

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

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

---

[STUDENT],<sup>1</sup>  
through the Parent/Guardian,\*

Petitioner,

v

DCPS,

Respondent.

Date Issued: 2/14/12

Hearing Officer: Seymour DuBow

2012 FEB 14 AM 9:21

OSSE  
STUDENT HEARING OFFICE

---

**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

A due process complaint was filed by counsel for petitioner on December 2, 2011. (P-1) On December 22, 2011 counsel for respondent filed her response to the complaint. (R-6) A resolution meeting was held on December 15, 2011 and the parties failed to reach an agreement. Counsel for the petitioner agreed to continue the resolution process for the full thirty day period and the HOD is due February 15, 2012. A prehearing conference was held on December 21, 2011 and a prehearing Order was issued on that date. On January 9, 2012 a second prehearing conference was held and a prehearing Order was issued on January 11, 2012. The January 11, 2012 Order stated that petitioner authorized her counsel to withdraw the issue in her complaint of failure to hold a manifestation meeting and is not requesting an expedited hearing and counsel for petitioner withdrew that issue.

---

<sup>1</sup> Personal identification information is provided in Appendix A.

The due process hearing convened at 9:30 a.m. on January 24, 2012 in the Student Hearing Office at 810 First Street, N.E., Washington, D.C. 20002. Petitioner was represented by Miguel Hull and respondent DCPS was represented by Victoria Healy. The hearing was closed. Both counsel for petitioner's documents P-1-P-18 and counsel for respondent's documents R-1-R-6 were admitted into evidence without objection. All witnesses were sworn under oath prior to testifying. Counsel for petitioner called as witnesses: the petitioner, the student, the educational advocate Juan Fernandez who testified in person and assistant educational director at Academy who testified by telephone. Counsel for respondent called as a witness Temple Crutchfield, program director of the Center in the District of Columbia who testified by telephone.

### **JURISDICTION**

The hearing was convened on January 24, 2012 pursuant to jurisdiction under *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 female who has been found eligible for special education services as a student with the disability classification of Emotional Disturbance. Counsel for petitioner is challenging the appropriateness of the DCPS proposed placement of the Program- two self-contained special education classrooms at School. Counsel for petitioner asserts that the student, as determined by the DCPS MDT team at

School, needs a more restrictive setting. Counsel for petitioner also argues that the program cannot implement the student's IEP and is inappropriate to meet the student's individual needs because of the lack of qualified instruction and behavioral supports. Counsel for respondent argues that the program can implement the student's IEP. Counsel for petitioner is requesting as relief funding and placement by DCPS at the non-public special education day school of The Academy in Springfield, Virginia.

### **ISSUES AND RELIEF SOUGHT**

The issue to be determined is as follows:

1. Did DCPS fail to provide an appropriate placement for the student at the Program at School that would implement the student's IEP and meet the student's individual needs for a more restrictive education setting?

The relief requested is placement of the student at Academy and compensatory education in the form of tutoring.

### **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 female who has been attending School for the 2011-2012 School Year. (P-2, R-1)
2. The student has been found eligible for special education services with the disability classification of Emotional Disturbance. (P-2, R-1)
3. The student's current IEP of November 16, 2011 calls for 32 hours of specialized instruction. (P-2, R-1) A Standard IEP Amendment Form of November 30, 2011

stated that the student will receive specialized instruction outside of general education. The rationale for the amendment states: "It was agreed upon in the IEP meeting that took place on November 16, 2011 that [student] would receive specialized instruction outside the general education setting. It was accidentally written in the IEP that [student] would receive specialized instruction inside the general education setting. This needs to be changed." (R-2) The student's IEP was amended accordingly without convening an IEP meeting and based on the MDT team deciding the student needed a more restrictive educational setting. (R-2) The student's IEP also calls for 240 minutes per month of behavioral support services outside of general education. (R-1 at 7, P-2-8)

