

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

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
December 30, 2014

STUDENT, ¹)	Date Issued: 12/29/14
through his Parent,)	
Petitioner,)	
)	
v.)	Hearing Officer: Keith L. Seat, Esq.
)	
District of Columbia Public Schools)	
("DCPS"))	
and)	
Office of the State Superintendent)	
of Education ("OSSE"),)	
Respondents.)	
)	

HEARING OFFICER DETERMINATION

Background

Petitioner, Student’s guardian, filed a due process complaint on 10/15/14, alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Improvement Act (“IDEA”) because, after the closing of Closed Charter, OSSE would not agree to pay for Student’s Nonpublic School while Student was without a Local Education Agency (“LEA”), and DCPS refused to permit Student to continue at Nonpublic School while assessing him. OSSE responded that it has no obligation to pay for Nonpublic School when Student was not enrolled in an LEA, as it is Petitioner’s obligation to keep Student enrolled in an LEA. For its part, DCPS responded that it was obligated to assess Student’s special education needs while he attended Neighborhood LEA, but since Student refused to attend DCPS has no obligation to pay for Nonpublic School.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to IDEA, 20 U.S.C. § 1400, *et seq.*; the implementing regulations for IDEA, 34 C.F.R. Part 300; Title V, Chapter E-30,

¹ Personally identifiable information is provided in Appendix A.

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of the District of Columbia Municipal Regulations (“D.C.M.R.”) and 38 D.C. Code 2561.02.

Procedural History

Following the filing of the due process complaint on 10/15/14, this Hearing Officer was assigned to the case on 10/17/14. On 10/22/14, DCPS filed District of Columbia Public Schools’ Response and made no challenges to jurisdiction in its Response. On 10/23/14, OSSE filed Office of the State Superintendent of Education’s Response to Petitioner’s Complaint and made no challenges to jurisdiction in its Response. Both responses were timely.

A resolution meeting took place on 10/28/14, at which time Petitioner and DCPS did not resolve the case or agree to end the resolution period. The 30-day resolution period for Petitioner and DCPS ended on 11/14/14. A final decision in this matter must be reached as to DCPS no later than 45 days following the end of the resolution period, which requires an HOD by 12/29/14. No resolution period is provided in the IDEA regulations for OSSE, so the 45 days for a final decision as to OSSE began to run with the filing of the due process complaint, but was extended by a 30-day continuance granted on 10/22/14, so an HOD is also required as to OSSE on 12/29/14.

Petitioner participated in person in the hearing on 11/25/14 and by telephone for the telephonic closing arguments on 11/26/14. Neighborhood LEA Representative participated in person in the hearing on 11/25/14 as the party representative for DCPS.

Neither party objected to the testimony of witnesses by telephone. The parties made no admissions. During the due process hearing one stipulation was agreed to:

Stipulation: Petitioner’s counsel requested Nonpublic School to submit invoices for Student to OSSE following the statement by OSSE’s counsel at the prehearing conference in this case that OSSE had not yet been billed for Student for the 2014/15 school year (“SY”).

Respondent OSSE’s Motion to Dismiss was denied for reasons noted on the record at the due process hearing.

Petitioner’s Disclosure statement, submitted on 11/18/14, consisted of a witness list of 9 witnesses and documents P-1 through P-30. Petitioner’s Disclosure statement and documents were admitted into evidence over objections by Respondents to witnesses (due to duplication and failure to sufficiently disclose) and documents (due to relevancy).

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Respondent DCPS's Disclosure statement, submitted on 11/18/14, consisted of a witness list of 4 witnesses and documents DR-1 through DR-5² DCPS's Disclosure statement and documents were admitted into evidence without objection, except for DR5-1 through DR5-10. Only pages DR5-11,12,13 were offered by DCPS and admitted into evidence during the presentation of DCPS's case.

Respondent OSSE's Disclosure statement, submitted on 11/18/14, consisted of a witness list of 5 witnesses and documents OR-1 through OR-8.³ OSSE's Disclosure statement and documents were admitted into evidence without objection.

Petitioner's counsel presented 4 witnesses in Petitioner's case-in-chief (*see* Appendix A):

1. Petitioner
2. Nonpublic School Psychologist ("Psychologist")
3. Special Education Teacher at Nonpublic School ("Teacher")
4. Nonpublic School Biller

Respondent DCPS's counsel presented 2 witnesses in its case (*see* Appendix A):

1. Manager of Nonpublic Unit, Private and Religious Office, DCPS ("PRO Manager")
2. Neighborhood LEA Representative

Respondent OSSE's counsel presented 3 witnesses in its case (*see* Appendix A):

1. Director of Placement Oversight, OSSE ("OSSE Placement Director")
2. Director of Non-Public Payment Unit, OSSE ("OSSE Payment Director")
3. Closure Generalist, Public Charter School Board ("PCSB Generalist")

Petitioner's counsel did not present any rebuttal witnesses.

The issues to be determined in this Hearing Officer Determination are:

² In the 11/3/14 Prehearing Order, Respondents were instructed to mark documents "D" for DCPS and "O" for OSSE, but both marked their documents "R," so throughout the hearing Respondents' documents were referenced as "DR" for DCPS and "OR" for OSSE, which is also used throughout this HOD.

³ *Id.*

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Issue 1: Whether OSSE denied Student a FAPE by failing to provide an appropriate placement and/or location of services when OSSE failed to fund Student at Nonpublic School from the beginning of the 2014/15 SY until 9/23/14⁴, after Closed Charter ceased operations on Closure Date, Charter LEA was unable to accept Student for the 2014/15 SY due to lack of space, and Student did not have an LEA from the beginning of the 2014/15 SY until 9/23/14.

