**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**
**OFFICE OF COMPLIANCE & REVIEW**
**STATE ENFORCEMENT & INVESTIGATION DIVISION**
**STUDENT HEARING OFFICE**

**CONFIDENTIAL**

Jane Dolkart, Due Process Hearing Officer
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# HEARING OFFICER'S DETERMINATION

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| IN THE MATTER OF: | ) | |
| | ) | |
| **DOB** | ) | DATE OF HEARING |
| | ) | May 5, 2009 |
| Student I.D. # | ) | |
| Petitioner | ) | DATE OF COMPLAINT |
| | ) | April 6, 2009 |
| V. | ) | |
| | ) | |
| **The District of Columbia** | ) | ATTENDING SCHOOL: |
| **Public Schools,** | ) | |
| Respondent | ) | |

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STUDENT HEARING OFFICE
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**COUNSEL FOR PARENT/STUDENT:** **Christopher West**
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**COUNSEL FOR DCPS:** **Nia Fripp**
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# HEARING OFFICER'S DECISION AND ORDER

## I. INTRODUCTION

This is a year old student presently in the grade and eligible for special education under the classification of ED. The student attended for the 2007-2008sy. The student's 2007-2008 IEP called for 12 hours of specialized instruction and 1.5 hours of counseling per week. notified DCPS that it was unable to provide the services needed by the student. On May 28, 2008, an MDT/IEP meeting was convened and the student's IEP was revised to provide for 27 hours of specialized instruction and 1.5 hours of counseling in an out of general education setting. The student was placed at On November 20, 2008, an MDT/IEP meeting was held at and the student's IEP was reduced to 12 hours of specialized instruction in a combination general/special education setting and 1 hour of counseling per week. This complaint was filed alleging that the student's current IEP is inappropriate, that the student's IEP has not been implemented, and that the student is in an inappropriate placement.

## II. JURISDICTION

The hearing was held and this decision was written pursuant to the Individuals With Disabilities Education Improvement Act (IDEA), 84 Stat.175, as amended, 20 U.S.C. ¶ 1400 *et seq.*, 34 CFR Part 300 *et seq.*, and the D.C. Municipal Regulations, Chapter 30, Title V, Sections 3000, *et seq.*

## III. ISSUES

Has DCPS denied the student FAPE by

1. Failing to provide an appropriate IEP because the IEP was reduced and is no longer a full-time out of general education IEP.

2. Failing to implement the student's IEP since she was never placed in a full-time out of general education setting.

3. Failing to provide an appropriate placement since cannot implement a full-time out of general education IEP.

## IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated April 28, 2009, containing a list of witnesses with attachments P 1-27. The disclosure was admitted in its entirety. Petitioner also submitted a supplemental disclosure on April 29, 2009, adding a witness to the

witness list. DCPS objected to the additional witness, but the Hearing Officer overruled the objection. Petitioner called as witnesses the student's mother, the student's educational advocate, and the student's First Home Care Community Support Worker.

DCPS submitted a five day disclosure letter dated April 28, 2009, containing a list of witnesses with attachments DCPS 1-5. The disclosure was admitted in its entirety. DCPS did not call any witnesses.

## V. FINDINGS OF FACT

1. This is a year old student presently in the grade and eligible for special education under the classification of ED. The student attended for the 2007-2008sy. The student's 2007-2008 IEP called for 12 hours of specialized instruction and 1.5 hours of counseling per week. (P 20).

2. On March 13, 2008, a manifestation meeting was held at concerning an incident in which the student was involved in an attack on another student while on the bus. determined that it was unable to provide the services needed by the student as a result of her behavior, attitude and absences. The student was at the time on a 45 day suspension. Present at the meeting were the student, the parent, the SEC, the principal, a general education teacher, a psychologist and a health teacher. (P 19).

3. On May 1, 2008, convened another MDT meeting. Present were 2 educational advocates, the parent, the student's aunt, the SEC, a special education teacher, the principal and a psychologist. A request for a new placement had been sent to Peggy Peigler at DCPS who was a placement specialist for DC charter schools. The Team agreed that a full-time IEP needed to be completed and that was not an appropriate placement for the student because she needed a more structured environment. It was agreed that an FBA would be conducted. (P 17).