4. DCPS conducted an educational evaluation of the student in May 2011 when she was years 10 months old and in the grade at at The Woodcock-Johnson III Tests of Achievement was administered and her overall reading ability was comparable to a student in grade 6.5 placing her in the low average range. Her overall mathematics ability was comparable to a student in grade 4.6 with her standard score within the very low range. (P-8) The student has had failing grades in core academic subjects as reported in her current IEP. (P-2-6)
5. At the November 16, 2011 MDT meeting at the case manager reported little progress with the student walking the halls and being disruptive when in class. The MDT team determined that anger management, coping skills, regard for adult authority, impulse control and following rules and regulations in an educational setting are among the skills she needs to develop. (P-3-4) The student's IEP states the student has shown verbal and physical aggression and has a school history of grade

retention and school suspensions. (P-2-6) The MDT Meeting Notes state that the clinical psychologist Dr. Phillip “said it seems a residential placement is probably the best thing for her given her behaviors.” The MDT Notes conclude “There was agreement she needs a residential setting. No one dissented from that viewpoint.”(P-3-5) Both the parent and student testified that the student does not want or need residential placement, but rather a non-public day special education program.

(Testimony of Parent and Student)

6. On January 3, 2012 DCPS issued a Prior Written Notice proposing to place the student at the \_\_\_\_\_ program at \_\_\_\_\_ School. (R-3) The \_\_\_\_\_ program began at \_\_\_\_\_ the day before this due process hearing. The \_\_\_\_\_ program consists of two self-contained classes at \_\_\_\_\_ School. One of the classes is diploma track and the other is a certificate track for lower functioning students. DCPS is proposing to place this student in the diploma track class. At the present time, there are only two students in that class. The class is taught by a teacher certified in special education K-12, but not certified in content areas. There is also an instructional aide in the class who has a Bachelor’s degree, certified as a substitute teacher and has one week of training by a special education teacher. There is also a behavioral counselor in the class who has not yet been trained. The students earn their Carnegie units through a computer program called A+ and not through direct instruction from a teacher qualified in content areas. The students stay in the self-contained class all day. The self-contained class is for students in 9<sup>th</sup> through 12<sup>th</sup> grade. All the students have behavioral issues. There is no time-out room separate from the two self-contained classes, but instead a space

built inside the classroom to refocus. There is a social worker at the program. There is also a transition specialist available one and half days a week at the program at [redacted]. The transition specialist will provide services to 40 students at three [redacted] program sites. The [redacted] program offers 27.5 hours of specialized instruction a week. The ages, gender and disability classifications of proposed students on the roster for the [redacted] program at [redacted] are not known by the program director for [redacted]. The staff at the [redacted] program has not spoken to the student's current teachers and is not aware of the November MDT Meeting recommendations for a residential setting. (Testimony of [redacted])

7. The student has been accepted at the [redacted] Academy, a non-public day special education program in Springfield, Virginia. [redacted] Academy is certified by the Virginia Department of Education and has a certificate to operate from OSSE and to provide Carnegie units. The [redacted] Academy has been operating as a private therapeutic day program for several years. The school serves students with the disability classification of Emotional Disturbance. The teachers are certified in special education and content areas by the state of Virginia and there are co-teachers in the classes. The school is small with 112 students and a small student to teacher ratio. There are seven full-time clinical psychologists and one clinical psychologist at the school four days a week and a psychiatrist on staff. Students are grouped by grade and functioning level. All students have a behavior management plan. There is also a crisis intervention center next to the classrooms with three professional staff. There is monitoring if a student leaves the class with a co-teacher contacting the behavior staff to follow up on returning the student to class and a police station next

door to return students if necessary. There is a transition department to determine the student's desires and strengths and weaknesses for employment options. There are on and off campus employment opportunities. The tuition is a day and is consistent with rates approved by OSSE. (Testimony of

### **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 (3<sup>rd</sup> Cir. 2003) This hearing officer found that both the testimony of petitioner's witness and DCPS's witness Temple Crutchfield to be credible based on their comprehensive descriptions of their respective programs.