Issue 2: Whether DCPS denied Student a FAPE by failing to provide an appropriate placement and/or location of services when DCPS refused to provide a full-time out of general education stand-alone school for 2014/15 SY as required by Student's IEP, and DCPS insisted that Student attend Neighborhood LEA before discussing placement.

Issue 3: Whether, for purposes of Stay Put, Nonpublic School is Student's current educational placement.⁵

Petitioner seeks the following relief:⁶

1. A finding that Student was denied a FAPE.
2. OSSE shall fund Student's placement and transportation costs at Nonpublic School from the beginning of the 2014/15 SY until 9/23/14.
3. DCPS shall fund Student's placement and transportation costs at Nonpublic School for the 2014/15 SY beginning on 9/23/14.
4. DCPS and OSSE shall convene a meeting within 10 days with Student's multidisciplinary team and consider Student's placement and/or location of services.

Oral closing arguments were made by counsel for all three parties at the end of the due process hearing. Citations were submitted in writing by all parties after the hearing was closed.

Findings of Fact

After considering all the evidence, as well as the arguments of counsel, the Findings of Fact⁷ are as follows:

⁴ The date of 10/2/14 in this issue and in the relief sought by Petitioner was corrected to 9/23/14 at the due process hearing, over objection.

⁵ Petitioner expressly stated during closing arguments that the issue of Stay Put is being reserved for appeal, so is not addressed further in this HOD.

⁶ Petitioner's claims for compensatory education as a part of the relief sought against both OSSE and DCPS were expressly withdrawn at the beginning of the due process hearing.

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1. Student is a resident of the District of Columbia. Petitioner is Student's guardian ("Guardian").⁸

2. Student is a child with a disability and is classified as OHI due to ADHD.⁹ His disabilities are quite serious, with particular difficulty in sensory processing; he is easily distracted, engages in aggressive behaviors, is disruptive and may have a depressive disorder, NOS.¹⁰

3. Student has a full-time IEP dated 5/23/14, with 23 hours/week of specialized instruction outside general education and another 3.5 hours/week of related services.¹¹ Student's IEP explains that previously a "Self-Contained classroom within the LEA has been attempted, however, found unsuccessful."¹²

4. Student was placed at Nonpublic School, a therapeutic day school, by OSSE on 11/7/12, after it was determined that Closed Charter could not meet his special education needs; as of the due process hearing, Student remained at Nonpublic School.¹³

5. Student has made much progress at Nonpublic School, but continues to need a great deal of support.¹⁴ Specifically, Student "continues to require a small, structured environment with a low student-to-staff ratio, integrated behavior management and therapeutic support..."¹⁵ While there has been a significant decrease in Student's level of anxiety in the classroom, he is still anxious and now only has behavioral outbursts once or twice a day.¹⁶ A return to public school would likely cause Student to regress.¹⁷

6. Student's classroom at Nonpublic School is comprised of 8 students and 4 staff, although he requires much 1:1 assistance; many strategies and accommodations are in place to help Student succeed by helping him focus and minimizing distractions.¹⁸

⁷ Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

⁸ Guardian.

⁹ P2-1.

¹⁰ P12-7,8,9; P9-1.

¹¹ P2-1; P2-10.

¹² P2-11.

¹³ OR5-1; Guardian.

¹⁴ Guardian; P10-1; Teacher.

¹⁵ P11-2.

¹⁶ Psychiatrist.

¹⁷ P9-1,2.

¹⁸ P10-1; Teacher.

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Student has experienced “multiple traumas” in his life that have left him unavailable for learning, but he is working on coping skills and at Nonpublic School has consistent access to his psychologist when experiencing stress and frustration.¹⁹ Student has had stability at Nonpublic School by being with the same teacher for 2-1/2 years, since he first began there.²⁰ Guardian is very good about communicating with Nonpublic School and is in touch by telephone or text about twice a week with Teacher.²¹ Student does not do well with change, so Guardian wants Student to continue receiving his current services that are helpful for him and not have his educational program disrupted.²²

7. Student was placed at Nonpublic School through Closed Charter, which was his LEA; Closed Charter ceased operations on Closure Date.²³ Efforts had been taken to reach out to parents prior to closure to ensure that students were enrolled in another LEA; letters were sent and phone calls made.²⁴ OSSE’s log shows that a message was left concerning Student, noting that he needed a new LEA in order to continue at Nonpublic School.²⁵

8. While Guardian should have been notified well in advance about the closing of Closed Charter, Guardian did not realize that Closed Charter was closing until Student’s school bus to Nonpublic School for Extended School Year (“ESY”) did not show up on 6/30/14.²⁶ Guardian contacted Closed Charter and was told that she needed to enroll in Charter LEA, which she attempted to do online through MySchoolDC on 7/1/14 or 7/2/14.²⁷

9. If Guardian had been aware that Closed Charter’s was closing and taken action by 6/1/14, Student was guaranteed a spot at Charter LEA, but she found out too late and Student was put on a waitlist and not guaranteed a spot at Charter LEA.²⁸ Guardian received a letter from OSSE informing her that Closed Charter ceased to operate on Closing Date and that Student must be enrolled in another LEA.²⁹

10. OSSE has an 11-page Charter School Closure Policy, which concludes with the goal of “ensur[ing] a smooth transition and as little disruption as possible to their students’ education.”³⁰ The Charter School Closure Policy states in section IV on Students with Disabilities Enrolled at a Nonpublic Special Education School that

¹⁹ P11-1; Psychologist.

