

Appropriate Public Education (FAPE) to the student by issuing a Notice of Placement to
Program because this proposed placement
allegedly is inappropriate and cannot implement the student's IEP calling for a full-time
therapeutic special education program. Counsel for petitioner requested as relief
placement at the School. Counsel for the petitioner also raised
the issue that OSSE denied a FAPE by failing to provide the parent with participation in
determining the student's educational placement. On September 17, 2010 OSSE filed its
response to the petitioner's complaint. Counsel for the respondent OSSE denies that the
proposed placement is inappropriate and OSSE's role was to determine the exact physical
site at which the educational placement determined by the IEP Team at
will be carried out. OSSE answers that it made a location assignment
after receiving input from and the parent of possible sites and the
decision to assign the student to was made
pursuant to *D.C. Code Section 38-2561.02* which requires that priority be given to
nonpublic schools in the District of Columbia over facilities outside of the District, and
also pursuant to IDEA which requires that students be placed as close as possible to
schools near the student's home. *See 34 C.F.R. Section 300.116*. The due process
complaint also raised several issues against

On October 4, 2010, a pre-hearing conference was held with this appointed
hearing officer with counsel for the parties. A pre-hearing Order was entered on October
6, 2010. The Order set out the issues against both OSSE and

The issues against OSSE are set out in the above paragraph. The Motion to
Dismiss filed by was argued and denied at that stage.

Counsel for petitioner withdrew all issues against _____ prior to the commencement of the due process hearing.

The due process hearing was held on October 19, 2010 in Room 2009 of the Student Hearing Office at 810 First Street, N.E., Washington, D.C. The hearing was closed. Darnell Henderson represented the petitioner and W. Iris Barber represented the respondent OSSE. The parent, grandparent, _____ the educational advocate, and _____ clinical director of the _____ School testified for the petitioner. Avni Patel, OSSE placement coordinator and _____ Director of Children at _____ program testified for respondent. All witnesses were sworn under oath prior to testifying. Petitioner's Exhibits 1-37 were entered into the record without objection and Respondent's Exhibits OSSE 1-27 were entered into the record without objection, but OSSE Exhibit 21 was withdrawn.

The hearing convened on October 19, 2010 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004, Title 34 of the Code of Federal Regulations, Part 300 and Title V of the District of Columbia Municipal Regulations.*

ISSUES

The issues to be determined are as follows:

1. Did OSSE deny a FAPE to the student by issuing a Notice of Placement to _____ program because this proposed placement allegedly is

inappropriate and cannot implement the student's IEP calling for a full-time therapeutic special education placement?

2. Did OSSE deny a FAPE to the student by failing to provide the parent with participation in determining the student's educational placement?

FINDINGS OF FACT

After considering all the evidence, as well as arguments of both counsel, this Hearing Officer's Findings of Fact on issue one on the appropriateness of

placement 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 Other Health Impaired.
2. A comprehensive psychological evaluation report dated April 1, 2010 conducted on four dates in February and March 2010 was completed on the student by licensed psychologist Dr. David Cranford and examiner school psychologist Kesha Davis. The reason for the referral was due to behavioral concerns that impact his academic performance for specifically being aggressive, hyperactive, oppositional, and defiant. The evaluation stated that the student's "current social, emotional and behavioral functioning revealed elevations in the Clinically Significant range on multiple subscales. Consistent with his previous diagnosis of ADHD, Combined Type and ODD as well as reports from school staff and family members, scores on the BASC-2 revealed significant problems with hyperactivity, aggression, and attention problems. Further, there were reports of significant symptoms of depression and anxiety as well as atypical behaviors and somatization....Rather, significant elevations are likely due to the severity of [student's] behavior which significantly impacts his social interactions...In concurrence with the

recent psychiatric evaluation, the student presents with severe symptoms of ADHD and ODD. Of immediate concern is the level of physical aggression observed within the home and school setting, which presents with potential safety issues for students and staff.” (P-24 at p.11-12) The evaluation’s concern for potential safety issues for students was supported by the testimony of the educational advocate and the mother upon their personal knowledge of the student’s severe aggressive behavior and their observations of the students with various disabilities in the _____ program at _____. The evaluation recommended a class placement incorporating the components of a small student to staff ratio (e.g. 2:6); a highly organized teacher with a structured and systematic teaching style; a behavioral program with clear rules; a consistent daily schedule; a minimum of classroom noise and confusion (visual and auditory); and a system in which students are aware that a transition is coming. The evaluation also recommended a one to one aide since his behaviors are unsafe for him and other students. (P-24 at p.12)

