DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER, on behalf of
[STUDENT],[1]

Petitioner,

v

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: June 29, 2011

Hearing Officer: Peter B. Vaden

Case No:

Hearing Date: June 15, 17, 2011

Student Hearing Office, Room 2004
Washington, D.C.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by PARENT (the "Parent"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, Parent alleges that Student's Individualized Education Program ("IEP"), developed on December 13, 2010, fails to provide Student a FAPE because if does not offer a full-time therapeutic special

---

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

education program. Parent seeks a private placement award for Student to attend MARYLAND PRIVATE SCHOOL ("MPS").

Student, an AGE adolescent, is a resident of the District of Columbia. She is eligible for special education services under the primary disability, Emotional Disturbance ("ED"). The Parent's Due Process Complaint, filed on March 15, 2011, named DISTRICT CHARTER as respondent.[2] The undersigned Hearing Officer was appointed on March 17, 2011. The parties met for a resolution session on April 6, 2011 and agreed that no agreement was possible. On April 14, 2011, a prehearing telephone conference was held with the Hearing Officer and counsel to discuss the hearing date, issues to be determined and other matters. On May 10, 2011, Parent moved for a continuance for health reasons. The timeline for issuance of this HOD was continued until June 29, 2011.

The due process hearing was held before the undersigned Impartial Hearing Officer on June 15 and June 17, 2011 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Parent and Student appeared in person and were represented by counsel. Respondent DCPS was represented by counsel.

The Parent testified and called as witnesses EDUCATIONAL CONSULTANT, PSYCHOLOGIST, CHILD PSYCHIATRIST, IEP EXPERT, MPS PRINCIPAL, and STUDENT. DCPS called as witnesses NEIGHBORHOOD HIGH SCHOOL ("NHS") SPED COORDINATOR and DISTRICT CHARTER SPED COORDINATOR Parent's Exhibits P-1 through P-27 and DCPS's Exhibits R-1 through R-12 were admitted into evidence without objection.

---

[2] District Charter has elected to have DCPS serve as its local education agency (LEA) for purposes of the IDEA. *See* D.C. Regs. tit. 5-E, § 3019.2.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

Whether District Charter's December 13, 2010 IEP denied Student a FAPE because it did not provide a full time special education placement outside of the general education setting.[3]

Parent requests that DCPS be ordered to fund Student's immediate placement at MPS and seeks compensatory education relief.

FINDINGS OF FACT

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

1. Student is an Age resident of the District of Columbia. Testimony of Parent.

2. Parent enrolled Student in District Charter at the beginning of the 2009-2010 school year. Testimony of Parent. At the time of the hearing, Student was in the GRADE at District Charter. Exhibit R-3.

3. Before enrolling at District Charter, Student had received therapy from professionals outside the school setting to address long standing emotional issues attributed to domestic hardship and family tragedy. Testimony of Parent.

4. In July or August 2009, Parent asked District Charter about having Student assessed for special education eligibility. No education evaluations were conducted. Testimony of Parent.

---

[3] In her due process complaint, Parent also alleged that DCPS had not evaluated Student in all areas of suspected disabilities. Parent withdrew that claim at the beginning of the due process hearing.

5. In January 2010, Parent made a written request to District Charter for "IEP testing" for Student. Exhibit P-3.

6. DCPS SCHOOL PSYCHOLOGIST conduced a psychological evaluation of Student on April 8, 2010. In her April 29, 2010 report, School Psychologist reported that on cognitive functioning tests, Student obtained a Verbal Intelligence Index of 82 and a Nonverbal Intelligence Index of 86. Both scores were within the below average range. Student's Composite Intelligence Index score of 81 was also in the below average range. On the Woodcock-Johnson Tests of Achievement (WJ-III ACH), Student's overall level of achievement and overall fluency scores were in the very low range. School Psychologist concluded that the results seemed to suggest a learning disability and recommended that Student's Multidisciplinary Team ("MDT team") consider her report and all other available data to make an eligibility determination. Exhibit P-4.

