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OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
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STUDENT, [1]through the Parents

Date Issued: July 9, 2010

Wanda Iris Resto Torres, Hearing Officer

v

Case No:

DCPS[2],

Hearing Date: June 28 and 29, 2010 Room 7a

Respondent.

AMENDED HEARING OFFICER DECISION[3]

BACKGROUND

On May 4, 2010, the Petitioners filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE").[4] The undersigned was appointed as the Hearing Officer on May 5, 2010.

The Hearing Officer held a pre-hearing conference call with both Counsels on May 24, 2010, at 4:30 PM. During that conference call, the Petitioners reiterated the issues as plead. The parties stipulated the student does not attend a DCPS.

Hearings were held on June 28th and 29th, 2010. The Petitioners presented a disclosure letter dated June 21, 2010 to which thirty-five documents were attached, labeled P-1 through 35 and supplemented on June 21, 2010, with documents identified as 36 and 37. The documents were admitted without objections except Petitioners' documents 2 and 3 which were excluded because the documents were already in the record; five witnesses testified, the Petitioner, the Educational Consultant, the Physical Therapist, the Occupational Therapist, and a Counselor. The Respondent presented a disclosure letter dated June 21, 2010, to which nine documents were attached, labeled DCPS 1 through 9; four

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

[2] Early STAGES (Screenings, Transition, Assessments, Goals, Evaluations and Services Program

[3] The HOD was amended to include in the Order the Respondent's obligation to pay for the 2010 ESY services, and correct grammatical errors.

[4] 20 U.S.C. §1415(c)(2)(B)(i)(I)

witnesses testified, the Evaluation Manager, the Family Care-Program Manager, the Evaluation Coordinator, and the Special Education Coordinator. The documents were admitted without objections except Respondent's document 2 which was excluded for lack of relevancy to the Complaint. The hearings were conducted in accordance with the rights established under the IDEIA and the implementing federal and local regulations, and the SOP.[5]

ISSUES

The issues to be determined are as follows:

1. Did the multidisciplinary ("MDT") members have knowledge of the student needs' the placement options, and did they consider the student's safety?
2. Did the Respondent offer the student a placement for school year 2010-2011 consistent with the least restrictive environment and designed for the student to gain educational benefit?
3. Were the service hours on the IEP inappropriate?
4. Was the student denied a FAPE?
5. Are the Petitioners entitled to reimbursement for the cost of extended year services during summer of 2010, and for the tuition of school year 2010-2011?

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. On January 11, 2010, the student was found eligible for special education and related services under the IDEIA. The disability category is Other Health Impairment, due to his "complex medical history significant for intraventicular hemorrhages bilaterally, hemiplegic cerebral palsy, chronic lung disease, gastroesophageal reflux disease, and has history of a large thrombus sitting in the inferior vena cava. [6] The parents and the DCPS members on the team did not agree on a final IEP; but did agreed to reconvene after DCPS completed a parent requested Adaptive Physical Education ("APE") Evaluation and an observation at the school to determine whether the student require a one-on-one aide. At that time, DCPS recommended and Schools as potential placements for the student. DCPS also agreed to initiate speech and language services until the IEP could be completed. During the meeting the parents requested an increase in services from 60 minutes to 120 minutes weekly and that some of the services be provided at the home. [7]

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[5] IDEIA and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

[6] The parties agreed at the hearing that the OHI category is appropriate.

[7] P# 13, January 12, 2010, Eligibility Meeting Notes, testimony of the Mother, the Family CARE Manager Evaluation Coordinator.

