

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

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Confidential

<p>STUDENT¹, by and through Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DECISION</p> <p>Date: February 26, 2010</p> <p><u>Hearing Officer: Wanda I. Resto</u></p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

DCSE
STUDENT HEARING OFFICE
2010 MAR 11

I. PROCEDURAL BACKGROUND

On December 23, 2009, parent's counsel filed a Due Process Complaint ("Complaint") against the [redacted] a District of Columbia charter school that has elected to be a local education agency ("LEA"), pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"),² alleging the Respondent denied the student a Free Appropriate Public Education ("FAPE"). The Petitioner asserted that the Student was not properly evaluated, his individualized education program ("IEP") is inappropriate and not implemented; and that the Student's placement at [redacted] was not appropriate. The Complaint also alleged the Student was removed from school on September 22, 2009, without a new school to attend; that the Student went without any education until the Petitioner placed the Student in a private school; and the tuition remains to be paid. The Petitioner further asserted the Student's 2008-2009 and 2009-2010 IEPs, are inappropriate because they contain insufficient hours, goals/objectives, there are no extended school year ESY services nor a behavior intervention plan ("BIP") included. The Petitioner asserted OSSE and DCPS failed to adequately monitor compliance with the requirements regarding the development of an appropriate IEP. The Petitioner further asserted that all of the respondents failed to provide an appropriate placement after the expulsion in September 2009.

On December 31, 2009 [redacted] filed an Answer to the Due Process Complaint it asserted that both in July 2008 and in August 2008 the MDT agreed the Student's behavior would be monitored for 45 days and an updated FBA/BIP would be completed if necessary; and one was not deemed necessary. During the 2008-2009 school year the Student was not exhibiting ongoing behavioral difficulties that required monitoring and neither the teachers nor other school personnel reported behavior problems. Nevertheless, after the Complaint was filed in November 2009 an FBA was offered to the parent and there has been no response.

The [redacted] alleged that the Student's August 4, 2008 IEP was developed with the participation of the parent, who consented to the services proposed; and the IEP was reasonably calculated to provide the educational benefit. It further alleged the IEP team on August 4, 2009, determined that the Student was not exhibiting ongoing behavior concerns that required a behavior intervention plan. After the Student's August 4, 2008 IEP the Student's behavior improved. Additionally, the [redacted] claims the Student was suspended three times in April, August, and September 2009 for behavior not related to his disability. The Respondent asserted that the Student did not participate in counseling because he refused or was absent when attempts were made to provide the service by the Psychologist. The Respondent alleged the Psychologist felt that the Student's social emotional functioning was adequate. The [redacted] further alleged that the Student's February 2008 BIP was implemented. The Student was found eligible for special education services in July 2008 the team agreed to monitor the Student's behavior for 45 days following the start of the 2008-2009 school year to determine if the BIP needed to be revised. It's the assertion of the Respondent that the Student no longer required a BIP because he was not exhibiting ongoing behavior concerns. The Respondent further alleged the parent was in agreement with this determination as indicated by her signature on the August 4, 2009 IEP.

² 20 U.S.C. §1415(c)(2)(B)(i)(I).

The claims the Student was suspended on September 11, 2009, followed by a manifestation meeting on September 14, 2009 and it was determined that the Student's behavior was not related to the Student's disability. The parent was in agreement with this determination. The Respondent further claims that upon the expulsion from school on September 22, 2009 and the parent was advised that she was required to enroll the Student in another school in accordance with the DC compulsive attendance law. The Respondent asserts that it offered to provide the Student specialized instruction in the form of tutoring after school and related services after school and was willing to do so until the parent enrolled the Student in another school. The parent was an agreement with this arrangement; but the Student never took advantage of the services. The Respondent further argued that parent is not entitled to reimbursement for the Student's unilateral placement because she failed to provide notice to that she was intending to enroll the Student at a non public school.

A telephonic pre-hearing conference call for the above reference matter was conducted January 14, 2009 at 5:00 PM. Attorney Douglas Tyrka participated on behalf of the Petitioner. Attorney Lauren E. Kasprzak participated on behalf of Attorney Carmela Edmunds participated on behalf of OSSE and Attorney Daniel McCall representative for DCPS did available participate in the prehearing conference call.