### **DISCUSSION/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:

The legal standard for educational placements was stated in the U.S. Department of Education interpretative guidelines 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 an appropriate educational placement that meets the needs set forth in the IEP and allows for its implementation. *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

In this case, DCPS is proposing to place a student at the Spectrum program at School that began the day before this hearing. There are currently in the program only two students in the class for this student. The proposed class would be for students between 9<sup>th</sup> through 12<sup>th</sup> grade. The special education teacher in the program is not certified in content areas, but will be teaching the student all day on all subjects in the self-contained classroom. The student will earn Carnegie units to graduate, however, not from direct instruction from the teacher but through a computer program called A+. The student's IEP calls for 32 hours of specialized instruction outside of general education and the program can only provide 27.5 hours of specialized instruction a week. The staff at the program has not spoken to the student's current teachers and are not aware of the November 16, 2011 MDT Meeting recommendations for a residential setting. (See Findings of Fact #6)

The Regulation to *IDEA* states "a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options" make placement decisions. 34 C.F.R. 300.116 (a)(1) See also *McKenzie v. Smith*, 771 F.2d 1527 (D.C. Cir. 1985) finding a denial of a FAPE when the school failed to properly make the placement decision since the decision was not made by persons knowledgeable about the child, the meaning of his evaluation data and the placement options.

At the November 16, 2011 MDT meeting at School, the MDT team that was "knowledgeable about the child" all agreed that the student needs a residential setting. The clinical psychologist Dr. Phillip stated that a residential placement is probably the best thing for her given her behaviors. (See Findings of Fact #5) While the parent and student

testified they disagree with the student going to a residential setting, they do support a restrictive setting of a special education day program. DCPS, however, is proposing a self-contained classroom in a public high school which is a placement much less restrictive than the residential setting proposed by the MDT team at \_\_\_\_\_ or the special day school wanted by the parent and student. IDEA requires a “continuum of alternative placements” and special classes in a regular school are less restrictive on the continuum than special day schools. *34 CFR 300.115*

The DCPS MDT team at \_\_\_\_\_ that had knowledge of the child’s needs recommended a more restrictive setting to meet her needs. The placement of the student at \_\_\_\_\_ was made without any consultation with the MDT team at \_\_\_\_\_. This hearing officer concludes that DCPS has denied a FAPE to the student in proposing a less restrictive placement for the student at the \_\_\_\_\_ program at \_\_\_\_\_ School rather than a more restrictive placement recommended by those with knowledge of the student’s needs.

The DCPS decision to place the student in an untested self-contained classroom in a public high school was not “individually determined in light of each child’s unique abilities and needs.” *Appendix A to 34 C.F.R. Part 300 Question 1*. Instead this student will be placed in one class all day with students from 9-12<sup>th</sup> grades who are of unknown gender, disability classification and age. Placing students from 9<sup>th</sup> to 12<sup>th</sup> grade in one class all day is too wide an age and grade gap for a teacher to meet all the students’ different individual needs, especially a teacher not certified in content areas. Moreover, this student who academically is performing several years below grade level in reading and math is to earn her Carnegie units not from direct instruction from a teacher qualified in content areas, but through a computer program. No Child

Left Behind's (NCLB) requires that states ensure all teachers of "core academic subjects" achieve highly qualified status not later than the end of the 2005-2006 School Year. *34 CFR 300.10* One of the criteria to be satisfied is the teacher demonstrate subject matter competency in each of the academic subjects in which he or she teaches in a manner determined by the state *34 CFR 200.56*. The highly qualified teacher mandate applies to special education teachers. Special education teachers teaching two or more core academic subjects exclusively to students with disabilities, which is the case here, under *34 CFR 300.18 (d)* are determined to be highly qualified if the teacher meets applicable requirements of NCLB for any elementary, middle or secondary school teacher who is new or not new to the profession. *34 CFR 300.18 (d)(1)* or in the case of a teacher not new to the profession demonstrates competence in all the core academic subjects in which the teacher teaches in the same manner as required by NCLB , *20 U.S.C. 7801 (23)(C)(ii)*; *34 CFR 200.56 (c)(2)(ii)* for an elementary, middle or secondary teacher who is not new to the profession. The program is not providing a special education teacher who meets the above NCLB requirements for teaching core academic subjects. In *Gagliardo v. Arlington Central School District*, 107 LRP 30223 (2<sup>nd</sup> Cir. 2007), The Second Circuit Court of Appeals held that lack of trained professionals makes a therapeutic placement inappropriate for a teen with an emotional disturbance because the placement did not meet the student's unique needs. In this case the lack of a teacher certified in content areas who teaches the special education class all day makes the Spectrum Program inappropriate for not meeting the student's individual academic needs as specified in the student's IEP.