4. An MDT/IEP/Placement meeting was held at on May 28, 2008. Present at the meeting were the guardian, a community support worker from First Home Care, the principal, the psychologist, the educational advocate, the SEC, the special education teacher, the student's cousin, and, by telephone, a DCPS Charter School Placement Specialist. The student had refused to cooperate in completing the FBA, had refused to attend 72 hours of compensatory education tutoring that was made available to her, and was not compliant with therapy. The student had a community support worker who was trying to teach skill building, communication skills, and study skills. Teachers and the principal had tried to intervene. The MDT Team agreed that a full-time placement was needed. (P 15, Testimony of community support worker).

The cover page of the student's IEP was revised to reflect a full-time program. The student was to receive 27 hours of specialized instruction and 1.5 hours of counseling. The record does not contain a new complete IEP, just a cover page. (P 14).

5. A placement meeting at DCPS headquarters at 825 North Capitol Street, NE, was held on August 12, 2008. Present at the meeting were a DCPS placement specialist, the student's educational advocate and the community support worker. The MDT notes from the meeting, taken by the DCPS placement specialist, state that the placement packet from supports a full-time placement designed to meet the needs of a student with ED, as stated in the student's IEP dated May 20, 2008 [actually dated May 28, 2008]. The placement specialist stated that the placement would be at the ED program and described the program as having a teacher, a social worker, and a para-professional in each classroom with no more than a 1:10 teacher/student ratio. The student did not have an acceptance from any other school. (P 11),

6. A prior notice of change of placement for the student was issued by DCPS on August 12, 2008. The prior notice indicates that both a regular education setting and a combination resource/special education setting were rejected because they did not work. DCPS proposed a full-time out of general education ED setting to meet the student's IEP. Under "other options considered" the prior notice states "[r]egular and combination settings have not been successful environments for [the student]." (P 13).

7. The student has worked with a community support worker/case manager (CSW) from First Home Care for approximately two years. The CSW met with the student 1-2 times per week during the first year and less frequently at present. The CSW attended the May 28, 2009 MDT/IEP meeting and the August 12, 2009 placement meeting. She is very familiar with the student and her problems and was an extremely credible witness.

The CSW went with the student to on the first day of school to enroll her. She brought the student's full-time IEP with her. informed the CSW and the student that the previous full time ED program, no longer existed. The student was placed in general education classes and 1 special education resource class.

The CSW contacted the student's guardian immediately concerning the student's placement.

The student is failing, has refused therapy, has refused medication management, is very oppositional, and has poor attendance at school. The CSW indicated that the student often goes to the school but does not attend classes. The student has told the CSW that she does not like (Testimony of CSW).

8. On September 15, 2008, the student's educational advocate wrote a letter to the SEC at informing her that the student's IEP indicated that she was to be in a full-time therapeutic program, but that she appeared to be in general education classes and was not receiving counseling. (P 4).

9. On November 20, 2008, an MDT meeting was held at Present were the special education teacher, the school psychologist, the school social worker, the educational advocate, the SEC, and, by telephone, the parent. The student was present for part of the meeting.

The MDT notes indicate that the most recent IEP had for the student was the November 30, 2007 IEP, which provided for 12 hours of specialized instruction and 1.5 hours of counseling per week. This was the IEP indicated it was implementing. The student was not in a full-time therapeutic ED program. The student's advocate provided the cover page for the May 28, 2008 IEP which called for 27 hours of specialized instruction and 1.5 hours of counseling per week, and provided a copy of the August 12, 2008 prior notice of placement to a full-time therapeutic ED program at

The SEC noted that the student's IEP hours were suddenly increased at and that there was no evidence of an FBA, a BIP, or other interventions substantiating the increase to a full-time program. The DCPS part of the MDT team determined that would continue to use the November 30, 2007 IEP and would reconvene in January 2009 to further assess the student's needs. A New Addendum Meeting Page to the student's IEP was developed providing the student with 6 hours of special education in a general education setting, 6 hours of special education in a resource setting, and 1 hour of counseling per week. The IEP reflected the services the student was getting at the time. The IEP was not signed by the parent. (P 9, 10).

10. There has not been an MDT meeting at subsequent to the November 30, 2008 meeting.

11. The student has extremely poor attendance in all of her classes. has contacted the parent on many occasions to discuss the student's truancy and has had at least one meeting with the parent and is trying to set up a second meeting to discuss the issue. (DCPS 2, 3, 5).

12. The student failed three of her classes during the first semester and received a D in the fourth. (DCPS 4).

13. The student's most recent psychological evaluation was completed on June 5, 2006. At that time the student was diagnosed with oppositional defiant disorder and anxiety disorder. (P 23).

14. The student's most recent educational evaluation was completed on May 19, 2006. At that time the student was performing at or near grade level on all of the administered Woodcock-Johnson Tests of Achievement III. (P 22).