7. Student's MDT team requested a clinical evaluation which was conducted by Psychological Assessment Solutions, LLC in July 2010. In the August 9, 2010 clinical report, the EXAMINER concluded that Student met the eligibility criteria for special education services under the criteria for Specific Learning Disability ("SLD") in reading, writing and mathematics and under the criteria for Emotional Disturbance. The Examiner reported significant emotional distress which impeded Student's academic functioning. The Examiner strongly recommended that Student be placed in a small-group setting reported that "can provide the scaffolding, support and nurturance [*sic*] that she needs." Exhibit P-5.

8. Student's MDT team reviewed the DCPS psychological and clinical evaluations on September 16, 2010 and did not think that Student required special education services. Exhibit P-7.

9. DCPS apparently did not issue prior written notice to Parent when the MDT team determined in September 2010 that Student was not eligible for special education services. Testimony of District Charter SPED Coordinator.

10. The December 13, 2010 IEP meeting notes state that at the September 16, 2010 eligibility meeting, Parent wanted to hold off on the eligibility determination until a psychiatric evaluation was completed under Student's private insurance plan. Exhibit P-7. Based upon the contrary testimony of Parent at the hearing, the strong conclusions supporting a finding of eligibility in the April 29, 2010 psychological evaluation and the August 9, 2010 clinical evaluation, and the failure by DCPS to issue a prior written notice to Parent after the September 16, 2010 eligibility meeting, I find the claim that Parent wanted to defer the eligibility determination not credible.

11. On October 26, 2010, Parent filed a due process complaint against DCPS, which resulted in a settlement. In a settlement agreement executed by the Parent on November 12, 2010, DCPS agreed to convene Student's IEP team to review the existing clinical and psychological evaluations, determine if the student is eligible for special education, develop an IEP if necessary, discuss and determine site location, if necessary and discuss compensatory education. Exhibit P-6. Parent's attorney in this proceeding also represented her for the negotiation of the settlement agreement. Representation of Parent's Attorney.

12. At an MDT/IEP team meeting on December 13, 2010, Student was found eligible for special education services under the disability classifications Emotionally Disturbed ("ED") and Learning Disabled ("LD"). The December 13, 2010 IEP provides for 10 hours per week of Specialized Instruction in the general education setting and 1 hour per week of Behavioral Support Services (counseling). Exhibit P-7.

13. The Annual Goals section of the December 13, 2010 IEP contains goals far in advance of Student's most recent tested achievement levels. For example, Annual Goal 1 in Academic-Mathematics states, "The student will be able to multiply and divide using two and three digit numbers with and without decimals with 90% accuracy. Annual Goal 1 in Academic-Reading states, "The student will be able to infer character feelings and emotions from a grade level passage with 90% accuracy." Exhibit P-7. In the April 29, 2010 WJ-III ACH testing, Student placed at grade equivalencies ranging from 2.4 for Passage Comprehension to 4.9 for Reading Fluency. Student was inconsistent in her ability to decode words beyond the mid third grade level. She demonstrated even less developed math calculation skills and had difficulty with multi-digit addition, subtraction, single-digit multiplication and division and most of the concepts beyond the beginning third grade. Exhibit P-4.

14. At District Charter, Student is placed in a full-inclusion setting. No pull-out services are provided. Testimony of District Charter SPED Coordinator.

15. Student is failing all of her classes at District Charter. Exhibit P-16.

16. Student's emotional state is deteriorating. Her symptoms of anxiety and depression have worsened over the past several months. Testimony of Child Psychiatrist.

17. Student's IEP at District Charter was revised on April 6, 2011. Special Education Services were increased by five additional hours per week, outside general education. In addition, the revised IEP provides one hour per week of Speech-Language pathology. Exhibit P-18.

18. DCPS has offered to place Student at her neighborhood school, NHS. At NHS, Student would be taught in an inclusion setting with at least 20 students in the general education classroom. There would usually be both a general education teacher and a special education

teacher in the classroom. NHS is also equipped to provide as needed "pull-out" services in a resource room for special education students Testimony of NHS SPED Coordinator.

19. At MPS, Student refused to attend counseling sessions at District Charter because she does not like the counselor. Testimony of Student.