²⁰ Teacher.

²¹ Teacher.

²² Guardian.

²³ OR5-1; OR2-1; Guardian.

²⁴ OR3-2; PCSB Generalist; OSSE Placement Director.

²⁵ OR1-1; OSSE Placement Director.

²⁶ P30-2; Guardian.

²⁷ Guardian.

²⁸ PCSB Generalist; OR3-2.

²⁹ OR2-1; Guardian.

³⁰ OR7-11.

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“Students attending nonpublic schools may remain at that school, but must enroll in another District of Columbia Public School or Public Charter School to maintain District funding and appropriate oversight by a Local Education Agency (LEA).”³¹ Whether a student may remain at a nonpublic school is up to the new school’s IEP team after Student enrolls at the new LEA.³²

11. The Charter School Closure Policy requires parents to be informed that the charter school will be closing and requires the school to “[p]rovide assistance to parents in obtaining information about available school options and to enroll their child in a new school.”³³ The closing school is to “[p]rovide a copy of the student’s file to his/her parent(s) to facilitate the transition of special education students to their new schools. By providing files to parents, they can furnish a physical copy of the file to the student’s new school, documenting the services the child needs.”³⁴ This was not done for Guardian.³⁵ In particular, the closing school is to provide parents “with a paper copy of your child’s IEP for your records.”³⁶ Neighborhood LEA did not ever ask Guardian for Student’s IEP or related documents.³⁷

12. OSSE also provides parents a Parent Brochure on Policies and Procedures for Placement Review, Revised, which concludes with a paragraph on parents’ responsibilities when their student is placed in a nonpublic school, emphasizing that students must be enrolled in a DC LEA every year, and that “[i]f your child is placed by a charter LEA that for some reason closes, you will need to enroll your child in another LEA.”³⁸ OSSE’s Notice of Location Assignment for Student in 2012 also noted that if Closed Charter ever ceases to operate, it “must notify” Guardian of her responsibility to enroll Student in another LEA.³⁹

13. OSSE recognized the family’s difficult situation (*see* Appendix A) and reached out directly to Guardian, noting on 7/8/14 that Guardian was “trying to support [Student] and learn what steps to take, but it is all new to her.”⁴⁰ OSSE asked what support PCSB might be able to provide.⁴¹ OSSE and PCSB did assist in trying to get Student set up with a new LEA.⁴²

³¹ OR7-5.

³² OSSE Placement Director.

³³ OR7-3.

³⁴ OR7-5 (III, C).

³⁵ Guardian.

³⁶ OR7-4.

³⁷ Guardian.

³⁸ OR8-1.

³⁹ OR5-1.

⁴⁰ OR3-2; OSSE Placement Director.

⁴¹ OR3-2.

⁴² OSSE Placement Director; PCSB Generalist.

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14. Guardian was encouraged by OSSE Placement Director to try to enroll in Charter LEA and understood that she needed to wait to hear back from Charter LEA.⁴³ When Charter LEA wasn't available by August 2014, PCSB Generalist spoke with Guardian about other options, giving her names of other charter schools and discussing their accessibility by city bus.⁴⁴

15. In late August, Guardian was told to give Charter LEA 2 more weeks to see if space opened up after school started.⁴⁵ OSSE Placement Director subsequently emailed Guardian, saying that Student should be enrolled in Neighborhood LEA, which OSSE Placement Director considered the fallback option.⁴⁶ Guardian checked to see what documentation she needed for enrollment; she had just begun a new job and had just moved, so needed to wait for her first paycheck and utility bill to arrive to have all the required documentation.⁴⁷

16. Guardian went to Neighborhood LEA and enrolled Student there on 9/23/14 without incident.⁴⁸ At Neighborhood LEA on 9/23/14, Guardian was forthright about seeking to enroll Student so he would have an LEA and could continue going to Nonpublic School. The registrar and Neighborhood LEA Representative were helpful and got Student enrolled; a printout from a DCPS database indicates that Student's "Enrollment status" was "Active" on 9/23/14.⁴⁹

17. At Neighborhood LEA on 9/23/14, Guardian worked to get DCPS transportation for Student to Nonpublic School where he continued to attend, and in the meantime received transportation from the Nonpublic School van.⁵⁰ Neighborhood LEA had to work to get Student into the DCPS SEDS system.⁵¹ Student's IEP showed up in the system a little later and DCPS was able to get transportation set up for Student to take the DCPS school bus to Nonpublic School.⁵² Once a DCPS identification number was generated for Student, Guardian was contacted about transportation; beginning on 10/6/14 a DCPS school bus transported Student to Nonpublic School.⁵³ Everything was fine for a few days until Guardian received a letter from Neighborhood LEA in mid-October 2014 stating that Student was not properly enrolled and must actually attend

⁴³ Guardian.

⁴⁴ PCSB Generalist; Guardian.

⁴⁵ Guardian.

⁴⁶ OSSE Placement Director; Guardian.

⁴⁷ Guardian; P17; P18.

⁴⁸ Guardian.

⁴⁹ P14-1; Guardian.

⁵⁰ Guardian; P19.

⁵¹ Neighborhood LEA Representative.

⁵² Guardian; P15-1; Neighborhood LEA Representative.

⁵³ Guardian.

