

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

Student Hearing Office
810 First Street, N.E.
Washington, DC 20002

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STUDENT HEARING OFFICE
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STUDENT,¹
through the Parent/Guardian,*

Petitioner,

v

DCPS,

Respondent.

Date Issued: 1/21/11

Hearing Officer: Seymour DuBow

Case No:

Hearing Date: 1/13/11 Room: 2007

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

On November 12, 2010 counsel for the petitioner filed a due process complaint alleging that DCPS failed to provide an appropriate placement for a -year old male student who has been found eligible for special education services as a student with the disability classification of multiple disabilities-Emotional Disturbance/Other Health Impaired. The student's current IEP calls for 26 hours per week of specialized instruction out of the general education setting and 1.5 hours a week of counseling services. On November 22, 2010 counsel for the respondent DCPS filed a Response denying that DCPS failed to provide an appropriate placement. On December 16, 2010 a resolution meeting was convened and DCPS proposed the (also called as the student's proposed placement. No agreement was reached at the resolution meeting. The resolution meeting was held outside the 30-day period, but the

¹ Personal identification information is provided in Appendix A.

timeline was adjusted accordingly. A pre-hearing conference was held on December 16, 2010 with counsel for the petitioner Zachary Nahass and counsel for the respondent DCPS Linda Smalls. On December 17, 2010 a pre-hearing Order was issued. The Order stated that counsel for the parties agreed that the 45-day timeline started to run on December 13, 2010- the day after the 30-day resolution period had lapsed. The HOD is due January 26, 2011. The Order stated that the issue to be determined at the due process hearing is whether or not the DCPS proposed placement of the _____ is an appropriate placement for the student. The relief requested by the petitioner is placement at a non-public special education program and compensatory education.

The due process hearing convened at 9 a.m. on January 13, 2011 in Room 2007 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Zachary Nahass represented the petitioner and Linda Smalls represented the respondent DCPS at the hearing. The hearing was closed. At the outset of the hearing, counsel for DCPS objected to admission of petitioner's documents 1-3 on the grounds of relevancy, but the objection was overruled by the hearing officer as being relevant background and should be included in an administrative hearing. Petitioner's Documents P-1-P-17 were than admitted into evidence and Respondent's Documents R-1-R-8 were admitted into evidence without objection. All witnesses were sworn under oath prior to testifying. Counsel for the petitioner called as witnesses the educational advocate and mother who both testified in person and a representative of The _____ who testified by telephone. Counsel for the respondent called as witnesses the special education coordinator at _____ School and the special education coordinator at The _____ who both testified by telephone.

JURISDICTION

The hearing was convened on January 13, 2011 pursuant to *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004 (hereinafter referred to as IDEA), Title 34 of the Code Of Federal Regulations, Part 300 (2006) and Title V-E of the District of Columbia Municipal Regulations.*

BACKGROUND

The student is a -year old male who has been found eligible for special education and related services. The student has a disability classification of multiple disabilities-Emotional Disturbance and Other Health Impaired. He has for the last three years attended School in a self-contained special education classroom for students with his disability classification. He has been taught by a special education teacher for all his academic subjects, received counseling services from a clinical social worker, and had a behavior modification plan. Despite these services, the Multi-Disciplinary Team (hereinafter referred to as MDT) agreed at the October 26, 2010 meeting that his needs were not being met at since he continued to exhibit rebellious, disruptive, aggressive, outbursts (screaming unprovoked), and defiant behaviors when attempts are made to redirect. The student has also destroyed school property. The MDT recommended a more restrictive setting. At the resolution meeting held on December 16, 2010, DCPS proposed Petitioner has filed this due process complaint challenging the failure of DCPS to provide an appropriate placement and is now asserting that is not an appropriate placement to address the student's behavioral issues that are interfering with his educational progress.

ISSUES AND RELIEF SOUGHT

The issue to be determined is as follows:

Did DCPS deny a Free Appropriate Public Education (FAPE) to the student by failing to propose an appropriate placement capable of implementing the October 26, 2010 IEP for the student at _____ The relief requested is placement at The _____ in Largo, Maryland, a non-public special education program and compensatory education for the denial of a FAPE and services missed as a result of DCPS's failure to provide an appropriate placement.