2. On March 9, 2010, the MDT met to review the Dedicated Aide Observation Report and Adaptive APE Evaluation and discuss placement. At that meeting, DCPS offered as a placement option; the parents rejected that offer; then DCPS offered the proposed school. The level of services was discussed; DCPS proposed to reduce services from 120 minutes to 60 minutes weekly, parents disagreed, and the MDT agreed to divide the minutes between 60 minutes inside general education and 60 minutes outside of general education.[8]

3. On March 15, 2010, DCPS authorized reimbursement for the student at the private school for school year 2009-2010. [9]

4. The student has been receiving occupational therapy once a week since September 2008. The student has below average fine motor skills, he presents with right hemiplegica, with neuromotor and sensorimotor delays. He has significant delays with visual motor integration development. The student's abdominal area is weak and he focuses on one side movement, and when he engages in activities his right side weakness stands out. At the private school there is a lot of equipment to assist his fine motor skills and strengthening. At the beginning of this year he was putting objects into his mouth to supplement his right hand and seldom used his right hand. He now uses his right hand for stability and moves objects from hand to hand, and no longer keeps his right hand close to his body.[10]

5. The student has respiratory and coordination problems which cause him to fatigue easily. The student becomes tired, and depending on the time of the day requires more assistance. He becomes weaker as the day passes. Changes to the student's physical therapy were made to accommodate his fatigue problems. The student was observed at the proposed school's playground which is covered in gravel and is bumpy making it difficult for the student to navigate; he was able to move around with the assistance of one of the three adults, he required a break within 10 minutes. When walking through the hallway at the proposed school he was hesitant, and asked for assistance. The student welcomes and sometimes relies on adults to get things done. The concerns about the playground were not presented to DCPS. [11]

6. According to the student's APE evaluation, he is unable to manage the following tasks in the school environment: get on or off the school bus, move through a crowded or uncrowded hallway, move through doorways, get on and off a classroom chair, sit on the floor or a regular classroom chair, walk around the classroom/lunchroom/gym, get up and down from the floor, access the playground or playground equipment, manage uneven surfaces (i.e. curbs, grass, changes from tile to carpet), go up or down stairs. [12] There were no concerns with the adaptive physical therapy goals and services. The concern is that the school day is a full day and the student cannot handle an entire day. The student gets fatigued easily. At the proposed DCPS; the student had difficulty navigating the

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[8] P#12, March 9, 2010, Meeting Agenda and Notes, testimony of the Education Consultant - admitted as a Special Education Placement Specialist, and testimony of the Family CARE Manager.

[9] P#9- March 15, 2010, Reimbursement Letter, for school year 2009-2010.

[10] P#23-February 12, 2009, Occupational Therapy Evaluation.

[11] Testimony of the Physical Therapist.

[12] P#18- March 19, 2010, Adaptive Physical Education.

pathway to the cafeteria, he was not familiar with the playground or the children. He also had difficulty transitioning from the grass to the sponge area in the playground. The physical therapist did not tell DCPS the terrain or the physical layout was inappropriate for the student.[13]

7. The student's April 6, 2010 IEP confers 3 hours per day of specialized instruction in a general education setting, 90 minutes per week of adaptive physical education, 60 minutes per week of speech language pathology, 60 minutes per week of physical therapy, 60 minutes per week of occupational therapy outside general education, with an additional 60 minutes of each in the general education setting. The student was provided a total 24 hours weekly of services.[14] The IEP includes goals directed at assisting the student achieve independence, negotiate between work stations, independently manage variable terrain, climb, handle playground equipment and participate in play activities without loss of balance; all the goals created by the student's current private school were also incorporated into the IEP.[15] The IEP provides the student the support of a dedicated aide, adaptive physical education, speech language pathology, physical therapy, and occupational therapy. In addition it provides 30 minutes a week of consultation service for speech language pathology, occupational therapy, and physical therapy to allow dialogue between teachers and service providers. The MDT determined the student eligible for both adaptive physical education and extended year services ("ESY"), and made those additions to his IEP; but it was not determined where the ESY services would be provided. The Petitioners agreed with the specialized instruction, related services, consultation services, and the other classroom aid and services. The Petitioners did not sign the IEP; they did not agree with its implementation because of safety reasons and the length of the school day. [16] The level of services was developed with the input from the Petitioners and it was known that the services were to be offered at a DCPS.[17]

