DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street NE, STE 2
Washington, DC 20002

[Parent] & [Grandparent], on behalf of [Student],[1]

Petitioners,

v

District of Columbia Public Schools (DCPS),

Respondent.

Date Issued: July 27, 2012

Hearing Officer: Jim Mortenson

Case No: 2012-0376b

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STUDENT HEARING OFFICE
2012 JUL 27 AM 11:00

HEARING OFFICER DETERMINATION

I. BACKGROUND

The complaint in this matter was filed by the Petitioners on May 16, 2012. The Petitioners are represented by Kiran Hassan, Esq., and the Respondent is represented by Tanya Chor, Esq. The complaint was bifurcated into separate hearings based on an issue arising under 34 C.F.R. § 300.532 which was heard in an expedited hearing and another issue that fell under 34 C.F.R. § 300.507. The expedited hearing resulted in a Hearing Officer Determination (HOD) issued June 26, 2012. This HOD is the result of the remaining issue, heard on July 16, 2012.

A prior complaint was filed in February 2012 and resulted in a settlement agreement that is not a part of this proceeding.

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

A prehearing was convened in this case on May 29, 2012 and a prehearing order was issued on that date. An untimely response to the complaint was filed on May 29, 2012 A resolution meeting was held on May 30, 2012. No agreements were reached at the meeting.

The parties were required to provide trial briefs in advance of the hearing outlining each party's legal arguments and describing the evidence they intended to present and how that evidence would support their cases including what documents would show or prove and what witnesses would testify about. Neither party complied with this order. The hearing was convened and held on July 16, 2012, in room 2003 at 810 First Street NE, Washington, D.C. The hearing was closed to the public. The due date for this HOD is July 30, 2012. This HOD is issued on July 27, 2012.

II. JURISDICTION

This hearing process was initiated and conducted, and this decision is written, pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400 et seq., its implementing regulations at 34 C.F.R. Part 300, and D.C. Mun. Regs. tit. 5E, Chap. 30.

III. ISSUE, RELIEF SOUGHT, and DETERMINATION

The issue to be determined by the IHO is: Whether the Respondent failed to place the Student in the least restrictive environment (LRE) and in accordance with her IEP revised May 2012 when it failed to place the Student in a separate special education day school?

The substantive requested relief includes:

- Placement in a non-public special education day school, specifically

- Compensatory education consisting of 280 hours of tutoring in reading, writing, and mathematics as well as 10 hours of mentoring.

The IEP team placed the Student outside of the general education setting in a small class for 27.5 hours per week and provided her with behavioral support services outside of the general education setting for two hours per week effective April 30, 2012. The IEP team also agreed this placement could not be made at the Student's then-current-school,

Campus. The Respondent, nevertheless, left the Student at

despite the IEP team's determination, and did not refute the Petitioners' demonstration that Accotink Academy is an appropriate educational placement to implement the Student's IEP.

IV. EVIDENCE

Five witnesses testified at the hearing, all for the Petitioners. The Petitioners' witnesses were:

1) Juan Fernandez, Educational Advocate (J.F.)
2) The Student's Grandmother, Petitioner (P)
3) Lorraine Land, Psychologist (Expert in psychology), (L.L.)
4) Special Education Tutor,
5)

Nine exhibits were admitted into evidence of 19 disclosures from the Petitioners. The Petitioners' exhibits are:

Ex. No.	Date	Document
P 6	December 7. 2011	IEP
P 7	February 29, 2012	IEP
P 8	May 6, 2009	Comprehensive Psychological Evaluation
P11	August 22, 2011 to January 31, 2012	Student Incident Report
P 12	November 3, 2011	Notice of Proposed Disciplinary Action
P 13	November 15, 2011	Office Discipline Referral Form (w/ attachments)

Ex. No.	Date	Document
P 14	May 8, 2012	Notice of Proposed Disciplinary Action (w/ Attachments)
P 15	January 20, 2012	Report to Parents on Student Progress
P 18	Undated	Curriculum Vitae for Lorraine Land

Nine exhibits of ten of the Respondent's disclosed documents were admitted into evidence. One, R 9, was admitted over the Respondent's objection after being moved for admission by the Petitioner.[2] The Respondent's exhibits are:

Ex. No.	Date	Document
R 1	February 24, 2012	Proposed Settlement
R 2	February 24, 2012	Independent Educational Evaluation Authorizing Letter
R 3	Undated	Psychological Evaluation [performed March 12 & 13, 2012]
R 4	Undated	Functional Behavioral Assessment [performed March 12 & 13, 2012]
R 5	April 2, 2012	Email from Hull to Mends-Brobbey
R 6	April 17, 2012	Email from Mends-Brobbey to Hull
R 8	July 5, 2012	120-Day Request for Response
R 9	April 30, 2012	IEP
R 10	May 30, 2012	RSM Notes

To the extent that the findings of fact reflect statements made by witnesses or the documentary evidence in the record, those statements and documents are credited. Any finding of fact more properly considered a conclusion of law is adopted as such and any conclusion of law more properly considered a finding of fact is adopted as such.