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. The student is a _____-year old male who has been found eligible for special education services as a student with the disability classification of multiple disabilities specifically Emotional Disturbance and Other Health Impairment. (P-1 p.1, P-4 p.1)
2. The student attended _____ School, his neighborhood elementary school in the 2007-2008 School Year. At a May 8, 2008 Meeting, the MDT reviewed the student's IEP and placement needs. The special education teacher reported the student's "aggressive behaviors are getting in the way of his learning and he kicks, bites, hits, and throws chairs when he does not have his way." The MDT determined that _____ School cannot meet the student's needs and DCPS offered _____ as placement for the student. (P-2)

3. A Prior to Action Notice was issued on May 8, 2008 changing the student's placement to (P-3)
4. The student attended from the 2008-2009 School Year until November 2010. (Testimony of Mother)
5. The student attended a full-time special education classroom at with students with Emotional Disturbance or Multiple Disabilities like his-ED/OHI. There are eight students in his class taught by a special education teacher with one instructional aide and one dedicated aide. There are two clinical social workers and one art therapist. The student also receives ninety minutes a week of individual counseling from one of the clinical social workers. The student has a behavior modification plan. There is also a part-time psychologist on staff. There is a crisis intervention room. Once a week the student leaves the self-contained classroom for art, music or gym. The special education classrooms are located in a general education school at (Testimony of special education coordinator at
6. In the current 2010-2011 School Year, the student was in the grade at School. (Testimony of Mother, special education coordinator at
7. The student's current IEP calls for 26 hours of specialized instruction per week outside of general education and 90 minutes a week of behavioral support services. The IEP states that "Student will receive 26 hours of specialized instruction in reading, writing, and math outside the general education setting due to significant behavior difficulties." (P-4 p.7) The IEP further states justification for these hours that "The MDT agrees that an out of general education setting is appropriate in

meeting IEP goals and objectives.”(P-4 p.8) The IEP also states in both the areas of concern in academic-mathematics and reading that the student “continue to have behavior concerns, such as rebellious, disruptive, aggressive, outbursts (screaming unprovoked), and can be defiant when attempts are made to redirect and destructive of school property. The behavior negatively impact his academic progress.” (P-4 p.2 and p.3)

8. The student was suspended this school year and the mother was called to pick up her son for behavioral outbursts including throwing objects, hitting staff and not being able to redirect this school year at (Testimony of Mother)
9. The student has been physically restrained this school year at for behavioral outbursts and his reaction to the restraint was to distrust the staff and escalate his behavioral outbursts. (Testimony of Mother)
10. On October 26, 2010 an MDT meeting was convened at Due to ongoing behavioral concerns, the MDT team agreed that a more restrictive placement is recommended and an alternative placement should be determined. The special education coordinator contacted the DCPS Office of Special Education to determine what placements are available. (P-6 p.2, R-4 p.2)
11. On November 12, 2010 a due process complaint was filed by petitioner’s counsel stating the violation was a failure to provide an appropriate placement.
12. On December 16, 2010 a resolution meeting was convened on the above complaint. At the resolution meeting DCPS issued a Prior to Action Notice changing the student’s placement from School to (P-7)

13. is a full-time DCPS day special education program for students classified with Emotional Disturbance for grades three through eighth grades. (Testimony of special education coordinator at
14. The student would be placed in a classroom with, at the present, all third graders. He would be the only grader. (Testimony of Mother and special education coordinator at The teacher questioned the special education coordinator why this grade student was being placed in his class of graders. When the mother observed the classroom, students were throwing a football and no instruction was being provided. (Testimony of Mother)
15. There are six social workers on contract at to serve seventy-one students. Two of the social workers are clinical social workers the other four are not so qualified. (Testimony of special education coordinator at
16. The program is located on the third floor of a school building. On the second floor is the a program for high school students who have been suspended or expelled from DCPS schools for serious disciplinary reasons. There would be some interaction with students at dismissal time and possibly at other times. The first floor is for athletic offices. (Testimony of special education coordinator at
17. During the parent's visit to she observed a student being restrained on the hall floor and the staff person restraining the student said over the walkie-talkie that the student was acting like an animal. (Testimony of Mother)
18. The student has been accepted at The a non-public day special education school for students whose primary disability is emotional disturbance. The

located in Largo, Maryland is certified by the state of Maryland and has been in existence for over thirty years. All teachers are special education teachers licensed and certified by the state of Maryland. There are three full-time behavior management senior staff for the lower school of first through eighth grades. Licensed clinical social workers provide individual therapy and each student is assigned a therapist. There is a level behavior system that students are judged on daily and each student has an individual behavior modification plan. The social workers are situated next to the students' classrooms. There is a consulting psychiatrist. The student's classroom has been identified as a combination fourth/fifth grade class with a male special education teacher and male program assistant. There are seven to eight students in the class. All staff are trained in guiding student behavior and only as a last resort is restraint used. There are crisis intervention rooms, but rarely used because of behavior interventions. The Foundation School can implement the student's IEP. (Testimony of Director of Transition Services at The P-17) The student has visited The and indicated to his mother he wanted to go to school there. (Testimony of Mother) The offers a program that can provide educational benefit to the student and is an appropriate placement.