The Petitioner reiterated her claims. The Respondent reasserted its response and asserted that it offered to provide the Student specialized instruction in the form of tutoring and related services after school and was willing to do so until the parent enrolled the Student in another school. It asserted that the parent was in agreement with this arrangement; but the Student never took advantage of the services. Counsel for the Petitioner asserted these claims were inaccurate; and that all offers were done as a result of the Complaint in contemplation of a settlement agreement. Counsel for OSSE reasserted its position and affirmed it would be presenting a legal briefing supporting its request for dismissal.

On January 30, 2010 an Order dismissed Petitioner's claims the OSSE and the DCPS.

A hearing was held on February 17, 2010. The Petitioner presented a disclosure letter dated January 28, 2010 to which four documents were attached, labeled P-1 through 4 and which listed six witnesses; two witnesses testified. The Respondent presented a disclosure letter dated February 1, 2010 identifying five witnesses and to which seventeen documents were attached, labeled FCPS 1 through 17; three witnesses testified.

The hearing was conducted in accordance with the rights established under the IDEIA and the implementing federal and local regulations, and the SOP.³

Issues

A. Did the Respondent fail to perform all necessary evaluations?

³ IDEIA and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

- B. Whether the Respondent failed to develop and implement an appropriate individualized education plan (“IEP”) for the Student?
- C. Did the Respondent fail to determine and provide an appropriate placement for the 2008-2010SY?
- D. Was the Student denied a FAPE?
- E. Is the educational placement chosen by the Petitioner appropriate?
- F. Is the Petitioner entitled to reimbursement for the unilateral placement choice?

II. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student attended during the 2008-2009 school year.⁴
2. The most current evaluation of the Student indicates his Full Scale IQ, Verbal Comprehension, Perceptual Reasoning Index are within the Borderline range. The Student’s scores in Mathematics and Written Language were in Average range and Low Average on Reading and Oral Language. His grades were progressively low.⁵
3. During a July 2008 meeting the Student was determined eligible for specialized instruction; as a student with attention deficit hyperactivity disorder (ADHD) and classified as other health impaired. It was agreed the Student would receive 30 minutes of individual counseling; that the FBA would be redrafted within 45 days of his return to school. Both the Petitioner and her Advocate participated in the decision and an IEP meeting was scheduled for August 4, 2008.⁶
4. On August 4, 2008 the Student’s Advocate did not attend the meeting and the Petitioner requested it go forward. The Student’s IEP and behavior were discussed and it was agreed that after 45 school days the staff would determine if a BIP was needed. The Petitioner signed and agreed with the August 2008 IEP.⁷
5. At an August 4, 2009 MDT meeting the Student’s most recent IEP was drafted. It was discussed that the Student’s math calculations and math reasoning levels stayed the same and his reading comprehension and basic reading increased by one year; and written expression scores dropped two grade levels. The Student transition goals, graduation requirements and potential scholarships were discussed. The MDT agreed that the Student was not in need of a BIP because he has not had ongoing behavioral difficulties that require

⁴ Complaint filed December 23, 2009.

⁵ F 3 July 28, 2008 Psycho-educational clinical evaluation.

⁶ Testimony of the Special Education Coordinator, F4 MDT July 2008 notes.

⁷ F5 August 4, 2008-MDT notes, IEP, and testimony of the Petitioner and SEC.

monitoring except for the most recent infraction for which she was suspended which was in isolated incident and it could not being addressed or monitor in a BIP (gambling). The IEP created that day provides 6.5 hours of specialized instruction in reading comprehension, math and written expression in the general education setting, and 30 minutes of behavioral support services weekly and written expression goals were discussed and added. The location of services was identified as _____ and the Petitioner signed in agreement with the recommendations of the MDT and the IEP.⁸

