

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

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

OSSE
Student Hearing Office
May 02, 2013

[Parent], on behalf of
[Student],¹

Date Issued: May 2, 2013

Petitioner,

Hearing Officer: Jim Mortenson

Case No: 2013-0159

v

District of Columbia Public Schools (DCPS),

Respondent.

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioner on March 15, 2013. The Petitioner is represented by Donovan Anderson, Esq., and the Respondent is represented by William Jaffe, Esq. A response to the complaint was filed on March 25, 2013. A prehearing was also convened on March 25, 2013 and a prehearing order was issued on March 26, 2013. A resolution meeting was convened on April 8, 2013, and resulted in no agreements. The Respondent filed disclosures on April 18, 2013. The Petitioner filed disclosures on April 19, 2013.

Because this matter was expedited, due to the Petitioner's appeal of a change in placement pursuant to 34 C.F.R. § 300.532 and the request of the Petitioner, the due process hearing was required to be held within 20 school days of the complaint (no later than April 25, 2013), and was convened and timely held on April 24, 2013, in room 2003 at 810 First Street NE,

¹ Personal identification information is provided in Appendix C which is to be removed prior to public dissemination.

Washington, D.C. The hearing was closed to the public. The due date for this HOD is May 8, 2013 (10 school days following the hearing). This HOD is issued on May 2, 2013.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5-E30.

III. ISSUES, RELIEF SOUGHT, and DETERMINATION

The issues to be determined by the IHO are:

1. Whether the Respondent changed the Student's educational placement when it removed him from school for more than ten school days during the 2012-2013 school year?
2. Whether the Respondent denied the Student a free appropriate public education (FAPE) because it has not provided an individualized education program (IEP) reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum when the IEP lacks a highly structured therapeutic setting and an effective behavior intervention plan (BIP)?

The Petitioner is seeking prospective placement at _____ School or, as an alternative, placement at _____ School as compensatory education.

The Respondent changed the Student's educational placement when it removed him from school for more than ten school days during the 2012-2013 school year. The Respondent denied the Student a FAPE because it has not provided him an IEP reasonably calculated to enable him to be involved in and make progress in the general education curriculum when the IEP lacks a highly structured therapeutic setting and an effective BIP.

IV. EVIDENCE

Two witnesses testified at the hearing, both for the Petitioner. The Petitioner's witnesses were the Petitioner, Student's Mother (P) and Admissions Director for (A.R.).

All three of the Petitioner's three disclosures were entered into evidence. The Petitioner's exhibits are listed in Appendix A. All three of the Respondent's three disclosures were entered into evidence. The Respondent's exhibits are listed in Appendix B.

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. The witnesses testified credibly. The findings of fact are the Undersigned's determinations of what is true, based on the evidence in the record. Findings of fact are generally cited to the best evidence, not necessarily the only evidence. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

V. FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a 15 year old learner with a disability, currently enrolled at School.² The Student is eligible for special education and related services under the definition of Other Health Impairment (OHI).³ The Student suffers from Attention Deficit

² Testimony (T) of P, P 1.

³ P 1.

Hyperactivity Disorder (ADHD).⁴ The Student previously was determined eligible for special education and related services under the definition of Specific Learning Disability (SLD).⁵

2. A comprehensive psychological evaluation of the Student was conducted in February 2012.⁶ There were fourteen sources of data that went into the comprehensive evaluation, conducted by an independent Licensed Clinical Psychologist.⁷ The Student's general cognitive ability is in the Low Average range.⁸ The Student's reading and writing skills appear to be significantly impaired.⁹ Mathematics is the Student's academic strength, but his performance in that subject was at least a year or more behind his then-current grade level.¹⁰ The Student's behaviors, including lack of self-control, refusal of services, disrespect, noncompliance, and hostility toward adults in the academic setting, have resulted in suspensions which, in turn, have impacted his academic progress.¹¹ The Student does not receive special education and related services while suspended from school.¹² The Student exhibits significant emotional distress in the academic arena, as opposed to home, and so it appears to be situational.¹³ He has significant difficulty at school with impulsivity, attending, self-regulation, restlessness, and severe behavioral problems.¹⁴ The Student does not adhere to rules and regulations, routinely loses his temper, and avoids accepting responsibility for

⁴ P 2.