20. Student has been accepted at MPS. MPS serves students with emotional disturbances, behavior disorders and autism spectrum disorders. MPS staff includes teachers, social workers, licensed counselors and visiting therapists. There are no non-disabled students at MPS MPS offers small class size – generally only six students. Testimony of MPS Principal.

21. Enrollment cost at MPS is approximately per year including therapy services. Testimony of MPS Principal.

22. Parent and Student have visited MPS and both believe that MPS would be a good setting for Student. Testimony of Parent, Testimony of Student.

CONCLUSIONS OF LAW

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

DISCUSSION

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Parent in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

WAS DISTRICT CHARTER'S DECEMBER 13, 2010 IEP INADEQUATE TO PROVIDE STUDENT A FAPE?

The only issue for determination in this case is whether the IEP team's decision in the December 13, 2010 IEP, to provide Student only 10 hours per week of Specialized Instruction, in the general education classroom, denied Student a FAPE.[4] Parent contends that Student is so severely disabled by ED and LD that she requires a full time special education placement outside of general education.

Under the IDEA, a Local Education Agency ("LEA") is obligated to devise IEPs for each eligible child, mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs. *See Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991). If no suitable public school is available, DCPS must pay the costs of sending the child to an appropriate private school. *Id.* Under the U.S. Supreme Court's decision in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Hearing Officer must address two questions that are aimed at DCPS's paralleling responsibilities to comply with the procedural and substantive requirements of the IDEA: First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Rowley*, 458 U.S. at 206-07, 102 S.Ct. 3034. *See, also, e.g., Suggs v. District of Columbia*, 679 F. Supp.2d 43, 47-48 (D.D.C. 2010). Parent does not allege any procedural deficiencies in her due process complaint. Accordingly, my inquiry is limited to whether District Charter's

---

[4] At the due process hearing, counsel for Parent raised other alleged violations of the IDEA by DCPS, including failure to classify Student as multiply-disabled, lack of an adequate transition plan, and failure to timely evaluate Student for special education eligibility. These additional matters were not agreed upon as hearing issues at the prehearing conference and will not be addressed in this determination. *See* Prehearing Order, April 14, 2011.

December 13, 2010 IEP was reasonably calculated for Student to receive sufficient educational benefits to meet the requirements of a FAPE. *See, e.g., N.S. v. Dist. of Columbia*, 709 F. Supp. 2d 57, 60, 54 IDELR 188 (D.D.C. 2010).

In this case, both the eligibility evaluations conducted by DCPS and the testimony of Parent's expert witnesses establish that Student is a Child with significant educational and psychological/emotional needs. DCPS's School Psychologist reported in an April 29, 2010 psychological evaluation that this high school student has been performing "much below" her Grade level. Student was inconsistent in her ability to decode words beyond the mid-third grade level and demonstrated difficult with reading material beyond the end of second grade level. She had not mastered math concepts beyond beginning third grade. In a follow-up clinical evaluation report dated August 9, 2010, another DCPS school psychologist, Examiner, concluded that Student met the eligibility criteria under the IDEA for a Specific Learning Disability in reading, writing and mathematics. Student also met the criteria for Emotional Disturbance based upon indications of significant emotional distress which impeded her academic functioning. This evaluator concluded that it was "essential to find a placement that is well able to meet [Student's] needs." She strongly recommended a "small-group setting that can provide the scaffolding, support and nurturance that Student needs."

Even with these evaluations, DCPS did not find Student eligible for special education services until after Parent filed her first due process complaint in November 2010. Pursuant to a settlement agreement with the Parent, Student's IEP team met at District Charter on December 13, 2010. Although Student was then found eligible for special education services under the ED and LD classifications, the IEP team only agreed to provide Student 10 hours per week of

Specialized Instruction, all in the general education classroom,[5] and one hour per week of Behavioral Support Services. Parent contends that the educational goals in Student's IEP were not at all reflective of Student's current performance and that Student's placement in an inclusion setting in District Charter School fails utterly to meet her needs. I agree.