6. The Student's specialized instruction was provide in an inclusion setting through co-teaching with a regular and a special education teacher and divided into smaller groups; the Student participated and was engaged in class, his performance was average. His behavior was really good; although he was late often. He is capable of performing in the general education. The Student did not receive course credits because the school policy requires a failing grade when there are excessive absences and the Student does not make up the missed work.⁹
7. The Student was not provided individual counseling and received group counseling services four times; he rarely was in the class and it was difficult to get him to agree to the counseling. A functional behavior assessment was completed a written report has not been provided to the petitioner. The Student's responses in class were on grade level; there were no behavior problems manifested in the classroom; however there were reports of many absences. The Student's 2009 IEP social emotional goals were discussed and he was not mastering them because of his lack of participation.¹⁰
8. On September 14, 2009, a manifestation determination review meeting was held. The parties stipulated that the student was expelled from _____ and no other location was identified. The Petitioner did not receive a new prior notice of placement. The Student's drug use was discussed and it was agreed that the Student would go to _____ to receive his related services as well as after school tutoring to make up for the specialized instruction that he will miss. The witness asserted that the services would be available from 3:00 PM to 5:30 PM; Wednesdays and Monday and Fridays from 3:30 PM to 5:30 PM. From the observation of the Psychologist and other staff the Student can be successful in a general education setting.¹¹
9. The Student was suspended from _____ various times and expelled in September 2009 for the use of _____ offered the Student services during the expulsion period and the Petitioner claims she was required to attend the classes with the Student. The Petitioner called the headquarters of the charter schools and was told that Student could not return to

⁸ August 4, 2009 - F12 MDT notes, F13 IEP, testimony of the special education coordinator and F5.

⁹ Testimony of the Regular Education History Teacher.

¹⁰ Testimony of the School Psychologist and P3 Counseling service logs.

¹¹ September 14, 2009 Manifestation determination review meeting notes F12, and testimony of the School Psychologist.

any charter school. Another school was not identified; the neighborhood public school was closed; she went to at least two public schools; and they were at their student limit. ¹²

10. only refers students to OSSE for alternative placements and when they cannot provide services and the student has a requirement for full time special education.¹³
11. The Petitioner enrolled the Student at A; he has been attending since October 19, 2009. Located in Washington, DC, provide academically focused, and therapeutic environment for students who require full time permanent and interim special education services. The students ages range 5-22 years; with a variety of disabilities. It has a low student teacher ratio; and intensive therapeutic/behavioral interventions and supports. The Student's IEPs, MDT notes of August 2009, psycho-educational and clinical evaluations of June 2008, report cards and progress reports were reviewed; and the admission team determined that the student could prosper in the fulltime program The Student is at the Upper school; has six teachers all are content and special education certified. All of the students in his class are of the same age, social maturation and academic abilities. The Student receives individual counseling. He is attending an educational academy that focuses on the Student's transition goals he is in the barbering program and working towards receiving a license. The tuition is a year.¹⁴
12. The Student's teachers at have provided good reports about the Student; he now averages four points in grade average and has not been suspended from school. The Student finds the work easy. During observation of the Student at he appeared introverted and was not interacting with peers.¹⁵
13. The Student has been attending for four months and his IEP has not been reviewed .

IV. CONCLUSIONS OF LAW

FAPE Requirements

A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, including children with disabilities who have been suspended or expelled from school.¹⁶ The applicable regulations define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."¹⁷

¹² Testimony of the Petitioner.

¹³ Testimony of the SEC.

¹⁴ Testimony of the admissions director of

¹⁵ Testimony of the Petitioner.

¹⁶ 34 C.F.R. § 300.101.

¹⁷ 34 C.F.R. § 300.17

In assessing whether a FAPE has been provided, a court must determine whether (1) the school complied with the IDEIA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the student to receive educational benefits.¹⁸

Burden of Proof

The burden of proof is the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.¹⁹

The Respondent did not meet its legal obligation under the IDEIA. Here is why.

Expelled Student

The LEA must make a free appropriate public education available to all eligible children with disabilities, including children with disabilities who have been suspended or expelled from school. When a student with a disability is removed from his or her current placement for more than ten (10) school days for disciplinary reasons, the LEA must continue to provide the specialized instruction and related services that are specified on the student's IEP.²⁰

After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. The services required may be provided in an interim alternative educational setting.²¹

Is the student entitled to a functional behavioral assessment?