⁵ P 2.

⁶ P 2.

⁷ P 2.

⁸ P 2.

⁹ P 1, P 2.

¹⁰ P 1, P 2.

¹¹ T of P, P 1, P 2.

¹² R 2.

¹³ P 2.

¹⁴ P 2.

his behavior, which appears to be the result of stress from his poor school performance.¹⁵ He is highly oppositional and functions with chronic feelings of inferiority and incompetence.¹⁶ Due to this combined academic and emotional stress, the Student is vulnerable to experience more severe psychological distress, and is need of increased support, emotional nurturance, and ongoing academic interventions.¹⁷ In short, the Student's cognitive and learning problems, likely not properly addressed since he began school, have resulted in maladaptive behaviors which, in turn, result in further academic dysfunction.¹⁸

3. The Student's IEP, last revised May 21, 2012, and amended November 13, 2012, includes annual goals in the following areas: mathematics (four goals); reading (four goals); written expression (two goals); and emotional, social, and behavioral development (four goals).¹⁹ The Student's emotional, social, and behavioral development goals are: 1) Student will utilize appropriate coping skills learned in group counseling when he becomes upset/angry; 2) Student will utilize the learned anger management technique called STOP (Stop, Think, Overcome, and Peace), when angry/upset; 3) Student will respect adults and peers both inside and outside of the classroom; and 4) Student will remain in his assigned area, unless given permission to leave by an adult in charge.²⁰ The specialized instruction and related services to help the Student reach all of his annual goals consists of: 1) specialized instruction (unspecified) outside of the general education setting for 6.5 hours per week; 2) mathematics instruction outside of the general education setting for 6.5 hours per week; 3) reading instruction outside of the general education setting for 6.5 hours per week; 4) written

¹⁵ P 2, R 3.

¹⁶ P 2.

¹⁷ P 2.

¹⁸ P 1, P 2, T of P.

¹⁹ P 1.

²⁰ P 1.

expression instruction outside of the general education setting for 6.5 hours per week; and 5) behavioral support services outside of the general education setting for 180 minutes per month.²¹

4. The Respondent proposed a BIP on March 20, 2013, that adds specifics to the behavior support services already in place.²²
5. During the 2012-2013 school year, the Student was suspended from school for more than 31 days.²³ This school year, he was suspended: October 23 through October 26 (four days); October 31 through November 7 (six days); December 5 through December 7 (three days); January 29 (one day); February 28 through March 5 (four days); March 7 through March 14 (six days); March 20 through March 29 (seven days); and was serving suspension on the day of hearing.²⁴ The Student was suspended for disrespect and running the halls.²⁵ School records show the Student was specifically suspended for the following behaviors on the following dates: December 5 – refusal to comply (IEP team determined this to not be a manifestation of the Student’s disability); January 17 – interference with school authorities or disruption of school operation (IEP team determined this to be a manifestation of the Student’s disability); February 28 – vandalism (IEP team determined this to not be a manifestation of the Student’s disability); March 19 – disruption in hall or building (IEP team determined this to be a manifestation of the Student’s disability); and March 29 – disruption on school property.²⁶

²¹ P 1.

²² P 1, R 3.

²³ P 3, T of P.

²⁴ P 3, R 2, T of P.

²⁵ T of P.

²⁶ R 1, R 2. (The only records of manifestation determinations this school year are reflected here.)