8. At the April 6, 2010, none of the evaluators who participated in the team discussions had seen the school, and the other LEA representatives had not seen the student. The level of services was discussed and parents expressed their concern that the proposed program require the student attend school five days/week for a full day. The parents raised their objection that this schedule does not meet the student's needs because he does not have the stamina to participate in such length of a school day or week. The parents provided a report with their expert's opinion of the placement and impact on the student at his current school versus him attending the proposed DCPS with a dedicated aide. The report spoke to the Petitioners' concerns with the student's ability to access the services at the proposed school, it alleged lacked of an inclusion program that is fully developed, the student's inability to navigate the classroom and building without assistance. The report claimed the low student/teacher ratio, that the ages and physical abilities of the other children was beyond the student's capacity, the lack of therapy equipment and of appropriate dedicated therapy space, would hamper the student's progress. The reported indicated that the lack of accessibility, the danger factors in the playground and cafeterias, and the length of the school day, were not appropriate for the student. It also mentioned concerns that even with a dedicated aide, there are significant risks of falling or choking because of the high number of students, low number of adults, and the objects

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[13] Testimony of the Physical Therapist.

[14] DCPS # 7, April 6, 2010, IEP, and testimony of the Evaluation Coordinator.

[15] P# 15-November 9, 2009, Individualized Learning Web.

[16] DCPS # 7, April 6, 2010, IEP, and testimony of the Mother.

[17] Testimony of the Family CARE Manager.

currently in the classroom that can be hazardous to the student. [18] The parents' report was briefly discussed; and the current DCPS was proposed. After that meeting there was an offer by the Central Office for another meeting, but nothing happened.[19]

9. The student's IEP requires full day attendance for the entire week with the assistance of a dedicated aide to transition, and navigate the classroom/school. The neighborhood school is the proposed DCPS to implement the IEP. There are approximately 340 students ranging from pre-kindergarten through fifth grade in the proposed school. There are students with disabilities; but none who require an IEP. The special education teachers are assigned by the need of the students. All the teachers are trained on resuscitation techniques and there is a full-time nurse. The MDT discussed that the proposed school offers a language based program for 4 year-olds; it provides services both outside and in the general education setting; the classroom layout and safety issues were also discussed. The school year for preschoolers starts later than the older students, and the 5 days attendance requirement is put into place gradually. The students play in different playgrounds depending on their ages; the students between 3-4 years of age play in the soft ground area. After lunch the student have an opportunity to nap approximately for an hour, to allow for rest time. The school has ramps to come into the school and at the stairwells there are rails, it also has an elevator. The MDT included a dedicated aide to assist the student in navigating the classroom/school and to access the curriculum. The SEC asserted that adaptive furniture would be provided and classroom modifications made to accommodate the student's needs.[20] During times when the dedicated aide is not available; other school staff will be on hand to assist the student. Speech Pathologist, Physical Therapist and other service providers required by the student's IEP are available; the providers meet weekly with teachers to discuss student progress. The services are offered throughout the school depending on the skill the student needs; it may be provided at the cafeteria, hallway and other areas, and there is not a big problem with other students passing through the area. The DCPS IEP also provides for no attendance penalty imposed on the student and visiting instruction services to be available if the student is to be absent from school for 30 days or more for medical reasons. [21]

10. The student places objects in his mouth constantly; which require extremes supervision, and modifications to the classroom environment; that would comprise the other students learning. The assistance of a dedicated aide will negatively impact his peer relations and his self-esteem. The student is likely to suffer social and emotional regression because the proposed DCPS does not foster independence. The student requires a small structure environment with a low student/teacher ratio to address his physical and social emotional needs. He needs instruction to improve his cognitive, academic, language, motor and self-help skills, and for the services to be integrated into his classroom and school day in an inclusion model. The student has difficulties walking and has two shunts in the head and falls must be prevented. The proposed school's physical layout can be overwhelming for the student and presents serious concerns for the parents; because the student who was prematurely born is small for a year-old; he would have to change classroom, maneuver between work stations, go up and down stair for classes and to get to the playground all with the

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[18] *P*#11, April 6, 2010, Meeting Agenda and Notes, P #4, March 29, 2010, Report of Findings of Proposed Full Inclusion Preschool Program at DCPS, and testimony of the Education Consultant.