The IDEIA recognizes that the quality of a child's education is inextricably linked to that child's behavior, and hence an effective educational evaluation must identify behavioral problems: "the IEP team must, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior."²²

¹⁸ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982); and *Jalloh v. District of Columbia*, 535 F. Supp. 2d 13, 16 (D.D.C. 2008).

¹⁹ 5 D.C.M.R. § 3030.3,

²⁰ DCMR B2510.6- District Of Columbia Register Vol. 56 - No. 33 August 14, 2009

²¹ 34 C.F.R. § 300.530 (2)

²² 20 U.S.C. § 300.324(a)(2)(i),

According to 34 CFR §300.530(d)(1)(ii), a student who is removed from his educational placement “must receive as appropriate a functional behavior assessment (FBA), and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.”

expelled the Student from his education placement; a FBA was conducted but no written report has been provided to the Petitioner; according to the Respondent the Student does not require a behavior intervention plan. The evidence was the Student was not provided individual counseling and received group counseling services only 4 times. The Student was demonstrating a behavior that required attention; and not leaving that decision solely to the Student. The Respondent had the obligation to provide at minimum a referral for intervention services designed to address the behavior that cause his expulsion.

The evidence was that the Respondent did not provide a BIP or suggestion on how the Student could receive substance abuse therapy or other behavior modifications. The LEA should attempt to address the root causes of behaviors that lead to the interruption of services or expulsions.

Individualized Education Program

An LEA Charter shall develop and implement an IEP for an eligible child within the timelines set by the IDEIA, District of Columbia law, regulations and state policy, and shall provide special education and related services consistent with that IEP.²³

An Individualized Education Programs or IEP “means a written statement for each child with a disability that includes a statement of measurable annual goals, including academic and functional goals, designed to—

- aa. Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
- bb. Meet each of the child’s other educational needs that results from the child’s disability.”²⁴

The Student is _____ years of age; his IEP must include a transitional services plan. Consistent with the IDEIA regulations at that plan must include:

- (1) Appropriate measurable postsecondary goals based upon age appropriate transition

²³ District of Columbia Municipal Regulations DCMR-E 3019.3

²⁴ 20 U.S.C. § 1414 (d)(1)(A)(i)(II)(aa), (bb).

assessments related to training, education, employment, and, where appropriate, independent living skills; and

(2) The transition services (including courses of study) needed to assist the child in reaching those goals.²⁵

did not meet its statutory obligations. The Student's IEP 2008 failed to include a detailed transition plan; and failed to include sample of work or documentation of observation. Thus, Petitioner requires a vocational assessment to facilitate the development of appropriate measurable postsecondary goals. However, there was no evidence that the procedural errors cause the Student harm.

Placement

Once developed, the IEP is then implemented through an appropriate placement in an educational setting suited to the student's needs. The placement decision, in addition to conforming to a student's IEP, should also consider the least restrictive environment and a setting closest to the student's home.²⁶ The mainstreaming of children eligible for special education services under the IDEA is "not only a laudable goal but is also a requirement of the Act." Roark ex rel. Roark v. District of Columbia, 460 F. Supp. 2d 32, 35 (D.D.C. 2006).

The IDEA and its regulations require that when determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. It also states that the determination of the educational placement of a child with a disability must be based on a child's IEP.²⁷

The LEA in the present case expelled the Student from school and another appropriate educational placement was not provided. A LEA may remove a child with a disability who violates a code of student conduct from his current placement to an appropriate interim alternative educational setting, another setting, or suspension. However, there is a change of placement occurs if the removal is for more than 10 consecutive school days. The Student in the current case was expelled from the LEA-public charter school.

It is clear that the student who is removed for more than 10 school days in the same school year must continue to receive educational services, to enable the child to continue to

²⁵ 34 C.F.R. §300.320(b).

²⁶ 20 U.S.C. §1412(a)(5), and 34 C.F.R. §300.116(a), (b).

²⁷ 34 C.F.R. § 300.116.

participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in his IEP and receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.²⁸

The LEA "must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."²⁹ The continuum required must include the alternative instruction in regular classes, special classes, or schools as necessary and make provision for supplementary services to be provided in conjunction with regular class placement.³⁰ Federal and District of Columbia laws and regulations prohibit discriminatory practices by LEAs against children with disabilities. Failure to conform to these legal requirements may subject LEAs to sanctions, including discontinuation of federal funding under IDEA Part B.