6. The Student has been socially promoted at school.²⁷ His last report card consisted of D and F grades.²⁸

7. The Student requires an environment in which he can be contained and protected from his maladaptive behaviors.²⁹ He is in need of academic services provided within an extensive therapeutic infrastructure.³⁰ He should have a highly structured, specialized education program that has a low student to teacher ratio and that utilizes multiple presentation formats which include: visual; auditory; kinesthetic; and tactile modalities.³¹ The Student requires access to psychotherapeutic intervention.³² The environment must be highly controlled, organized, and void of excessive stimuli.³³

8. The Student has been accepted, but has not yet enrolled, a

³⁴ The Student was accepted based on a review of his most recent IEP, comprehensive psychological evaluation, and attendance records, as well as a meeting with the Student and the Petitioner.³⁵ is a non-public therapeutic special education day school where students can work toward a District of Columbia Diploma.³⁶ The classes may have a maximum of 12 students per class, and include a teacher and aide in each classroom.³⁷ A classroom therapist is involved with all of the students at the beginning and end of the school day, and is available for students throughout the school day, providing both

²⁷ T of P.

²⁸ T of P.

²⁹ P 2.

³⁰ P 2.

³¹ P 2.

³² P 2.

³³ P 2.

³⁴ T of A.R.

³⁵ T of A.R.

³⁶ T of A.R.

³⁷ T of A.R.

group and individual counseling.³⁸ The therapist spots issues students are having early in the day, helps to deal with them during the day, and provides a “wrap-up” with students on how their day went.³⁹ A psychiatrist is also available.⁴⁰ All of the teachers at _____ are certified in special education by the State of _____, with the majority being dually certified in special education and a subject content area.⁴¹

9. Students at Foundations typically present with severe social/emotional needs, and usually not with cognitive problems.⁴² When the social/emotional needs of these students at _____ are met, academic success follows.⁴³ Students are not permitted to avoid classes due to suspension at _____.⁴⁴ The academic challenges faced by students can also be addressed at _____.⁴⁵ Services can also be provided over the summer months.⁴⁶
10. _____ has been approved by the Office of the State Superintendent of Education (OSSE).⁴⁷ The cost of the school is approximately \$40,000.00 annually.⁴⁸

VI. CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

1. The burden of persuasion in a special education due process hearing is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. “Based

³⁸ T of A.R.

³⁹ T of A.R.

⁴⁰ T of A.R.

⁴¹ T of A.R.

⁴² T of A.R.

⁴³ T of A.R.

⁴⁴ T of A.R.

⁴⁵ T of A.R.

⁴⁶ T of A.R.

⁴⁷ T of A.R.

⁴⁸ T of A.R.

solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof.” D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).

2. When a child with a disability under IDEA engages in behavior that results in discipline that will change the Student’s educational placement, a manifestation determination must be made. 34C.F.R. § 300.530(e). A change in educational placement occurs if the disciplinary removal is for more than 10 consecutive school days, or the child has been subject to a series of removals that constitute a pattern because the series of removals total more than 10 school days in the school year, the behavior resulting in the removals is substantially similar, and because of consideration of such factors as: the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. 34 C.F.R. § 300.536(a).
3. The Student has been suspended from school for more than 31 days this school year. The Student has almost always been suspended for disrespectful or disruptive behaviors. These behaviors, generally, are a function of his disability, because he has poor self-regulation, is impulsive, and has learned mal-adaptive behaviors to cope with his academic frustration. On one occasion the Student was suspended for four days for vandalism. Thus, his removals from school have been largely for the same behaviors. Two of the removals were for four days and two were for four days. There were removals for one, three, and seven days, as well. Furthermore, the removals have occurred throughout the school year, from October to

the present. Thus, the Petitioner has shown that the Student's placement was changed by the Respondent as a result of its repeated removals of the Student from school for much more than 10 days this school year.

4. A free appropriate public education (FAPE) for a child with a disability under the IDEA is defined as:

special education and related services that –

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320 through 300.324.

34 C.F.R. § 300.17. A “determination of whether a child received FAPE must be based on substantive grounds.” 34 C.F.R. § 300.513(a)(1). “An IEP may not be reasonably calculated to provide benefits if, for example, a child's social behavior or academic performance has deteriorated under his current educational program, *see Reid v. District of Columbia*, 401 F.3d at 519-20; the nature and effects of the child's disability have not been adequately monitored, *see Harris v. District of Columbia*, 561 F. Supp. 2d at 68; or a particular service or environment not currently being offered to a child appears likely to resolve or at least ameliorate his educational difficulties. *See Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d 18, 25-27 (D.D.C. 2006).” *Suggs v. District of Columbia*, 679 F. Supp. 2d 43, 53 IDELR 321 ((D.D.C.2010).