[19] Testimony of the Family Care Manager

[20] Testimony of Evaluation Coordinator, Early Stages

[21] Testimony of the SEC.

assistance of the dedicated aid. The student would be the only student with an adult by his side constantly; a dedicate aide would not allow him to become independent and his self-esteem can be negatively impacted and, cause social regression. He is very aware of himself and the assistance of a dedicated aide would single-out the student and ostracize him instead of "mainstreaming". There is no privacy for the provision of related services which are provided in a Gym; where other students pass; or on a stage section-off with a curtain. Placing the student at the proposed DCPS may cause him physical and emotional harm.

11. The student is currently attending a private that is small, he is engaged with other students; he can act independently and receive support at the same time; for example he receives encouragement to move his right arm; instead of providing him with the object or performing the activity for him. There other students, who are at the oral stage of development in his classroom, and others who also are working on toileting skills. The student has friends, engages in parallel playing, and during lunch has opportunities to ask for things. The current school is a fully integrated inclusion program that meets the student's unique needs as a student with a disability. At the private school the language program is integrated in all aspects of the curriculum; he has opportunities to ask for things, and develop independence; the student is thriving at the school. He has improved academically, his playing also improved; he is able to put toys away, and has good interaction with adults. The private school is appropriate for the student because it is small, nurturing, and a structured environment. The furniture and the physical environment are also appropriate. It is less restrictive than the placement at the proposed DCPS with a dedicated aide. He receives instruction and related services, both in his classroom and in small group settings. It is fully accessible to the student; the small size allows him to navigate the school, and the teacher to student ratio permits him to fully access the curriculum, and the student has progressed. At the April 6, 2010 meeting; the report written by the witness was referenced, but not discussed in detail. The Student can receive academic benefit from the IEPs that have been developed by DCPS, as well as from the Learning Web created by the private school.[22]

12. The private school is a play-based preschool inclusion program where instruction and related services are provided in an open space classroom; which has small furniture. The classes are divided by age group and with student similar in size. The program at the private school is a part-day program. The student attends school three mornings per week plus one afternoon of additional specialized support because he physically could not do more. He will begin to take classes 5 days a week from 8:40 am to 11:30 am. Once a month two teachers go to the student's house and provide the Petitioners with instruction on how to adapt his therapy and services to the home environment. At the school he constantly has adult supervision and they are aware of his needs; while allowing him to develop independence. The Petitioners receive weekly progress reports of the student's therapy sessions. His scheduled hours at school were reduced from five hours to three, because of his physical condition and various hospitalizations, which have caused him to be physically and mentally behind his peers. The student has had several slips and falls during this school year and requires close attention to maintain his balance and safety. The student has progressed; now he has playmates and gets invitations to birthday parties.[23]

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[22] Testimony of the Education Consultant- admitted as an expert witness on special education placement specialist- she supervised placement decisions for all disabilities in D.C for approximately 12 years, and testimony of the Mother.

[23] Testimony of the Petitioner.

13. The program at the private school includes Speech/Language, Occupational Therapy, and Social-emotional development as a major component of the curriculum for all of the students incorporated into the classroom. A team provides 30-45 minutes daily accommodations and adaptations to ensure the student participates in the play-based curriculum and is an active member of the classroom community. The student has made progress walking independently in the class and in the playground; socially he now joins the 2.5 and 3 year-old students in play; he is on their level cognitively and in size. The student does not require a dedicated aide at the current school, he maneuvers well in the class, goes to the bathroom alone, and does not need to hold on to an adult to get around anymore the classroom. The students of the same age as the student are developing emotionally, cognitively and socially faster than the student and he would require additional modifications to reach his peer age level. The student is part of the class and not singled out through "pull-out" services. The class he is to attend for the 2010/11 school year includes 19 students (one other student with disabilities), 3 lead teachers, and 1 resource teacher, none are special education certified; they have over 18 years working in inclusion programs. The student will also participate in Play Pals next school year, a weekly multi-sensory enrichment group. This group has 4-6 children who receive additional support with social interactions, motor skills, speech and language development, or self-regulation. The private school cannot provide services outside the general education setting, nor implement the IEP as drafted by the MDT. [24]

14. The parties stipulated the OHI category is appropriate, the goals on the April 6, 2010 are appropriate, and that a dedicated aide service is appropriate for the proposed DCPS.