The Respondent offered 6.5 hours of specialized instruction and 30 minutes of counseling the amount prescribed by the Student's IEP; and the testimony was the Student failed to appear at the school during the expulsion days to receive any service. The evidence demonstrated that the LEA made a change in the educational placement of the Student by expelling him and decided it had no obligation to notify or refer the Student to another entity who could be responsive. There was also no evidence that the selection of the alternative arrangement was made by determining the appropriate educational goals for the Student or assuring there was access to regular education. The Respondent did not show that it provided a continuum of placement not even a referral to another service provider.

After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency. Even if a private school or facility implements a child's IEP, responsibility for compliance remains with the public agency and the SEA.³¹

Furthermore if an LEA Charter anticipates that it may be unable to meet its obligation to provide a FAPE to a child with a disability currently enrolled in its school: (1) The LEA Charter shall contact the OSSE for technical assistance regarding the provision of FAPE to the child within the LEA Charter. If a child's placement is changed to a nonpublic school (whether by reason of a Hearing Officer Determination, Settlement Agreement, or a placement decision by the IEP Team at the LEA Charter), a child enrolled in an LEA Charter shall remain enrolled in

²⁸ 34 C.F.R. §§300.530, (b), (d), through 300.536.

²⁹ 20 U.S.C. 1412(a)(5) and 34 C.F.R § 300.115 (b).

³⁰ 20 U.S.C. 1412(a)(5).

³¹ 34 C.F.R § 300.325 (2) (b).

and is the responsibility of the LEA Charter, unless and until his or her parent reenrolls the child into another LEA (whether another LEA Charter, a District Charter, or DCPS).³²

The Responsibility for compliance with the IDEIA and local law and regulations for a child placed into a nonpublic school remains with the LEA in which the child was most recently enrolled (the sending LEA), a LEA Charter until the child's parent or guardian voluntarily reenrolls the child into another LEA. Such responsibility includes, but is not limited to evaluating the child, attending IEP meetings, monitoring progress, assessments, accountability as required under IDEIA, and developing a plan for the child's return from the nonpublic school to the LEA Charter.³³

Regardless of the placement alternative selected the LEA must provide or arrange for nonacademic and extracurricular services and activities to be addressed.³⁴

Additionally, local rule provides that a principal or other school official may establish, or make a referral to, a special class or other supervised program for students who are suspended, subject to the approval of a person designated by the Chancellor. Analogous to the DCPS; has the same obligation at a minimum to provide written notice to the parent indicating the name and address of the neighborhood school; and an alternative possible placement if the neighbor school is closed as in the present case.³⁵

A student who has been expelled shall be placed in an alternative educational setting that will allow the student the opportunity to continue to earn credits towards promotion or graduation requirements.³⁶ The LEA did not provide evidence that it met this obligation.

The LEA may not use the disciplinary procedure to evade responsibility "discipline must not be used as a means of disconnecting a child with a disability from education. Section 300.530(d) clarifies, in general, that the child must continue to receive educational services so that the child can continue to participate in the general curriculum (although in another setting), and progress toward meeting the goals in the child's IEP.." Comment to 34 C.F.R. § 300.530(b).³⁷

failed to show that the decisions regarding the Student educational setting balanced the interests the school community, with the obligation to minimize disruption of academic instruction to the Student.

³² 34 C.F.R. §300.114; 34 C.F.R. §300.325(c); and DCMR 3019.8 (2009).

³³ Id.

³⁴ 34 C.F.R. § 300 .118.

³⁵ DCMR B2504.9, 10 and (b) B2504 Policy For Suspensions And Expulsions -District Of Columbia Register Vol. 56 - No. 33 August 14 , 2009

³⁶ DCMR B2504.10

³⁷ *Federal Register Vol. 71, No 156, 46715.*

Least Restrictive Environment

Placement decisions must be made "in conformity" with the least restrictive environment provisions, federal and D.C. regulations require placements to be "based on the child's IEP" and "as close as possible to the child's home."³⁸

In determining the least restrictive environment, consideration is given to the types of services that the child requires.³⁹ Still, "[m]ainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of the Act." *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989).