The program does not have a separate time out room outside of the two self-contained classrooms for the student with behavioral issues, but instead has an area built inside the classroom for the students to refocus. (See Findings of Fact #6) In *Quincy Public Schools*,

50 IDELR 295 (SEA MA 2008) the single factor of the absence of a separate time-out room for a student with a history of behavioral issues made a public program inappropriate because of its importance in addressing the behavioral issues of the student. That decision is directly applicable to this case where the student has displayed both verbal and physical aggression in the school setting. A time out room inside the classroom is not a separate room that the court in *Quincy* found necessary to address the student's behavioral issues. (See Findings of Fact #5)

This hearing officer concludes that taking into account all of the above factors about the Spectrum program, that the student's needs cannot be met in such a fledging and untested program that only began the day before this hearing. DCPS has not offered a FAPE to the student at the Spectrum placement.

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 Academy. 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. *See also IDEA 2004* and its *2006 Regulation at 20 U.S.C. 1412 (a)(10)(C)(ii) and 34 CFR 300.148 (c)*. In *Carter*, the Court held: "[c]ourts fashioning discretionary equitable relief under IDEA must consider all relevant factors." *Id.* In *Branham v. District of Columbia*, 427 F.3d 7, 13 (D.C. Cir. 2005) the Court stated: "Specifically, 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 environment." These "relevant factors" have been considered in this case as follows: the student has been classified with the disability classification of Emotional Disturbance and her needs for anger management, impulse control and coping skills can be addressed by the services offered by Academy.

Academy has been operating for several years as a special education day program focusing on students with emotional disturbance and is certified by both the State of Virginia and OSSE.

Academy has eight clinical psychologists and a psychiatrist on site to address the behavioral issues of its students. Each student has a behavior management plan and there is a crisis intervention center with trained professional staff in close proximity to the classrooms to meet the students' behavioral needs. Academy can meet the student's academic needs by providing small classes taught by co-teachers certified in both special education and content areas. Academy's cost of \$267 a day including group counseling is consistent with rates approved by OSSE.

In weighing all equitable considerations including the costs of the private placement are reasonable and there are no unreasonable actions by the petitioner, this hearing officer finds no equitable impingement to placement of the student in a non-public special education school. This hearing officer concludes that Academy can provide educational benefits to the student.

Compensatory education is an equitable remedy for the denial of a FAPE. In *Reid v. District of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005), this Circuit set out the standards for an

award of compensatory education. “Under the theory of ‘compensatory education,’ courts and hearing officers may award educational services...to be provided prospectively to compensate for a past deficient program. *Id.* at 522 Designing a compensatory education remedy requires “ a fact-specific exercise of discretion by either the district court or a hearing officer.” *Id.* at 524 To assist the court or hearing officer’s fact specific inquiry, “ the parties must have some opportunity to present evidence regarding [the student’s]specific education deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits.” *Id.* at 526 DCPS may be required to “offer proof that the placement compensated for prior FAPE denials in addition to providing some benefit going forward.” *Id.* at 525

In this case, counsel for petitioner did not present a plan for compensatory education on the failure to provide an appropriate placement for the student. Counsel for petitioner also failed to present any evidence from his witnesses on the amount of compensatory education to be awarded. The parent has the burden of “propos[ing] a well-articulated plan that reflects [the student’s ] current education abilities and needs and is supported by the record.” *Phillips v. District of Columbia*, 2010 WL 3563068, at \*6, 55 IDELR 101 (D.D.C. Sept. 13, 2010) Neither party has requested an extension of time beyond the 45-day timeline to supplement the record. The hearing officer cannot unilaterally extend the 45-day timeline. *34 C.F.R. Section 300.515 (c)*. DCPS has authorized 30 hours of compensatory education in the form of tutoring(R-4) and counsel for petitioner has stated that the parties are still negotiating the amount of hours. Counsel for petitioner in his closing argument stated he is not requesting this hearing officer to determine compensatory education and will defer consideration of compensatory education until after a thirty day review of the student’s progress in a new placement.

**ORDER**

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

**DCPS shall issue a Prior Notice of Placement to The Academy in Springfield, Virginia and fund and place the student at The Academy for the 2011-2012 School Year including transportation costs within fifteen (15) school days of issuance of this Hearing Officer's Determination.**

**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: 2/14/12

Seymour DuBow /s/  
Hearing Officer