15. The parties agreed that the student was determined eligible for 2010 ESY services.[25] The IEP prescribed 3 hours per day in a general education setting; the location of the services was not decided. The parents requested that DCPS reimburse them for payment at the private school summer ESY program, which is an inclusion based program. The Petitioners did not provide any evidence of the amount paid.

Preliminary Matters

The Respondent prior to the presentation of its witnesses requested the Hearing Officer make a finding that the evidence proved the Petitioners agreed with all the services on the IEP and that the private school could not implement the MDT created IEP.

The Respondent's request was granted; the testimony was the Petitioners agreed to the services on the IEP as drafted by the MDT, and the private school cannot implement that IEP.

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:

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[24] Testimony of the Special Education Coordinator at the private school.

[25] DCPS # 7, April 6, 2010, IEP.

The IDEIA requires all states including the District of Columbia that receive federal funds for education to provide each child between the ages of three and twenty-one, who has a disability, with a free appropriate public education.[26] The law defines FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)." [27]

Multidisciplinary Team

It's the Petitioner's contention that some MDT members did not have knowledge of the student's needs including safety and others did not have knowledge of the placement.

The public agency must ensure that the IEP Team for each child with a disability includes—(1) The parents of the child;(2) a regular education teacher of the child;(3) one special education teacher of the child, or, not less than one special education provider of the child;(4) a representative of the public agency who—(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;(ii) Is knowledgeable about the general education curriculum; and(iii) Is knowledgeable about the availability of resources of the public agency.(5) An individual who can interpret the instructional implications of evaluation results, (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and(7) Whenever appropriate, the child with a disability. [28]

At the April 6, 2010 MDT meeting, evaluators with knowledge of the student, a representative with knowledge of the site, the Petitioners, their Education Consultant and attorney participated in the meeting for the IEP development. The evidence was there were various meeting in which enough data and information was exchanged between the different services providers, the parents, their advocates and other MDT members. The law does not require that each member of the MDT have specific knowledge of the student and the site; the MDT is formed by a collection of knowledge and information. I find the MDT was appropriate.

Individualized Education Program

The Petitioners claim that the IEP is not designed to provide a meaningful education because it is too long and to be implemented at a physically inappropriate environment; although they agreed to the goals, services and participated in its creation.

The Respondent has the obligation once it has determined a child eligible, to provide special education and related services through an appropriate IEP and Placement, designed to meet the child's unique needs and prepare him for further education, employment, and independent living. [29]

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[26] 20 U.S.C. §1412(a)(1)(A).

[27] 20 U.S.C. § 1412(a)(1)(A), and 34 C.F.R. § 300.17

[28] 20 U.S.C. §1414(d)(1)(B)-(d)(1)(D), 34 C.F.R. § 300.321, and 5 D.C.M.R. 3007.1- 3007.8.

[29]20 U.S.C. § 1400 (d)(1)(A et seq. and 5 D.C.M.R. § 3000.1

An IEP "means a written statement for each child with a disability that includes a statement of measurable annual goals, including academic and functional goals, designed to—

aa. Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

bb. Meet each of the child's other educational needs that results from the child's disability."[30]

The student's DCPS IEP has goals to increase gross motor skills, address his cognitive, academic, language, social emotional, motor and self-help skills, and is an inclusion model; all necessary services and accommodations for academic success. The IEP comprehensively describes the student's present academic level, details measurable annual goals for the student incorporating those presented by the Petitioners, specifies necessary specialized instruction, related services, accommodations and establishes the extent to which the student will participate in a regular education classroom and the Petitioners' agreed. The testimony was the parents participate in drafting the goals and required that additional services be added; which increased the hours of services.

The MDT including the Petitioners crafted an IEP that entitles the student to15 hours a week of specialized instruction out of the general education classroom setting, with 9 hours of related services both in general education and outside the general education setting; the distribution of services was discussed with the parent and their experts. An IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not "maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children". [31]

I find the goals/objectives and services were created by a group of knowledge people including the Petitioners, and were designed to provide educational benefit; through an appropriate IEP.