3. The student has been attending _____ Public Charter School, since the 2008-2009 School Year.
4. At the May 4, 2010 MDT/IEP meeting at _____ the MDT Notes state: “The team agreed [student] is in need of a full time therapeutic program. He should have a full-time IEP. The at (sic) _____ including the parent and advocate agreed. The team will wait for the placement location from OSSE.” (P-11)
5. The OSSE change in placement coordinator, _____ sent out referral packages to _____ program, _____ School and _____ Center. The student was conditionally accepted awaiting a parent’s visit and interview in

a letter dated May 6, 2010 at (P-1-2) and at in a letter dated May 10th (R-25), but put on a waiting list for (Testimony of

6. Based on the placement being in the District of Columbia and closer to the student's home compared to the placement being in Rockville, Maryland and a farther distance from the student's home, the OSSE change in placement coordinator issued a Notice of Location Assignment on May 12, 2010 for the student to (P-1)

7. The program is located in the basement of School, a DCPS public school. The school has four levels. On the basement level, the public school has a kindergarten class, a pre-kindergarten class, a non-category special education class for students with various disabilities, a music room, a PTA room and other rooms. The program is in two other classrooms in the basement separated by a hall. One of those classrooms is large and there are eight students in the two classrooms that are divided based on cognitive ability. It is a non-categorical program with students with various disabilities ranging in age from five to ten years old. The program at has one special education teacher and six staff persons with college degrees. The special education teacher meets sometimes with all the students in one of the classrooms and sometimes in small groups in the two classrooms. The students in the program have contact with non-handicapped students at lunch and in the halls. There is no psychiatrist, school psychologist or social worker on site for the program at The students in the program can access the school nurse for There are windows in the basement rooms, but they do not open. (Testimony of

8. The student has been accepted at _____ School in Rockville, Maryland.

The school is a non-public special needs school for students ages four to eleven and in grades pre-K through fifth grade. The student would be in a class with no more than eight students including this student with a lead certified special education teacher, a teacher's aide and a dedicated aide. The other children in his class are at or near his chronological age and range in cognitive and social-emotional functioning from slightly below to slightly above his levels. Related services including psychological counseling are provided on site and all staff are trained in crisis intervention. The students in his class have different disabilities with a wide range of behavioral problems. The school provides a structured stable therapeutic environment implementing group and individualized behavior management plans. (Testimony of _____ P-34) OSSE's change in placement coordinator agreed that the _____ School can meet the student's needs.

After considering all the evidence, as well as arguments of both counsel, this Hearing Officer's Findings of Fact on issue two on parental participation in determining the student's educational placement are as follows:

1. The parent and her educational advocate participated in the May 3rd and May 4th MDT/IEP meetings at _____ Public Charter School. (P-9 & P-11) At the May 3rd meeting the OSSE change in placement coordinator participated and stated in the notes she would forward the completed IEP to potential placements and the team agreed to meet on May 4th to complete the IEP. (P 9 at p.6) At the May 4th MDT/IEP meeting,

the OSSE change in placement coordinator did not participate and the team agreed to a full-time IEP and “will wait for the placement location from OSSE”. (P-11 at p.3)

2. On May 6, 2010, the educational advocate wrote a letter to the special education coordinator at _____ objecting to the lack of parental participation in the placement decision. The letter objected to OSSE picking the location of services within ten days and only wanting the parent’s description of characteristic features of an appropriate education setting instead of suggesting possible placements to implement the student’s IEP. The letter also stated: “Additionally, parents have the right to visit and dialogue with staff from the placements proposed by OSSE” and after the visitation the MDT team should reconvene to discuss the pros and cons of each program before making the final placement decision. The letter stated the parent wanted to explore other placements including _____ School and _____ and was going to send out placement packages to those schools. (P-30)

3. The OSSE change in placement coordinator sent out referral packages to _____ program, _____ School and The _____ The student was conditionally accepted at _____ on May 6, 2010 (P-1) and conditionally accepted at _____ School on May 10, 2010 (R-25) and was put on a waiting list for The _____ (Testimony of _____ The OSSE change in placement coordinator sent out a Notice of Location Assignment to the parent on May 12, 2010 naming _____ Program as the student’s next attending school. (P-1) The OSSE change in placement coordinator determined that _____ Program was the location assignment based on it

being in the District of Columbia and closer to the student's residence than the

School which is located in Rockville, Maryland. (Testimony of

4. On May 28, 2010 the parent and student visited

Program. (Testimony of

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 on issue one: Petitioner's counsel argues that OSSE denied a Free Appropriate Public Education (FAPE) to the student by issuing a Notice of Placement to Program because this proposed placement allegedly is inappropriate and cannot implement the student's IEP calling for a full-time therapeutic special education program. Counsel for petitioner requested as relief placement at the Center. Counsel for the respondent OSSE denies that the proposed placement is inappropriate and OSSE's role was to determine the exact physical site at which the educational placement determined by the IEP Team at PCS will be carried out. OSSE answers that it made a location assignment after receiving input from and the parent of possible sites and the decision to assign the student to was made pursuant to *D.C. Code Section 38-2561.02* which requires that priority be given to nonpublic schools in the District of Columbia over facilities outside of the District, and also pursuant to IDEA which requires that students be placed as close as possible to schools near the student's home. *See 34 C.F.R. Section 300.116.*