Parent's experts, a clinical psychologist, a child psychiatrist and two very experienced special education educators all testified that Student cannot make educational progress in an inclusion setting and that she requires a full-time therapeutic placement to address her psychological/emotional and academic needs. Educational Consultant testified that the Annual Goals on Student's December 13, 2010 IEP were inappropriate because they were geared to Student's current Grade level, when Student tested years behind Grade level in all academic areas. She opined that based upon the DCPS psychological and clinical evaluations, Student needs a very small, highly structured, therapeutic learning environment with a supportive staff. Clinical Psychologist opined that Student would be more available to receive academic instruction if her ED needs were fully addressed. She opined that Student cannot function in a school setting without strong therapeutic and learning support. Child Psychiatrist, who is Student's treating therapist, recommended that Student be placed in a small classroom setting in a "therapeutic milieu." She warned that Student is clearly deteriorating in the regular classroom and "is on her way to a residential placement" if her emotional needs are not addressed. IEP Expert opined that Student needs to be in a "psychotherapeutic milieu" where her psychological issues would be addressed "first and foremost."

---

[5] Neither the December 13, 2010 IEP nor the IEP meeting notes specify or describe what type of specialized instruction services that Student would be provided under the IEP. *See N.S. v. Dist. of Columbia*, 709 F. Supp. 2d 57, 70 (D.D.C. 2010) (IEP must be specific enough to allow parents to understand what services will be provided and make a determination about whether the proposed placement is adequate.)

Only District Charter SPED Coordinator testified that the December 8, 2010 IEP was appropriate – based upon the evaluations reviewed by the IEP team. I find her opinion unpersuasive. The evaluations provide no support for the IEP team's decision to place Student in an inclusion setting at District Charter. Either the IEP team did not review the evaluations or the team gave little weight to the August 9, 2010 report of DCPS's own clinical evaluator, who strongly recommended that Student be placed in a small-group setting that could provide scaffolding, support and "nurturance".

I find therefore that Parent has established by the preponderance of the evidence that District Charter's December 13, 2010 IEP was not reasonably calculated for Student to receive sufficient educational benefits to meet the requirements of a FAPE and that the inclusion placements offered at District Charter and NHS were inappropriate.

Private-School Placement

Turning next to the question of relief, Parent seeks a placement award for Student to attend MPS. Where a public school system has defaulted on its obligations under the IDEA, a private school placement is "proper under the Act" if the education provided by said school is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 176, 102 S.Ct. at 3034. *Wirta v. District of Columbia*, 859 F.Supp. 1, 5 (D.D.C. 1994) *See, also, e.g., N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008). An award of private-school placement is prospective relief aimed at ensuring that the child receives tomorrow the education required by IDEA. *Branham v. Government of the Dist. of Columbia*, 427 F.3d 7, 11 (D.C. Cir. 2005). Placement awards must be tailored to meet the child's specific needs. *Id.* at 11-12. Courts have identified a set of considerations "relevant" to determining whether a particular placement is appropriate for a particular student, including the nature and severity of

the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the private school, the placement's cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* at 12. The evidence in this case meets the *Branham* criteria:

Nature and Severity of Disability

The evidence establishes that Student is a child with severe emotional and psychological symptoms that affect her availability for learning. She is years behind her age equivalent peers in all academic subjects. She is currently failing all of her courses. Her emotional state is deteriorating in the inclusion setting at District Charter.

Student's Specialized Educational Needs

Parent's experts testified, persuasively, that Student can only make academic progress if she is placed in a full time therapeutic school environment where her psychological and emotional issues can be addressed. Neither Student's current placement at District Charter and nor DCPS's proposed placement at NHS offers this setting.

Link Between Needs and the Services Offered by MPS

The private placement proposed by parent, MPS, is on the D.C. Office of the State Superintendent of Education's ("OSSE") list of approved non-public schools. MPS offers a full time therapeutic program along with the small class size strongly recommended by Examiner in the August 13, 2010 clinical evaluation. MPS has a staff of certified special education teachers, social workers and counselors available to offer intensive behavioral support for its students.

Private Placement Cost

The tuition cost at MPS is approximately annually. There was no evidence that the tuition cost at MPS exceeds that of comparable OSSE-approved private schools.