Placement

The Petitioners contend that the placement offered to the student for school year 2010-2011 is not consistent with the least restrictive environment and will not permit the student to gain educational benefit.

The determination of the educational placement of a child with a disability must be made "in conformity" with the least restrictive environment provisions, federal and D.C. regulations require placements to be "based on the child's IEP" and "as close as possible to the child's home."[32]

The IDEA does require school districts to place students in the less restrictive environment ("LRE"). LRE means that, to the maximum extent appropriate, school districts must educate students with disabilities in the regular classroom with appropriate aids and supports, referred to as "supplementary aids and services," along with their nondisabled peers in the school they would attend if

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[30] 20 U.S.C. § 1414 (d)(1)(A)(i)(II)(aa), (bb), and *5 D.C.M.R. § 3002.1*

[31] *Anderson v. District of Columbia,* 606 F. Supp. 2d 86, 92 (D.D.C. 2009)

[32] 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550, 5 D.C.M.R. §§ 3011. 3013.1(e).

not disabled, unless a student's IEP requires some other arrangement. This requires an individualized inquiry into the unique educational needs of each disabled student in determining the possible range of aids and supports that are needed to facilitate the student's placement in the regular educational environment before a more restrictive placement is considered.

"In implementing IDEA's LRE provisions, the regular classroom in the school the student would attend if not disabled is the first placement option considered for each disabled student before a more restrictive placement is considered. If the IEP of a student with a disability can be implemented satisfactorily with the provision of supplementary aids and services in the regular classroom in the school the student would attend if not disabled, that placement is the LRE placement for that student. However, if the student's IEP cannot be implemented satisfactorily in that environment, even with the provision of supplementary aids and services, the regular classroom in the school the student would attend if not disabled is not the LRE placement for that student." (See: OSEP Memorandum 95-9, 21 IDELR 1152 (OSEP 1994),

Addressing a question of the least restrictive environment requirements OSEP[33] stated "... Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The overriding rule is that placement decisions must be determined on an individual, case-by-case basis, depending on each child's unique needs and circumstances and based on the child's IEP. ...Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement."

In the present case the IEP goals and objectives were discussed; accommodations and support from a dedicated aide were also put into the program to address safety concerns and to allow the student to access the curriculum. The participants all were aware of the obligation to comply with the LRE would require looking at the DCPS as the first option for placement. *The* student's needs were discussed the IEP was agreed; the IEP guides the LRE.

The DCPS IEP provides for the specialized instruction in a general education setting, and related services in and out of the general education setting. During the development of the IEP supplementary aids, accommodations, and modifications were made to achieve the least restrictive environment. The evidence was the MDT did hear evidence on the physical layout of the school and made modifications to accommodate the needs of the student. The overwhelming evidence also was that the Petitioners asked for more services creating an IEP that exceeded the hours they now insist are inappropriate for the student. If the service hours were of concern to the Petitioners they had an obligation to stop the process

[33] November 30, 2007- OSEP-Letter to Tom Trigg.

and not continue working on an IEP that would increase the hours of service they were willing to consider.

It is disingenuous for the Petitioners to participate in the development of the IEP; ask for additional services; agreed to the goals and services on the IEP, and then present a challenge the implementation of the IEP they agreed was appropriate.

The Petitioners did not prove that the Student's current IEP which is the cornerstone of the Student's program and drives the placement decision was defective. The Petitioners have pointed to no evidence in the record contradicting the determination that the IEP can be implemented at the proposed DCPS, and even their expert agreed that the student can achieve educational benefit with the drafted IEP. The Hearing Officer therefore concludes that placement at the public schools satisfied the statutory requirements.

The Petitioner chose as placement a private school with no opportunity for the Student to interact with non disable peers, and that cannot implement the IEP as drafted by the MDT. The request is contrary to the strong preference in the IDEIA for educating children with disabilities in regular classes with children who are not disabled; with the appropriate aids and supports.34 The Petitioners' concerns that the student was not ready for a full day program could have been discussed further. An option for the student could have been for the specialized instruction hours in the general education setting to be provided at the DCPS and the related services hours be provided at home. However, there was no further meeting to discuss this as a potential option, although the Respondent invited the Petitioners to another meeting.