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Neighborhood LEA in order to be enrolled.⁵⁴ The DCPS school bus stopped transporting Student to Nonpublic School on 10/20/14.⁵⁵

18. DCPS determined that it had made an error in enrolling Student as “non-attending” and insisted that Student begin attending Neighborhood LEA.⁵⁶ DCPS recognized that Student had an IEP from another LEA, but wanted to observe and assess him at Neighborhood LEA to determine what sort of special education services might be appropriate.⁵⁷

19. DCPS wanted Student to attend Neighborhood LEA until DCPS “either adopts Student’s previous IEP” or develops a new IEP, and refused to discuss services in advance of a 30-day IEP Review.⁵⁸ Psychologist at Nonpublic School reached out to Neighborhood LEA at least twice in September 2014 by email and telephone concerning Student’s IEP, so Neighborhood LEA could obtain the information it needed to assess Student, but Neighborhood LEA was not ready or willing to collaborate with Nonpublic School and focus on Student’s IEP.⁵⁹ According to DCPS, students must actually attend a public school in order to be offered an IEP.⁶⁰

20. An option to have DCPS develop an IEP for Student while he remained at Nonpublic School was offered through DCPS’s Private and Religious Office (“PRO”), but only if Student was attending the Nonpublic School as a private student and was not publicly funded.⁶¹ Guardian did contact the PRO office by telephone and spoke with a woman who told her to contact Neighborhood LEA; Guardian left her name and number at the PRO office, but never heard back from PRO.⁶² When enrolling Student at Neighborhood LEA and indicating her desire for Student to continue to attend Nonpublic School, Guardian was never told she should contact PRO by Neighborhood LEA Representative or anyone else.⁶³

21. PRO is involved when a parent pays for private school, but not when private school is publicly funded.⁶⁴ A student in a private school can have an IEP developed through PRO to see what might be offered by DCPS as FAPE, without having to attend a DCPS school to be assessed, as the student is observed in the private school.⁶⁵ However,

⁵⁴ Guardian; DR2.

⁵⁵ *Id.*

⁵⁶ Neighborhood LEA Representative.

⁵⁷ Neighborhood LEA Representative; DR2-1.

⁵⁸ DR2-1.

⁵⁹ Psychologist.

⁶⁰ Neighborhood LEA Representative.

⁶¹ DR2-1.

⁶² Guardian.

⁶³ *Id.*

⁶⁴ PRO Manager.

⁶⁵ *Id.*

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it would be impossible for a student from another LEA to be directly placed by DCPS in a nonpublic school without first becoming a DCPS student.⁶⁶

22. At the resolution meeting in this case at Neighborhood LEA on 10/28/14, DCPS told Guardian and counsel that Student was not properly enrolled and that Guardian needed to go downstairs to enroll Student.⁶⁷ But when Guardian went to the main office to try to enroll Student, she was told that he was already enrolled and was active, and that she didn't need to do anything further to enroll Student.⁶⁸ This is documented by a "Student Enrollment List – All Records," apparently printed on 10/29/14, which indicates an "Active" status, is coded "Assessment for special ed" and is dated 9/23/14.⁶⁹ Very similar enrollment information for Student appears on a "Student List" also apparently printed on 10/29/14.⁷⁰

23. DCPS stated that it could offer comparable services for Student while he was undergoing assessment at Neighborhood LEA.⁷¹ This determination was based on Neighborhood LEA Representative scanning Student's voluminous file, including his current assessment and attachments, in the hour before the 10/28/14 resolution meeting at which DCPS offered to make comparable services available to Student.⁷² Neighborhood LEA Representative was not sure if she read the 3 two-page letters from Student's current providers at Nonpublic School which summarize his progress and ongoing needs.⁷³

24. If Student was in clear need of a more restrictive setting, Neighborhood LEA would expedite its review of his IEP and "immediately" move Student to a proper setting and implement his existing IEP while a new one was developed.⁷⁴

25. Neighborhood LEA could provide up to 25 hours/week of specialized instruction out of general education for Student, although specials (such as Music, Art, Physical Education) would be with non-disabled students and so was not full-time.⁷⁵ Neighborhood LEA did not have a self-contained classroom for Student, but proposed to put him in a "resource room" that would be used for a rotating group of pull-out students.⁷⁶ While the total number of students in the resource room at any point was not expected to exceed 5-6, the fact that they would be rotating in and out indicates that their

⁶⁶ *Id.*

⁶⁷ Guardian.

⁶⁸ Guardian; P14.

⁶⁹ P25-1.

⁷⁰ P25-2.

⁷¹ Neighborhood LEA Representative.

⁷² *Id.*

⁷³ Neighborhood LEA Representative; P9; P10; P11.

⁷⁴ Neighborhood LEA Representative.

⁷⁵ *Id.*

⁷⁶ *Id.*

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disabilities were less severe than Student's and that he would have to constantly be adjusting to changes in his environment.⁷⁷

26. DCPS never showed Guardian a classroom or school where comparable services would be provided Student.⁷⁸ Guardian was concerned about the disruption to Student's educational program which is working well for him.⁷⁹ Guardian was willing to consider an alternative school for Student, if it was similar to Nonpublic School, but was skeptical that a public school could be comparable.⁸⁰

27. Nonpublic School is owed for Student's tuition for September, October and November 2014.⁸¹ OSSE requested invoices for Student by email, which Nonpublic School Biller sent on 11/13/14.⁸² Guardian has never been billed by Nonpublic School and is not responsible for paying Nonpublic School, even if OSSE and DCPS do not pay.⁸³

Conclusions of Law

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

The overall purpose of the IDEA is to ensure 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).