19. Counsel for petitioner concedes he has presented no evidence on compensatory education. (Transcript-closing argument)

CREDIBILITY FINDING

A hearing officer is responsible for assessing the credibility of witnesses. *See Shore Regional High School Bd. of Educ. v. P.S., 381 F.3d 194 (3rd Cir. 2004)* This

hearing officer finds the testimony of the mother very credible based on my observation of her testimony in person at the hearing. The mother's demeanor throughout her testimony both on direct and cross examination was thoughtful, detailed, factual and consistent. As the mother, she also had the direct knowledge of the child since birth. This hearing officer further finds the testimony of the special education coordinator at
who testified by telephone, not credible. Her version of the restraining incident in the hallway, for example, that the student was being playfully tickled on the floor, is not worthy of belief since the staff person was using the walkie-talkie for assistance.

CONCLUSIONS OF LAW/DISCUSSION

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: A guiding principle in determining whether a placement is appropriate is provided in the U.S. Department of Education interpretative guidelines to the 1999 Regulations that: "educational placements under Part B must be individually determined in light of each child's unique abilities and needs, to reasonably promote the child's educational success." *Appendix A to 34 C.F.R. Part 300. Question 1* Following the development of an IEP, the public school system is required to provide a appropriate educational placement that meets the needs set forth in the IEP. *See Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 25 (D.D.C. 2004) (*citing Petties v. District of Columbia*, 238 F. Supp. 2d 114, 116 (D.D.C. 2002)).

Based on the above Findings of Fact and in particular Findings of Fact # 14-17, this hearing officer concludes that placement at the _____ will not "reasonably promote the child's educational success" *Id.*, and will not meet his needs set forth in the student's

IEP. The student has had a long history of behavioral problems that are interfering with his academic progress. At the October 26, 2010 MDT meeting, the team determined that was not able to meet the student's needs even with the student being placed for most of the school day in a small special education class of eight students all with his primary disability of emotional disturbance. His class was taught by a special education teacher with an instructional aide. There are two clinical social workers on staff to provide counseling services. Despite these services, the MDT recommended a more restrictive setting. The student also had a negative reaction to physical restraint at [redacted] that resulted in distrust of staff and further outbursts. DCPS's proposed placement to [redacted] based on Findings of Fact #14-17 would not provide the substantial and effective behavioral support this child needs to succeed educationally. The mother's observation at [redacted] of physical restraint in the hall and the staff person calling the student an animal is not the type of educational setting that will foster the trust and respect this student needs especially in light of his negative experience with physical restraint at [redacted]. It is also not appropriate to place this [redacted] grade student in a class with all third graders when his mother testified that this student is bright and would feel stupid by being placed in a lower grade. Such a placement would negatively impact the student's motivation to learn. The mother's observation of a football being tossed around the room and no instruction being provided does not support the student's IEP being implemented. Finally, the close proximity of high school students who are at [redacted] for serious disciplinary infractions one floor down from the [redacted] program does not offer good modeling for a student already having serious issues with controlling his behavior and could result in unsafe altercations.

The petitioner has met the first prong of the *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) test that DCPS has not provided a FAPE to the student offering the Hamilton Center as the student's placement for the 2010-2011 School Year. Once a court or hearing officer finds that the public school district has failed to offer a FAPE, the court or hearing officer is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. Section 1415 (i)(2)(C)(iii). "Under this provision equitable considerations are relevant in fashioning relief, and the Court enjoys broad discretion in so doing." *Carter*, 510 U.S. at 16.

The petitioner has requested as relief placement of the student at The [redacted]. The second prong of the *Burlington* and *Carter* test and the *IDEA Regulation at 34 CFR 300.148 (c)* is that the private placement must be appropriate. Based on the detailed description of the program by the Director of Transition Services at The [redacted] at the hearing and the mother's testimony, it is the conclusion of this hearing officer that The Foundation School is an appropriate placement for the student that will meet his unique needs. (See Findings of Fact # 18) The [redacted] offers experienced certified professional staff to provide a variety of behavioral interventions on an ongoing basis with clinical social workers in close proximity to the student's classroom that can address his needs before they escalate beyond control. This hearing officer finds the testimony of the Director of Transition Services that physical restraints and placement in crisis intervention rooms are rarely used significant in appropriately addressing this student's behavior concerns especially in light of his prior negative reaction to physical restraint at [redacted]. The student's positive reaction to his visit to The [redacted] and expressed desire to go there also is an encouraging factor "to reasonably promote the child's educational success." *Appendix A to 34 C.F.R. Part 300. Question 1*

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: 1/21/11 _____

Seymour DuBow /s/ _____
Hearing Officer