The Petitioner did not prove that the Student's current IEP which is the cornerstone of the Student's program was substantially defective or that he required more hours than the 6.5 specialized instruction currently on his IEP. The Student was expelled there was no indication that another placement was established by an IEP team or that the Petitioner made any effort to inform the Respondent that a private placement would be sought for the Student.

The Petitioner chose as placement a full time special education private school with no opportunity for the Student to interact with disabled peers. The request is contrary to the strong preference in the IDEA for educating children with disabilities in regular classes with children who are not disabled; with the appropriate aids and supports.⁴⁰

The evidence was that the Student may require fewer hours of specialized instruction than that offered at The Petitioner chose the most restrictive educational environment, it requires that all the relevant MDT members, and in this case the Student who is years of age participates in the placement discussion.

Furthermore, the District of Columbia Code imposes a strict order of priority for special-education placement: "(1) DCPS schools or District of Columbia public charter schools; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia."⁴¹

Educational Benefit

The Petitioner argued that the Student is receiving educational benefit at the new placement; therefore there is no need to review if the placement is appropriate and in agreement with the need for services as prescribed in the Student's IEP; although the Student does require fulltime specialized instruction.

³⁸ 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550; D.C. Mun. Regs. tit. 5, § 3011 (2006).

³⁹ 34 C.F.R. § 300.552(d).

⁴⁰ 20 U.S.C. 1412(a)(5), and 34 CFR §§ 300.114 through 300.118.

⁴¹ D.C. Code § 38-2561.02(c) (2007).

Under *Florence County School District Four v. Carter*,⁴² when a public school system has defaulted on its obligations under the Act, a private school placement is “proper under the Act” if the education provided by the private school is “reasonably calculated to enable the child to receive educational benefits.”⁴³ “[O]nce a court holds that the public placement violated IDEA, it is authorized to ‘grant such relief as the court determines is appropriate.’ ‘...[E]quitable considerations are relevant in fashioning relief’... and the court enjoys ‘broad discretion’ in so doing.”⁴⁴

The evidence is not clear that _____, the school chosen by the Petitioner, is compatible with the Student’s current needs or IEP and therefore may not be an appropriate placement nor provide educational benefit. I find that the MDT must reconvene and determine a proper placement for the Student that addresses his unique needs as determined by evaluations, the Student’s educational record, the Student’s and Petitioner’s input.

Reimbursement

The Supreme Court’s decisions in *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359 (1985) indicates that tuition reimbursement is only available if a Federal court concludes “both that the public placement violated IDEA, and that the private school placement was proper under the Act.”

The IDEA indicates that if the parents of a student with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

The reimbursement may be reduced or denied “if at the most recent IEP Team meeting that **the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team** that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (emphasis supplied)

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.⁴⁵

⁴² 510 U.S. 7 (1993).

⁴³ *Id.*, 510 U.S. at 11.

⁴⁴ *Id.*, 510 U.S. at 15-16.

⁴⁵ 20 U.S.C. 1412(a)(10)(C), 34 C.F.R. § 300.148 (c) and (d).

In the present case, it was not evident that the parent acted reasonably or that the Petitioner gave notice to [redacted] that they intended to enroll the Student at a private school at the expense of the LEA. [redacted] knowledge of the Student's enrollment in a private school occurred with the filing of the Complaint. The Petitioner did not demonstrate that the private placement she chose can appropriately provide services with the regular education population to meet Student's unique needs or the current IEP. Consequently, the Petitioner bears responsibility for a portion of the tuition for the private placement.

As indicated above the IDEIA authorizes reimbursement for the cost of private special education services when a school district fails to provide FAPE and the private-school placement is appropriate. The Respondent failed to provide counseling services, expelled the Student and did not make available an adequate continuum of services to allow the Student to progress academically constituting a denial of FAPE. The Respondent will pay tuition for the Student at the private placement until a MDT determines otherwise. The Respondent's payment obligation began January 2, 2010.