"The IEP is the 'centerpiece' of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (3d Cir. 2010), quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and is the primary vehicle for providing a FAPE. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

The Act's FAPE requirement is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Smith v. Dist. of Columbia*, 846 F. Supp. 2d 197, 202 (D.D.C. 2012), citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982). The IDEA imposes no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Rowley*, 458 U.S. at 198. Congress, however,

⁷⁷ *Id.*

⁷⁸ Guardian.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Nonpublic School Biller.

⁸² P29; P28; Nonpublic School Biller.

⁸³ Guardian; Nonpublic School Biller.

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“did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.” *Hall ex rel. Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985).

In addition, Respondents must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114.

A Hearing Officer’s determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a Hearing Officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a). In other words, an IDEA claim is viable only if those procedural violations affected the child’s *substantive* rights.

“Based solely upon 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 that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE.” 5-E D.C.M.R. § 3030.3. The burden of proof is on the party seeking relief. *Schaffer v. West*, 44 IDELR 150 (U.S. 2005).

“The IDEA is administered by state education agencies (‘SEAs’) and local education agencies (‘LEAs’). See 34 C.F.R. 300.608; *id.* § 300.200. An SEA is responsible for general supervision and enforcement, see D.C. Mun. Regs. tit. 5, § 300.149, usually accomplished by apportioning and restricting funds, see 34 C.F.R. § 300.608.” *Thomas v. Dist. of Columbia*, 773 F. Supp. 2d 15, 16 n.1 (D.D.C. 2011). OSSE is the SEA for the District of Columbia, as explained in *United States v. Emor*, 850 F. Supp. 2d 176, 182 (D.D.C. 2012),

The Public Education Reform Amendment Act of 2007, effective June 12, 2007, created the District of Columbia’s Office of the State Superintendent of Education (“OSSE”) and entrusted it with authority over all state special education functions in the District. Since its creation, OSSE has served as the state education agency (“SEA”) in the District of Columbia that manages the state-level education functions required by federal and local law.

Issue 1: *Whether OSSE denied Student a FAPE by failing to provide an appropriate placement and/or location of services when OSSE failed to fund Student at Nonpublic School from the beginning of the 2014/15 SY until 9/23/14, after Closed Charter ceased operations on Closure Date, Charter LEA was unable to accept Student*

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for the 2014/15 SY due to lack of space, and Student did not have an LEA from the beginning of the 2014/15 SY until 9/23/14.

Petitioner asserts that OSSE is responsible for providing an appropriate placement and/or location of services for Student during the period when he did not have an LEA, which was the few weeks from the beginning of the 2014/15 SY until Student was enrolled in Neighborhood LEA on 9/23/14. On balance, Petitioner met her burden of proof on this issue, as set forth below.

OSSE correctly emphasizes that to obtain public funding of Nonpublic School, Student was and is required to have an LEA at all times, and marshals extensive documentation demonstrating that an LEA is required and that Guardian was repeatedly informed of that requirement.⁸⁴ However, Guardian does not dispute the LEA requirement and all evidence in this case points to the fact that Guardian diligently sought to obtain a new LEA as soon as she realized that Student's previous LEA had ceased operations. It is unclear why Guardian did not learn earlier about the pending closure, which would have made her life much easier and avoided this litigation. However, Respondents presented no definitive evidence that Guardian received advance notice of the closure as she should have.

Guardian credibly testified that she had not realized that Closed Charter was closing until Student's school bus to Nonpublic School for ESY did not show up on 6/30/14. Guardian then contacted Closed Charter and was told that she needed to enroll in Charter LEA, which she promptly attempted to do online on 7/1/14 or 7/2/14. Guardian was encouraged by OSSE Placement Director to try to enroll in Charter LEA and understood that she needed to wait to hear back from Charter LEA. When a spot in Charter LEA wasn't available in August 2014, PCSB Generalist spoke with Guardian about other options, giving her the names of other charter schools. In late August, Guardian was told to give Charter LEA 2 more weeks to see if space opened up after school started. OSSE Placement Director subsequently emailed Guardian to say that

⁸⁴ See OSSE's letter to Guardian dated 7/3/14 (informing Guardian that Closed Charter ceased to operate on Closing Date and that Student must be enrolled in another LEA); OSSE's Charter School Closure Policy (which states in section IV on Students with Disabilities Enrolled at a Nonpublic Special Education School that "Students attending nonpublic schools may remain at that school, but must enroll in another District of Columbia Public School or Public Charter School to maintain District funding and appropriate oversight by a Local Education Agency (LEA)."); OSSE's Parent Brochure on Policies and Procedures for Placement Review, Revised (which concludes with a paragraph on parents' responsibilities when their student is placed in a nonpublic school, emphasizing that students must be enrolled in a DC LEA every year, and that "[i]f your child is placed by a charter LEA that for some reason closes, you will need to enroll your child in another LEA."); and OSSE's Notice of Location Assignment for Student in 2012 (which noted that if Closed Charter ever ceases to operate, it must notify Guardian of her responsibility to enroll Student in another LEA).

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Student should be enrolled in Neighborhood LEA, which Guardian did after checking to see what documentation she needed for enrollment. Guardian had just begun a new job and had recently moved, so there was some delay for her paycheck and first utility bill to arrive in order to have all the required documentation. Guardian went and enrolled Student at Neighborhood LEA on 9/23/14.