15. The student's educational advocate testified at the hearing. She has impressive credentials and attended all of the MDT meetings from May 1, 2008 to the present. However, the advocate had not spoken with the student or her mother since the November 20, 2008 MDT meeting and did not appear to have reviewed the student's file. Therefore, the advocate was not fully apprised of the student's situation subsequent to November 2008. Her testimony concerning events through November 20, 2008 was

consistent with the written record and the testimony of the mother and the CSW. (Testimony of educational advocate).

16. Petitioner did not present any testimony concerning an alternative placement for the student, although the student's attorney represented that the student had a provisional accept to the The educational advocate reiterated that the student requires a small structured program that can address the student's emotional problems. (Testimony of educational advocate).

17. Petitioner requests that the student be placed at for summer school in order to make up some of the courses the student failed during the 2008-2009sy. No testimony was presented from The educational advocate testified that can provide tutoring and counseling, as well as skills for transition into the work force. The advocate had not spoken with the student about and had not confirmed that had a summer program. The attorney for Petitioner indicated that the student had an oral acceptance for the summer. (Testimony of educational advocate).

18. The student was at the hearing but refused to testify. The student is pregnant and is due to have the baby in October 2009.

## VI. DISCUSSION AND CONCLUSIONS OF LAW

As a condition of receiving funds under the Act, the IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See,* 20 U.S.C. ¶ 1413. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See,* 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include "a statement of the child's present levels of educational performance, ... a statement of measurable annual goals, a statement of the special education and related services [and] the anticipated frequency, location and duration of those services... to be provided to the child...." 20 U.S.C. ¶ 1414(d)(1)(A). The adequacy of the student's IEP is determined by whether the student has "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley,* 458 U.S. at 201 (1982). The IDEA does not require that the services provided maximize each child's potential. *Id.* at 198. Thus, the question is whether the IEP is reasonably calculated to produce meaningful educational benefit. *Id.* at 199, *Iapalucci v. District of Columbia,* 402 F.Supp.2d 152, 167 (D.D.C. 2005).

### A. The Student's August 12, 2008 IEP

During the 2007-2008sy, when a Public Charter School was unable to meet the needs of a special education student enrolled in its school, it was to notify DCPS, which assumed responsibility for determining the needs of the student and finding a new placement if

warranted. 5 DCMR 3019.[2] DCPS attended the student's August 12, 2008 MDT/IEP meeting via telephone and participated in the revision of the student's IEP. In developing an IEP, 34 C.F.R. 300.324 requires the IEP Team to consider (i) the strengths of the child; (ii) concerns of the parents for enhancing the education of the child; (iii) the results of the initial or most recent evaluation of the child; and (iv) the academic, developmental, and functional needs of the child. Additionally, 30 DCMR § 3002.1(f) requires that, "the services provided to the child must address all of the child's identified special education and related services and must be based on the child's unique needs and not on the child's disability." (Emphasis added).

Thus, the IEP is developed to reflect the student's unique needs separate and distinct from any particular education program. "The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. *School Committee of the Town of Burlington v. Department of Education of the Commonwealth of Massachusetts et al.,* 105 S.Ct. 1996, 2002 (1985). The student's revised IEP called for a full-time out of general education for the student. The record contains only the first page of the new IEP, but it is clear that the MDT Team, including the DCPS member, agreed that the student needed a full-time out of general education program. It was this IEP which guided placement for the student and was to be implemented at the student's new placement.

**B. The Student's Placement**

Once an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child's needs as set out in the IEP. Placement decisions must be made in conformity with the child's IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, it is the IEP which determines whether a placement is appropriate, not the other way around. *See, Rourke v. District of Columbia,* 460 F.Supp.2d 32, 44 (DDC 2006). DCPS held a placement for the student at DCPS headquarters on August 12, 2008. At that time DCPS offered what was supposed to be a full-time out of general education therapeutic ED placement for the student at Spingarn SHS. This placement was consistent with the previously revised IEP and was determined following the receipt of a placement packet which must have contained sufficient information for DCPS to make its determination.

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[2] The DC local charter law, the School Reform Act, allows charter schools to choose to be DCPS Charters, in which case DCPS is the LEA, or LEA Charters, in which case the charter schools serve as their own LEAs. D.C. Code § 38-1802.02(19). In 2007, D.C. passed the Public Education Reform Amendment Act of 2007 ("PERAA") D.C. Code § 38.2601.01. Prior to the implementation of the PERAA, DCPS served the functions of both the LEA and the State Education Agency (SEA). As of the May 28, 2008 MDT/IEP meeting at which the student's IEP was revised and the August 12, 2008 placement meeting at which a notice of change of placement was issued, DCPS continued to serve both functions.

