicated aide – could not be provided by City Academy. City Academy is a full-time special school for children with emotional disabilities. The uncontroverted evidence of LEA Representative is that City Academy is able to provide the Specialized Instruction and Behavioral Support Services specified in Student’s IEP and there is no component of the IEP that the school cannot implement. Petitioner’s only evidence, which raises any concern about City Academy’s ability to implement the IEP, was Educational Advocate’s testimony that, when she observed another student at City Academy, she was concerned by students’ running in and out of their classrooms and she did not observe implementation of behavior principles, crisis interventions or data collection/analysis. Educational Advocate was at the school early in the school year, for only some 60 to 90 minutes. What she may or may not have observed on that occasion sheds little, if any, light on whether City Academy is currently able to implement the services specified this Student’s IEP.<sup>7</sup>

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<sup>7</sup> At the conclusion of Petitioner’s case in chief, DCPS moved for a directed finding (better-styled, a motion for decision as a matter of law) that Petitioner had not established a *prima facie* case that City Academy was unable to implement Student’s IEP. I took the motion

I find that placing Student at City Academy satisfied the requirements of the January 22, 2013 IEP.<sup>8</sup> Therefore, DCPS was not required to consider placing him at another public or private school. *See Savoy v. District of Columbia* 844 F.Supp.2d 23, 32 -33 (D.D.C.2012). Petitioner has not met her burden of proof to show that City Academy is unable to implement Student's IEP, as written, *see Hinson, supra*, 579 F.Supp.2d at 105, or that Student has been denied a FAPE.

### ORDER

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

1. All relief requested by the Petitioner in this matter is denied.
2. DCPS' oral motion for a directed finding is denied.

Date: April 4, 2013

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).

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under advisement. Considering the testimony of Educational Advocate in the light most favorable to Petitioner and drawing all reasonable inferences in Petitioner's favor, I now deny DCPS' motion.

<sup>8</sup> Petitioner has stipulated to the appropriateness of the content of the January 22, 2013 IEP, except to the extent the IEP does not specify Student's need for a "therapeutic" setting.

APPENDIX A

**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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[REDACTED]

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2013-0053

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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HEARING OFFICER DETERMINATION  
PERSONAL IDENTIFICATION INFORMATION

Petitioner/Mother	[REDACTED]
Student	[REDACTED]
Age	[REDACTED]
[REDACTED]	[REDACTED]
Grade	[REDACTED]
[REDACTED]	[REDACTED]
City Academy	[REDACTED]
City High School	[REDACTED]
[REDACTED]	[REDACTED]
Educational Advocate	[REDACTED]
Independent Psychologist	[REDACTED]
LEA Representative	[REDACTED]
DCPS Program Director	[REDACTED]
Petitioner's Counsel	Maria E. Blaeuer, Esq.
DCPS Counsel	Daniel McCall, Esq.



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\*\* NOTE: Please do not modify subject line when replying \*\*

\*\* This email was sent by Peter Vaden [mailto: Peter.Vaden@dc.gov] \*\*

Dear counsel:

My Hearing Officer Determination is attached. Thank you both for your professionalism and courtesy in this matter.

Sincerely,  
Peter Vaden  
Hearing Officer