There is no evidence that Guardian ever wanted to be without an LEA, that she ever did anything wrong or was uncooperative with OSSE or PCSB. Nor did Guardian do anything out of the ordinary while seeking to obtain an LEA during the summer of 2014. Guardian simply kept Student in the school in which OSSE had placed him in 2012 and which OSSE had been funding.

On the other hand, OSSE's Charter School Closure Policy requires parents to be informed that the charter school will be closing and requires the school to "[p]rovide assistance to parents in obtaining information about available school options and to enroll their child in a new school." (OR7-3.) The closing school is to "[p]rovide a copy of the student's file to his/her parent(s) to facilitate the transition of special education students to their new schools. By providing files to parents, they can furnish a physical copy of the file to the student's new school, documenting the services the child needs." (OR7-5 (III, C).) Guardian was not given a copy of Student's files, which if done in a timely manner would have alerted her to Closed Charter's impending closing. Nor was Guardian sufficiently assisted in obtaining information about a new LEA or sufficiently assisted in getting Student promptly enrolled.

OSSE acknowledges in its Charter School Closure Policy that "OSSE is responsible for monitoring LEAs for compliance with the IDEA, and for ensuring that students with disabilities receive a free and appropriate public education." (OR7-3.) As set forth in 20 U.S.C. § 1413(g) and 34 C.F.R. 300.227, OSSE is required to use payments that otherwise would have been available to an LEA for direct services to Student since Closed Charter was unable to provide FAPE and Guardian – following the guidance of OSSE – had not yet been able to enroll Student with another LEA. See *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 952 (4th Cir. 1997) ("SEA may be held responsible if it fails to comply with its duty to assure that IDEA's substantive requirements are implemented"). See also 34 C.F.R. 300.600; 300.149(a) (SEA is responsible for ensuring that the requirements of Part B of the IDEA are carried out); 5 D.C.M.R. § 3801.1 (OSSE's responsibilities include ensuring that all LEAs in the District of Columbia are in compliance with the IDEA).

OSSE argues that there was no educational loss to Student, but that is only true because Guardian continued to send Student to Nonpublic School; there would have been substantial educational loss if Nonpublic School had refused to allow Student to attend because the school was not receiving payment from OSSE for his education. Equally meritless is OSSE's contention that there was no economic loss in this case, as OSSE clearly had neither paid nor agreed to pay for Student to attend Nonpublic School during the 2014/15 SY and Student certainly could not attend Nonpublic School indefinitely without his tuition being paid. See *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 111-12

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(D.D.C. 2000) (legal harm exists despite District resolving tuition issue during the course of the litigation).

While OSSE (and PCSB) did assist Guardian in trying to get Student set up with a new LEA, the effort was not timely as Student did not have an LEA in place by the beginning of the 2014/15 school year. The issue is whether OSSE did all it was required to in this situation and, weighing the equities, where responsibility should fall when it was difficult to get a new LEA for Student. Guardian followed the guidance of OSSE and PCSB, took reasonable steps to secure an LEA and was simply seeking the best for Student, so Student should not be penalized. Nonpublic School was not at fault and is doing a good job working with Student, so shouldn't be responsible for the loss. OSSE had been funding Student at Nonpublic School and presumably would have continued that funding if Closed Charter had not closed down or the requirement of Student having a new LEA had been satisfied more easily.

OSSE's Charter School Closure Policy sets out the central goal of ensuring "as little disruption as possible to their students' education" (OR7-11) in the event of a charter school closing. Applying that principle, it is clear that despite Guardian's efforts there was significant disruption that is contrary to the IDEA and OSSE's principles. Considering the equities in the situation, it is this Hearing Officer's conclusion that Student was denied a FAPE and that OSSE is responsible for Student's tuition and transportation to Nonpublic School from the beginning of the 2014/15 SY through 9/23/14 when Student was enrolled at Neighborhood LEA. As the court explained in *Dist. of Columbia v. Vinyard*, 971 F. Supp. 2d 103, 115 (D.D.C. 2013) *appeal dismissed*, 2013 WL 6818236 (D.C. Cir. Dec. 26, 2013), "[a]n order awarding reimbursement of private-education costs when a school district fails to provide a FAPE merely requires the district to belatedly pay expenses that it should have paid all along." *Forest Grove*, 557 U.S. at 246, 129 S.Ct. 2484 (citation omitted)."

Issue 2: *Whether DCPS denied Student a FAPE by failing to provide an appropriate placement and/or location of services when DCPS refused to provide a full-time out of general education stand-alone school for 2014/15 SY as required by Student's IEP, and DCPS insisted that Student attend Neighborhood LEA before discussing placement.*

Petitioner asserts that DCPS should have implemented Student's IEP, which required a full-time stand-alone school such as Nonpublic School, as soon as he was enrolled as a DCPS student, rather than insisting that Student must actually attend Neighborhood LEA in order for DCPS to determine whether his placement and/or location of services at Nonpublic School were suitable or whether a change was required. For the reasons discussed below, Petitioner met her burden of proof and demonstrated that DCPS denied Student a FAPE.

The analysis begins with the regulatory provisions of 34 C.F.R. 300.323(e). For children who transfer between LEAs within the same state, the IDEA requires:

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If a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including **services comparable** to those described in the child's IEP from the previous public agency), until the new public agency either—

(1) Adopts the child's IEP from the previous public agency; or

(2) Develops, adopts, and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.