5. The Student's IEP in place for the 2012-2013 school year is not reasonably calculated to enable the Student to be involved in and make progress in the general education curriculum or to meet his other needs resulting from his disability. The services the Student has been receiving under his IEP at _____ have not permitted him to progress toward his goals, as evidenced by the change in placement to a more restrictive setting (home for more than 31

days) where the IEP was not even implemented, nor to achieve passing grades. A more therapeutic setting, as recommended in the last evaluation report, would have provided the necessary support the Student required to benefit academically and functionally. A specific BIP was not offered as part of the IEP (and not even offered until after the filing of the complaint). The Respondent provided no explanation why the IEP did not include the services recommended in the evaluation report. The disciplinary removals that resulted in the change of placement and poor grades bear witness to the inappropriate IEP. Thus, the Student's IEP resulted in a denial of FAPE.

6. This hearing officer has broad discretion to grant relief appropriate to ensure the Student is provided a FAPE. *See* 34 C.F.R. § 300.516(c)(3), Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985). When considering prospective nonpublic placement as a remedy to ensure the provision of FAPE the following factors must be considered: a) the nature and severity of the Student's disability; b) the Student's specialized educational needs; c) the link between those needs and the services offered by the private school; d) the reasonableness of the placement's cost; and e) the extent to which the placement represents the least restrictive environment. Branham v. District of Columbia, 427 F. 3d 7, 12, (D.C. Cir. 2005). "Because placement decisions implicate equitable considerations, moreover, courts may also consider the parties' conduct." *Id.*, *citing* Reid v. District of Columbia, 401 F.3d 516, 524, (D.C. Cir. 2005).
7. The Student's disability has been compounded by a vicious cycle: cognitive and behavioral deficits resulting in behavioral problems at school which in turn result in a loss of educational opportunity and, thus, appropriate growth in both academic and functional areas. Thus, as the 2012 evaluation data shows and evaluator recommended, the Student requires an

academic setting that can address both his cognitive needs and his behavioral needs, which would include the provision of specialized instruction and therapeutic supports on a constant basis. The Student's IEP and educational placement currently do not provide the therapeutic supports the Student requires to benefit from his education. _____ is a school that has a program that can meet the Student's needs by providing specialized instruction in a therapeutic setting with constant behavioral supports. The cost of the school was not challenged and the school has been approved for use by OSSE, which regulates reimbursement of non-public schools. Finally, the Student will be in a less restrictive setting, since he is currently at home for a good deal of time, without any specialized instruction or behavioral supports, and when he is at school, he lacks the support he needs to meet his functional goals which, in turn, impacts his overall educational progress. Thus, the _____ is an appropriate prospective placement for the Student.

VII. DECISION

1. The Respondent changed the Student's educational placement when it removed him from school for more than ten school days during the 2012-2013 school year.
2. The Respondent denied the Student a FAPE because it has not provided him an IEP reasonably calculated to enable him to be involved in and make progress in the general education curriculum when the IEP lacks a highly structured therapeutic setting and an effective BIP.

VIII. ORDER

1. The Student will be placed at _____ effective immediately and no later than May 13, 2013.
2. The Student's IEP will be revised, no later than May 13, 2013, to include therapeutic supports throughout the school day and a specific BIP to be followed by the staff.
3. The Student will remain at _____ School for the remainder of the current school year and for the 2013-2014 school year, unless the Respondent and Petitioner agree to another location or placement prior to the end of the 2013-2014 school year or the School expels the Student (in which case a new location to provide the services will be determined by the Respondent, which is equivalent to the placement as _____).

IT IS SO ORDERED.

Date: May 2, 2013



Independent 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 USC §1415(i).