[2] R 9 is the Student's current IEP revision. It is unclear why this document was not disclosed as a potential exhibit by the Petitioners, and the Respondent clearly wished to not enter it into evidence given that the Petitioners did not include it in their own disclosures. However, the undersigned determined that to ensure a complete record upon which to make an informed determination, the document would be entered into the record regardless of which party disclosed it or which party moved it for entry into the record.

V. FINDINGS OF FACT

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

1. Student is an year old learner with a disability who was enrolled in the grade during the 2011-2012 school year.[3] The Student has multiple disabilities including specific learning disabilities and behavioral needs.[4]
2. The Student's individualized education program (IEP) was revised in December 2011.[5] The services for the Student at that time included specialized instruction outside of the general education setting for 10 hours per week, and behavioral support services outside of the general education setting for 30 minutes per week.[6] The Student was attending at the time.[7]
3. The Student's IEP was revised again in February 2012.[8] The specialized instruction was increased to 15 hours outside of the general education setting per week and behavioral support services were increased to one hour per week, outside of the general education setting.[9] The Student remained at CHEC.[10]
4. The IEP was revised again on April 30, 2012.[11] This time, the specialized instruction was increased to 27.5 hours per week, outside of the general education setting and behavioral support services were increased to two hours per week, outside of the general education

[3] R 9, Testimony (T) of P.
[4] P 6, P 7, R 3, R 9, T of P.
[5] P 6.
[6] P 6.
[7] P 6, T of P.
[8] P 7.
[9] P 7.
[10] P 7, T of P.
[11] R 9, T of J.F.

setting.[12] The IEP team agreed that this level of services in a segregated setting could not be provided at and that a separate special education day school with therapeutic supports would be the Student's educational placement.[13] The services were to start on April 30, 2012.[14] The Respondent did not place the Student in accordance with the IEP team's determination, and the IEP did not properly reflect the IEP team's determination.[15]

5. Following the filing of the complaint, the parties engaged in a resolution meeting and placement at School was discussed.[16] No evidence about School and whether it is an appropriate placement in which to implement the IEP was presented at hearing, and the Respondent made no argument that it was.[17]

6. The Petitioner sought out a school for the Student to attend and located a non-public special education day school, serves students with multiple disabilities, like the Student, as well as students with autism and emotional disturbances.[19] The school is located in Springfield, Virginia and is highly structured with intensive therapeutic supports for students with behavioral needs.[20] Students at have access to a psychologist throughout the school day (there are seven on staff) and other staff are trained in crisis intervention for severe behaviors.[21] There are 112 students in the therapeutic

[12] R 9.
[13] T of J.F. (It is important to note that the testimony of J.F. about what was discussed and determined at the April 30, 2012, IEP team meeting, which he attended, was not contradicted by the Respondent.)
[14] R 9. (It is not clear how the services and placement could start on the same day as the IEP team meeting, given the need to provide prior written notice of the proposed changes, but it is presumed that the services would start nearly immediately, even if not on that very day.)
[15] R 9, T of J.F.
[16] R 10.
[17] Counsel for Respondent argued that because it is summer the Respondent still has time to select a "location of service" for the Student for the next school year and has not yet done so. This argument does not address the fact that the IEP was changed to the more restrictive setting on April 30, 2012,and that the change was to take place immediately and had still not occurred at the time of hearing.
[18] T of P, T of J.C.
[19] T of J.C.
[20] T of J.C., T of P.
[21] T of J.C.

program and group counseling is available.[22] The cost of the school is per year plus additional related service expenses.[23] The Student has been accepted at as an appropriate candidate for the school based on review of her IEP.[24]

7. There was a lack of implementation of the IEP for ten to 15 days during the month of May as a result of a disciplinary removal.[25] It is not known where the Student would have been educationally but for the removal and lack of implementation.[26]