34 C.F.R. 300.323(e) (emphasis added). Because Student did not transfer to DCPS until the 2014/15 SY had begun, he enrolled within the same school year.⁸⁵ Thus, this intrastate transferee provision does apply and DCPS was obligated to implement “services comparable” to Student's 5/23/14 IEP, while deciding whether to adopt Student's IEP or develop an appropriate new IEP. The key issue here is whether the services DCPS offered were comparable to Student's IEP.

Student's current IEP is full-time, with 23 hours/week of specialized instruction outside general education and another 3.5 hours/week of related services. Student's IEP explains that a Self-Contained classroom had previously been attempted at the LEA but was unsuccessful. To fulfill his IEP, Student was placed at Nonpublic School where he has made much progress, but continues to need a great deal of support. Student has experienced traumas in his life, including a difficult situation within the last year, that left him unavailable for learning and make it important for him to have consistent access to a school psychologist and as much stability in his life as possible. Student does not do well with change, making it understandable that Guardian seeks to avoid as much disruption in his schooling as possible.

DCPS stated that it could offer comparable services to Student at Neighborhood LEA while determining whether his IEP was appropriate or not. DCPS could only provide 25 hours/week of specialized instruction out of general education at Neighborhood LEA, rather than full-time. More importantly, Neighborhood LEA did not even have a self-contained classroom available for Student. Instead, DCPS proposed to put him in a resource room that would be used for a shifting group of pull-out students from general education. Although the total number of students in the resource room was not expected to exceed 5 or 6 at any point, the fact that they would be rotating in and out means that their disabilities are less severe than Student's. In such a setting, Student would have to try to adjust to very frequent changes in his environment, even though he is known to be a child who needs stability and does not do well with change.

⁸⁵ DCPS could not, and was not required to develop an IEP before the school year began, pursuant to 300.323(a).

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Providers at Nonpublic School who know Student did not believe he could get by with less support than he was receiving there. Student's occupational therapist at Nonpublic School stated in a letter (P9) her belief that a return to public school would likely cause Student to regress. Student's teacher at Nonpublic School stated by letter (P10) that many strategies and accommodations have been put in place to help Student succeed by helping him focus and minimizing distractions. Student's psychologist at Nonpublic School stated in her letter (P11) that Student requires a great deal of support, including a small, structured environment with integrated behavior management and therapeutic support.

On the other hand, DCPS's conclusion that it could offer comparable services was not based on knowledge of Student and may not have even been informed by a review of the letters from Student's current providers. DCPS merely promised that if Student clearly needed a more restrictive setting, the review of his IEP would be expedited and he might be moved to a more suitable setting in the meantime. But students are not required to be put into positions of failure when the situation is not viable. *See, e.g., James ex rel. James v. Upper Arlington City Sch. Dist.*, 228 F.3d 764, 768 (6th Cir. 2000) (no requirement to leave child in "an arguably inadequate program").

Indeed, a self-contained classroom – which was **not** available for Student at Neighborhood LEA – would have been much more suitable than the proposed resource room with its constantly changing groups peers. Yet even a self-contained classroom was expressly stated on Student's IEP as not being sufficient, as it previously had been tried without success. Accordingly, this Hearing Officer concludes that the resource room at Neighborhood LEA could not provide services comparable to what is required by Student's IEP, so it was a denial of FAPE for DCPS to insist that Student attend Neighborhood LEA; it was not an appropriate location of services that could implement his IEP. *See James v. Dist. of Columbia*, 949 F. Supp. 2d 134, 139 (D.D.C. 2013) ("Under the IDEA, an appropriate location of services is one which can implement a student's IEP and meet his specialized educational and behavioral needs. *See* 20 U.S.C. § 1401(9); *N.G. v. Dist. of Columbia*, 556 F.Supp.2d at 37.").

This conclusion is bolstered by the Charter School Closure Policy statement in section IV on Students with Disabilities Enrolled at a Nonpublic Special Education School that "Students attending nonpublic schools may remain at that school, but must enroll in another District of Columbia Public School or Public Charter School to maintain District funding and appropriate oversight by a Local Education Agency (LEA)." (OR7-5.) OSSE Placement Director explained that the determination of whether a student may remain at nonpublic school is up to the new school's IEP team after Student enrolls at the new LEA. But it is clear from the existence of this provision that OSSE does not contemplate that every District-funded special education student in a nonpublic school must attend their new LEA while their IEP is being considered. Here, Student should not have been required to do so.

Even if Student had been parentally-placed at Nonpublic School, as asserted in the alternative in this case by various parties, the cases cited by DCPS make clear that DCPS would be required to develop an IEP for Student, if requested by Guardian,

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without forcing Student to enroll in – much less attend – a DCPS school.⁸⁶ The decisions in *Vinyard*, 971 F. Supp. 2d 103, and *Dist. of Columbia v. Wolfire*, 10 F. Supp. 3d 89, 2014 WL 169873 (D.D.C. 2014), involved parents of children with disabilities, who were enrolled in private schools, requesting that DCPS develop an IEP for their child, and DCPS declined the IEP requests, stating that it was not obligated to provide a child with an IEP until the child was enrolled in a DCPS school. In each case, the court held that DCPS was obligated to offer the student a new IEP when his parent made the request.⁸⁷