Least Restrictive Environment

At MPS, Student would have no interaction with her nondisabled peers. However, in determining the least restrictive environment, consideration is given to the types of services that the child requires. 34 C.F.R. § 300.552(d). Parent's experts opined that because Student needs to be in a psychotherapeutic milieu, where the first priority will be to address Student's psychological and emotional issues, a full-time special educational program is the least restrictive environment for her.

In sum, I find that under the *Branham* factors, MPS is an appropriate private placement for Student and that Parent is entitled to a placement award for Student to attend MPS. *Cf. Gellert v. District of Columbia Public Schools*, 435 F.Supp.2d 18, 27 (D.D.C. 2006) (Courts may order school districts to reimburse parents for expenses incurred by the unilateral placement of their child at a private school if: i) the student's public school IEP was inappropriate, thereby denying the child FAPE; and ii) the private placement desired by the parents is proper.)

Compensatory Education

Parent also seeks an award of compensatory education for Student. "Compensatory education is, as the term suggests, educational service that is intended to compensate a disabled student who has been denied the individualized education guaranteed by the IDEA." *Wilson v. District of Columbia*, 2011 WL 971503, (D.D.C. March 18, 2011) (*citing Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory education is designed "to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid*, 401 F.3d at 518. Denial of a FAPE is a prerequisite to an award of compensatory services. *Id. Walker v. District of Columbia*, Civil Action No. 10-506 (D.D.C. May 20, 2011).

In this case, I have found a denial of FAPE in that District Charter's December 13, 2010 IEP was not reasonably calculated to provide educational benefits to Student. The evidence establishes that under the District Charter IEP, Student is failing all of her classes and that her emotional state is deteriorating. Student is entitled to an award of educational services to compensate her for the past deficient program. *See Gill v. District of Columbia*, Case No. 09-1608 (D.D.C. March 16, 2011). Parent's expert, Educational Consultant, developed a compensatory education plan which recommends 300 hours of intensive tutoring. Exhibit P-26. The tutoring proposal is intended to remedy DCPS's failure to find Student eligible for special education services before December 2010. However, whether Student should have been found eligible before December 2010 is not an issue in this case. Educational Consultant also recommended 100 hours of psychological counseling to remedy Student's emotional problems "beginning at age 8." Again, whether Student should have received psychological counseling before the December 13, 2010 IEP was developed is not an issue in this case and cannot be the basis for a compensatory education award.

Student is nonetheless entitled to compensation for the loss in educational benefit she suffered under DCPS's inadequate December 13, 2010 IEP. Student has effectively lost the benefit of one semester of education programming appropriately individualized for her. MPS principal testified that MPS's intensive remediation programming has been successful in putting children like Student, who are academically behind, back on track. Counsel for Parent represented at the hearing that MPS runs an 11 month program and that Student could start there immediately. I find that an appropriate equitable remedy, reasonably calculated to provide the educational benefits that DCPS should have provided in the December 13, 2010 IEP, would be to require DCPS to fund Student's enrollment at MPS for the 2011 summer term.

SUMMARY

In summary, I find that Parent has established, by the preponderance of the evidence, that DCPS's December 13, 2010 IEP was not reasonably calculated to provide educational benefits to Student, resulting in denial of FAPE. Student is entitled to a private placement award at MPS. In addition, an award for Student to attend the 2011 summer program at MPS would be an appropriate remedy to compensate Student for DCPS's failure to provide FAPE in the December 13, 2010 IEP.

ORDER

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

Within 10 days of the date of this determination, DCPS shall convene Student's IEP team to effect Student's placement at MPS, at DCPS' expense, for the 2011-2012 school year and for the 2011 summer session. Pursuant to 34 CFR § 300.325(a), an MPS representative must attend the IEP meeting; and

DCPS shall provide school transportation as needed for Student to attend MPS in accordance with DCPS's school transportation policy.

All other relief requested by the Parent in her Due Process Complaint is denied.

Date: June 29, 2011

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

NOTICE OF RIGHT TO APPEAL

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