VI. CONCLUSIONS OF LAW

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

1. The burden of persuasion in a special education due process hearing, generally, is on the party seeking relief. Schaffer v. Weast, 546 U.S. 49 (2005), *See also* D.C. Mun. Regs. 5-E3030.14. "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." D.C. Mun. Regs. 5-E3030.14. The recognized standard is preponderance of the evidence. *See, e.g.,* N.G. v. District of Columbia, 556 F. Supp. 2d 11 (D.D.C. 2008); Holdzclaw v. District of Columbia, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 34 C.F.R. § 300.516(c)(3).
2. A student's educational placement must be determined by the IEP team and be based on his or her IEP. 34 C.F.R.§ 300.116, D.C. Mun. Regs. 5-E3001.1.

[22] T of J.C.
[23] T of J.C.
[24] T of J.C.
[25] *See,* HOD #2012-0376a.
[26] HOD #2012-0376a, T of C.R.

3. Despite the determination by the Student's IEP team on April 30, 2012, that she required a more restrictive setting, the Respondent failed to ensure this was adequately documented in the IEP and that the placement was made. The revised IEP was to take effect April 30, 2012 (according to the document itself), or as reasonably soon thereafter to permit proper notice of the proposed change and an opportunity to object. (*See* 34 C.F.R. § 300.503). At the time of hearing, however, the placement had still not been made by the Respondent. In the absence of the Respondent's placement of the Student, the Petitioner located a school that could implement the IEP in accordance with the IEP team's determinations. Because the Petitioner had to locate a school for the Student because the Respondent failed to do so, and because the chosen school can implement the Student's IEP, the Student shall be permitted to attend Accotink Academy for the 2012-2013 school year at the expense of the Respondent.
4. Compensatory education is an equitable remedy that may be provided as relief in disputes under the IDEA. Reid ex rel. Reid v. District of Columbia, 401 F.3rd 516, 523, 43 IDELR 32, (p 5, p 6) (D.C. Cir. 2005), *citing* G. ex rel. RG v. Fort Bragg Dependent Schs., 343 F.3d 295, 308 (4th Cir. 2003), and Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 (1993). If, in the hearing officer's broad discretion, compensatory education is warranted, the "goal in awarding compensatory education should be 'to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" Wilson, at p 9, *citing* Reid, 401 F.3d at 518, and Carter at 15-16.
5. It was determined in the decision for the expedited issue (Case #2012-0376a) that the ten to 15 days the Student lacked services due to a disciplinary removal was remedied when the disciplinary hearing officer placed the Student back in school. More importantly, the Petitioners presented no evidence to support their request for over 280 hours of

compensatory services. Indeed, this amount is far beyond what the Student could have missed even if she had not attended any school during the months of May and June. Finally, the proposal was based on a "lack of data" as opposed to a showing of where the Student would have been but for the violation, which would have been necessary to place her "in the same position [she] would have occupied but for the school district's violations of IDEA." Id. Thus, no compensatory education services are warranted in this case and even if they were, there is no credible evidence demonstrating what such services would or should be.

VII. DECISON

The Petitioners have shown that the Respondent failed to provide the Student with an educational placement in accordance with the IEP team's determinations. The Petitioners have also shown the non-public school they have located can implement the Student's IEP. Therefore, the Petitioners prevail and the Student may attend Academy at the expense of the Respondent for the 2012-2013 school year.

The Petitioners have not shown the Student requires compensatory education services.

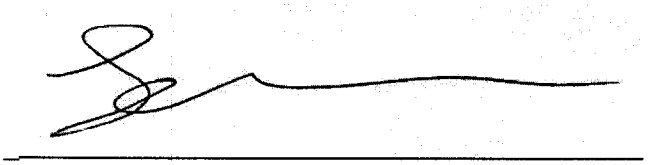
VIII. ORDER

1. The Respondent shall pay the education, transportation, and related service expenses of the Student for the 2012-2013 school year while she is enrolled at Academy in Springfield, Virginia. The Respondent shall enter into an agreement directly with Accotink to ensure payment and provision of services in the IEP.
2. While the Student's IEP may be reviewed and revised as necessary during the course of the year, the Student may remain at Accotink during the 2012-2013 school year unless the

Petitioners and Respondent Representative on the IEP team agree a less or more restrictive setting is necessary.

3. This HOD affects no other portions of the IEP during the course of the 2012-2013 school year.

IT IS SO ORDERED.



Date: July 27, 2012

Independent Hearing Officer

NOTICE OF RIGHT TO APPEAL

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