Furthermore, the District of Columbia Code imposes a strict order of priority for special-education placement: "(1) DCPS schools or District of Columbia public charter schools; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia." [35] There was no evidence to demonstrate why the Petitioner should be allowed to override the priority.

Dedicated Aide

The Petitioners argued that a dedicated aide and the implementation of the student's IEP as proposed would limit the student's abilities to interact socially with his peers and can stigmatize him socially. The student has goals on his IEP that seek to establish his independence, and it was determined all service providers will work to ascertain the student's progress and adjust goals as progress happens to secure self-sufficiency. In addition the Petitioner's worked on the formation of the IEP, the reasons for a dedicated aide were discussed and included as part of the IEP, based partially on Petitioners request for additional services and accommodations. The Hearing Officer determines that the student requires a dedicated aide to participate in an inclusion program as prescribed in his IEP.

The parents have chosen a private school where the student would not require a dedicated aide nor have access to services outside the general education setting.

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[34] 20 U.S.C. 1412(a)(5), and 34 CFR§§ 300.114 through 300.118.

[35] D.C. Code § 38-2561.02(c) (2007).

Although the IDEA guarantees a Free Appropriate Public Education, it does not, however, provide that this education will be designed according to the parent's desires. The primary responsibility for formulating the education to be accorded a [child with a disability] and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parent or guardian of the child. Thus proof alone that loving parents can draft a better program than a state offers does not, alone, entitle them to prevail under the Act."[36]

In assessing whether a FAPE has been provided, a court must determine whether (1) the school complied with the IDEIA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits.[37]

In this case the Respondent provided written notice, the parents examined records, participated in the identification, evaluation, and developing the IEP. I find the IEP was reasonably calculated to provide an educational benefit to the student. The Respondent met its legal obligation; the student was not denied a FAPE.

Reimbursement

The Supreme Court's decisions in *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359 (1985) indicates that tuition reimbursement is only available if a Federal court concludes "both that the public placement violated IDEA, and that the private school placement was proper under the Act." In the case on hand the Petitioners had amble opportunity to participate, and did so. There was no evidence of a procedural or substantive violation, and the private school cannot implement the IEP as drafted.

The Hearing Officer determined there is no denial of FAPE and the Petitioner's are not entitled to reimbursement for the current school year 2010-2011.

The parties agreed that the student was determined eligible for 2010 ESY services.[38] The IEP prescribed 3 hours per day in a general education setting; but that the location of the services was not decided. The Petitioners sought the ESY services from the private school. The Respondent did not challenge the cost of the ESY services. Therefore, the Hearing Officer determines that the Respondent accepted as accurate the allegation that it has an obligation to pay for the summer 2010 ESY services. The Petitioner's failed to provide evidence of the payment or a bill from the Private School showing the amount due.

Burden of Proof

The burden of proof is the responsibility of the party seeking relief, in this case the parent. It requires that based 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 that

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[36] Shaw v. The District of Columbia 238 F. Supp. 2d 127, 139 (D.D.C. 2002).

[37] *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982); and *Jalloh v. District of Columbia*, 535 F. Supp. 2d 13, 16 (D.D.C. 2008).

[38] DCPS # 7, April 6, 2010, IEP.

the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.[39]

The Respondent met its legal obligation under the IDEIA.

ORDER

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

ORDERED, the Petitioner's must provide the Respondent with evidence of payment of the 2010 ESY services, or the bill. The Respondent within 45 days of receipt of the either the proof of payment or the bill for payment, will reimburse the Petitioners or paid the cost directly to the Private School, **it is further;**

ORDERED, the Petitioner's due process complaint is Dismissed, **it is further;**

This order resolves all matters presented in the Petitioners' May 4, 2010, due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).

Dated: July 20, 2010

Wanda I. Resto Torres Hearing Officer

[39] 5 D.C.M.R. § 3030.3.