It was the responsibility of DCPS' placement office to notify of the student's enrollment in the full-time ED program and to forward her revised IEP and prior notice of placement to . Either DCPS failed to follow through and provide with the necessary information, or lost the information. Whichever is the case, it is clear that had no knowledge of the student's August 12, 2008 IEP or her placement prior to the student's arrival at the start of the 2008-2009sy.

The student's CSW provided with at least the cover page of the new IEP at the time of enrollment. The school ignored this IEP and placed the student in a combined general education/resource room special education program with only 12 hours of specialized instruction and 1.5 hours of counseling. On September 15, 2008, the student's educational advocate wrote a letter to SEC informing her that the student had a full-time IEP that called for her placement in a therapeutic ED program. The school did nothing to change the student's placement following the letter.

On November 20, 2008, finally convened an MDT/IEP meeting. The student had been seriously truant since the beginning of the school year. One of the reasons for placing the student in a full-time ED program was that she was in need of a more structured setting and small class size to keep her in school and focused. However, at the meeting, reduced the student's IEP to reflect the services the student was presently being provided, rather than implementing the IEP and placement that had clearly been agreed to by DCPS. consciously failed to implement the student's IEP or placement for the entire 2008-2009sy.

Petitioner has met her burden of proof in this case. *Schaffer et al. v. Weast,* 546 U.S. 49 (2005). DCPS denied the student FAPE by failing to implement her IEP and provide her with an appropriate placement.

**C. Remedy**

It is reasonable to believe that this due process complaint was brought in order to provide the student with a new placement for the 2009-2010sy and to provide her with some form of summer school so that she can make up for her failed 2008-2009sy. Surely, a simple finding of denial of FAPE is of no use to the student, although it could provide the attorney with fees.

Petitioner's attorney failed to provide any evidence on the record concerning a new placement for the student. He attempted to contact the but could not get anyone on the phone. There is no letter of acceptance from the school in the record and no testimony concerning whether the school can meet the student's needs, particularly given that she is pregnant. The Hearing Officer understands that the has only provisionally accepted the student. The Hearing Officer has no idea why the acceptance is provisional. Thus, the student is entitled to placement in a private full-time therapeutic ED program, but no placement can be made as a result of this hearing.

Likewise, there was a request for compensatory education in the form of summer school at However, the record contains no testimony concerning the program at and its appropriateness for this student. There was no letter of acceptance to the program in the record. Petitioner's evidence concerning the student's entitlement to compensatory education is weak. However, considering that the student's IEP was not implemented and that she was in an inappropriate placement for the entire school year, and that she failed to attend classes most of the year, compensatory education in the form of summer school for the 2009sy is clearly warranted. The student is entitled to be placed in a summer program, perhaps but the Hearing Officer has insufficient evidence to order a specific placement.

Further complicating the matter is the student's significant record of truancy. DCPS is not required to fund the student in a placement if she refuses to attend school. The order will reflect this concern.

Petitioner's attorney in this matter failed properly to represent his client. He should have come to this hearing prepared to provide sufficient evidence for the Hearing Officer to order a new placement for the student and a specific compensatory education plan. Instead, the matter will have to return to the MDT Team which failed initially to implement the student's IEP and provide an appropriate placement. This is not in the best interest of the student or the efficiency of the process.

## VII. SUMMARY OF RULING

DCPS has denied the student FAPE by failing to implement her August 12, 2008 IEP and failing to provide an appropriate placement pursuant to the August 12, 2008 prior notice of placement.

## VIII. ORDER

It is hereby **ORDERED** that

1. DCPS shall convene an MDT/IEP meeting no later than 15 school days from the date of this HOD.

2. At the MDT/IEP meeting, DCPS shall provide a private full-time out of general education ED placement for the student for the 2009-2010sy at DCPS expense, including transportation. DCPS shall monitor the student's attendance and if, at the end of 90 calendar days, the student has been absent more than 3 days, except for good cause shown, DCPS may terminate funding for the private placement and provide placement at a DCPS public school.

3. DCPS shall provide the student with funding, including transportation, for a therapeutic out of general education summer program of the parent's choosing. If the

student fails to attend 8 of the first 10 days of the program, except for good cause shown, DCPS may terminate the funding.

4. Any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

**This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.**

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: May 14, 2009