Although the IDEA guarantees a Free Appropriate Public Education, it does not, however, provide that this education will be designed according to the parent's desires. The primary responsibility for formulating the education to be accorded a [child with a disability] and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parent or guardian of the child. Thus proof alone that loving parents can draft a better program than a state offers does not, alone, entitle them to prevail under the Act." Shaw v. The District of Columbia.⁴⁶

V. SUMMARY OF DECISION

The Petitioner did not prove that the Student's current IEP contained insufficient hours, goals or objectives; there was no evidence that extended school year services were required. There was no noticeable behavior problem at the school that required a behavior intervention plan. However there was a problem that caused an expulsion which was not addressed.

The Student was expelled from [redacted] and there was no evidence that the interim alternative educational setting in which the Student was placed would allow the Student to continue to participate in the general curriculum, or provided services and modifications designed to address the behavior that cause the interruption of services. The LEA Charter until the child's parent or guardian voluntarily re-enrolls the child into another LEA; has the responsibility of, monitoring progress, assessments, and accountability as required under the IDEIA, and developing a plan for the child's return from the nonpublic school to the LEA Charter.

A FBA was conducted but no written report has been provided to the Petitioner. The Respondent did not provide a BIP or suggestion on how the Student could receive substance

⁴⁶ 238 F. Supp. 2d 127, 139 (D.D.C. 2002).

abuse therapy or other behavior modifications. The Student has a problem that caused his expulsion it has to be addressed.

The Petitioner chose as placement a full time special education private school with no opportunity for the Student to interact with disable peers. The evidence was that the Student may require fewer hours of specialized instruction than that offered at The Petitioner chose the most restrictive educational environment, it requires that all the relevant MDT members, and in this case the Student who is years of age participates in the placement discussion. The Petitioner did not provide a timely notice to the LEA that a private placement would be sought for the Student.

The evidence was that the Student may require fewer hours of specialized instruction than that offered at The Petitioner chose the most restrictive educational environment, which is contrary to the intent of the IDEIA. A decision that imposes such a drastic change requires that all the relevant MDT members, and in this case the Student who is years of age participates in the placement discussion.

I find that the MDT must reconvene and determine a proper placement for the Student that addresses his unique needs as determined by evaluations, the Student's educational record, the Student's and Petitioner's input.

Upon consideration of Petitioner's request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the has denied the Student a FAPE and issues the following:

VI. ORDER

ORDERED, the Respondent has a tuition payment obligation which began January 2, 2010, the Respondent will pay for the private placement of the Student starting January 2, 2010 until a MDT identifies an appropriate educational placement for the Student, **it is further;**⁴⁷

ORDERED, the MDT meeting must be convene by March 31, 2010 and include all parties that may be responsible for the services the Student is requiring. The Respondent will document its efforts to secure the participation of the Petitioner, should it fail to secure the participation of the Petitioner after three attempts it may request termination of payment for tuition via an expedited hearing, **it is further;**

ORDERED, the MDT will review the Student's IEP, it will discuss and document the Student's behaviors and how to address the problem identified. The MDT will discuss transition goals, vocational programs and the services the Student would need to achieve the goals. The MDT will discuss the progress the Student has or has not made; and what sites and services are presently recommended to meet the Student's needs, **it is further;**

⁴⁷ Two weeks after Notice of the Complaint, when the Respondent was notified of the private placement.

ORDERED, the MDT will also discuss what efforts are planned to prepare the Student to return to a less restrictive environment; why the educational placement and location chosen can fulfill the Student's identified needs, **it is further**;

ORDERED, at the MDT/IEP meeting, the advantages and disadvantages with respect to each school must be discussed, including any schools proposed by the Petitioner. The Respondent shall provide the Petitioner an explanation for the placement it proposes, and the reasons for the proposal shall be written in the meeting notes, the final placement determination must be made by the MDT with a written report, **it is further**;

ORDERED, the Respondent shall send all notices to counsel for the parent with copies of such to the parent, **it is further**;

This Order resolves all matters presented in the Petitioner's December 23, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)



Wanda Iris Resto - Hearing Officer

Signed: February 26, 2010