part of the day with the special education teacher having to go between the classes to instruct each class. There is no psychologist, psychiatrist or social worker on site to provide counseling or crisis intervention to this student who has a history of severe aggression and impulsivity. The April 2010 comprehensive psychological evaluation recommended based on the student's need for constant monitoring and individualized attention a stable structured calm small setting with a minimum of classroom noise and confusion both visual and auditory. The placement is located in the basement of a large regular public school with four levels. The basement also houses several other classrooms for the regular public school including a pre-kindergarten class, a kindergarten class, a music room, a PTA room and a non-categorical special education class for public school. The placement would not provide the calm setting with a minimum of noise and confusion both visual and auditory that this student would need to address his needs. This hearing officer concludes that the placement would not be an appropriate placement for this student "individually determined in light of each child's unique abilities and needs, to reasonably promote the child's educational success." Following the development of an IEP, the public school system is required to provide an 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) and *34 CFR 300.116*). OSSE's proposed placement of cannot meet the student's needs set forth in his IEP for a full-time therapeutic placement. OSSE has therefore denied a FAPE to the student.

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.” *Florence County School District Four v. Carter*, 510 U.S. 7 at 16 (1993) Counsel for the petitioner is requesting for relief placement of the student at the _____ School. Such relief can be granted under the Supreme Court decisions in *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359 (1985) and *Carter* if the public school system failed to provide a FAPE and the private placement is appropriate. *IDEA 2004* and its *2006 Regulation* codified these requirements at *20 U.S.C. 1412 (a)(10)(C)(ii) and 34 CFR 300.148 (c)*. Both of these prongs of the above test have been met in this case. Findings of Fact # 8 shows that the _____ School is an appropriate private placement that can implement the student’s IEP calling for a full-time therapeutic placement. The school provides a structured stable therapeutic environment implementing group and individualized behavior management plans. Related services including psychological counseling are provided on site and all staff are trained in crisis intervention. This hearing officer finds that the _____ program can effectively address the student’s severe behavioral issues “to reasonably promote the child’s educational success.”

The second issue raised by petitioner’s counsel is whether OSSE denied a FAPE by failing to include the parent in the placement decision. The Regulation to *IDEA* require that “the parents of a child with a disability, be afforded an opportunity to participate in meetings with respect to...[the] educational placement of the child.” *34 CFR Section 300.501 (b)(1)*; *see also 20 U.S.C. Section 1414 (e)*. Counsel for the petitioner’s argument that the parent was not included in the placement decision is not supported by the record. The parent and her educational advocate participated in both the May 3rd and May 4th MDT/IEP Meetings where the MDT team agreed that the student needs a full-time therapeutic educational placement. The

parent's educational advocate wrote a letter to the special education coordinator at [redacted] recommending consideration of the [redacted] School and that he was sending out a referral package to that school. The OSSE change in placement coordinator also sent out a referral package to the [redacted] School. The OSSE change in placement coordinator did consider the [redacted] School along with [redacted] and the decision to assign the student to [redacted] was made pursuant to *D.C. Code Section 38-2561.02* which requires that priority be given to nonpublic schools in the District of Columbia over facilities outside of the District, and also pursuant to IDEA which requires that students be placed as close as possible to schools near the student's home. *See 34 C.F.R. Section 300.116*. The student was accepted conditionally at both [redacted] and [redacted] pending a visit by the parent and an interview. The parent and student did visit the proposed placement of [redacted] on May 28, 2010 where they had an opportunity to tour the site and ask questions to the director of the program. The OSSE "Policies and Procedures for Placement Review, Revised (January 5, 2010) was admitted into the record and states: "The parental right to dispute the location assignment is unaffected by this policy. The parent still holds the same legal rights that apply to every aspect of the special education process. Therefore, when a disagreement occurs, the parent can request mediation, file a state complaint, or file a due process complaint." (R-4 at p.5) The latter was followed in this case with the petitioner's counsel filing a due process complaint challenging the location assignment. In *T.T. et al. v. District of Columbia, et al.*, 2007 U.S. Dist. Lexis 52547 (2007), Judge Bates held under similar circumstances that a review of the record "confirms that defendants did not prevent plaintiffs from participating meaningfully in the placement decision for T.T." Counsel for the petitioner has not met his burden of proof on this issue.

ORDER

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

**OSSE shall issue a Notice of Location Assignment to the
School in Rockville, Maryland for this student within five business days of the
issuance of this Hearing Officer's Determination to place and fund the student at
the School including transportation for the 2010-2011
School Year.**

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: 10/28/10

Seymour DuBow/s/
Hearing Officer _____