The court in *Wolfire* explained,

[T]here is no requirement that the child be currently enrolled in a public school in order to trigger the LEA’s obligation to develop an IEP for that child. *See Woods v. Northport Pub. Sch.*, 487 Fed.Appx. 968, 979–80 (6th Cir. 2012), quoting *James ex rel. James v. Upper Arlington City Sch. Dist.*, 228 F.3d 764, 768 (6th Cir. 2000) (“To hold otherwise would allow the school to slough off any response to its duty until the parents either performed the futile act of enrolling their son for one day and then withdrawing him as soon as the IEP was complete, or, worse, leaving the child in an arguably inadequate program for a year just to re-establish his legal rights.”); *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 85 (D.D.C. 2007), quoting Hr’g Officer Decision at 8 (affirming the HOD, which found that “[t]he LEA is still required to offer a FAPE to any resident when there is a parent request for the student to be evaluated” and that offering a FAPE includes, among other things, “determining eligibility [for services, and] developing an IEP if the student is eligible”); *see also Vinyard*, 971 F. Supp. 2d at 112–14, 2013 WL 5302674, at *8–9 (collecting cases).

Wolfire, 2014 WL 169873 (D.D.C. Jan. 16, 2014).

This conclusion is reinforced by *Dist. of Columbia v. Oliver*, 2014 WL 686860, at *6 (D.D.C. Feb. 21, 2014), which stated that, “[t]his Court, consistently and repeatedly, has held that DCPS must develop an IEP for an eligible student who resides in the District of Columbia.... Not only has no judge of this Court, in any published opinion, recognized an exception to this principle with respect to students who attend private schools; the argument that such an exception exists has been flatly rejected.”

⁸⁶ If Student had been parentally-placed in Nonpublic School, DCPS’s Private and Religious Office would have been relevant and possibly involved. Guardian testified that she had contacted the PRO office and left her contact information, but was not called back.

⁸⁷ Respondents unsuccessfully sought to prove that Guardian would only consider a private school for Student and would never consider public school. However, the cases are clear that an IEP must be developed before a Parent has anything to reject. *Vinyard*, 971 F. Supp. 2d at 114 (“the relevant inquiry is whether the parents expressed their intent to maintain the child’s private school enrollment *after* the school district offers a FAPE” (emphasis in original)); *Wolfire*, 2014 WL 169873 (only after receiving an offer of a FAPE may parents exercise their option to accept the offer or stay in private school).

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Remedies

A number of court decisions have held that Respondents may be ordered to pay a nonpublic school directly and retroactively for expenses already incurred when Petitioners lack the financial resources to “front” the costs of private school tuition. As the U.S. District Court for the Southern District of New York explained,

Section 1415(i)(2)(C)(iii) [of the IDEA] authorizes a direct retroactive tuition remedy for the same reasons that the *Burlington* court [*Sch. Comm. of the Town of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 374, 105 S. Ct. 1996, 85 L.Ed.2d 385 (1985)] found that the Act authorizes a tuition reimbursement remedy. Given the nature of the administrative and judicial review process, parents who request an impartial hearing will rarely, if ever, be able to obtain a ruling prior to the onset of the school year. Accordingly, denying parents the opportunity to seek retroactive relief is tantamount to denying them any relief at all under the Act. Where parents have the financial resources to enroll their child in an appropriate private school, they may do so and seek retroactive reimbursement in a due process hearing. Where, as here, parents lack the financial resources to “front” the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs – or will take years to do so – parents who satisfy the *Burlington* factors have a right to retroactive direct tuition payment relief.

Mr. and Mrs. A. ex rel. D.A. v. New York City Dept. of Educ. 769 F. Supp. 2d 403, 427-428 (S.D.N.Y. 2011).

In the present case, the fact that Petitioner is not obligated to pay Nonpublic School does not change the fact that Respondents denied Student a FAPE, that Nonpublic School is an appropriate placement, that the tuition is reasonable, that the equities favor payment of tuition, and that § 1415(i)(2)(C)(iii)¹⁹ is sufficiently broad to encompass retroactive direct tuition payment to Nonpublic School. Accordingly, OSSE will be ordered to reimburse Student’s tuition and transportation costs for Nonpublic School from the beginning of the 2014/15 SY through 9/23/14, and DCPS will be ordered to reimburse Student’s tuition and transportation costs for Nonpublic School from 9/24/14 and continuing as long as Nonpublic School remains his location of services. For the same reasons that Student’s placement at Nonpublic School was proper for reimbursement in this case, Student’s ongoing placement at Nonpublic School is appropriate under the factors for prospective placement set forth in *Branham v. Dist. of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005). The evidence establishes that Nonpublic School is a good fit for Student and he is making progress there.

¹⁹ The court, basing its decision on the preponderance of the evidence, “shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii).

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Petitioner also requests as relief that OSSE and DCPS be required to convene Student's multidisciplinary team to review his placement and/or location of services, which will be ordered within 20 school days from the date of this HOD.

ORDER

Petitioner has met her burden of proof on the issues set forth above. Accordingly, **it is hereby ordered that:**

- (1) OSSE shall fund Student's placement and transportation costs at Nonpublic School from the beginning of the 2014/15 SY through 9/23/14.
- (2) DCPS shall fund Student's placement and transportation costs at Nonpublic School beginning on 9/24/14 and continuing as long as Nonpublic School remains his location of services.
- (3) DCPS and OSSE shall convene a meeting within 20 school days with Student's multidisciplinary team and consider Student's placement and/or location of services.

IT IS SO ORDERED.

Dated in Caption

/s/ Keith Seat

Keith L. Seat, Esq.
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).