DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

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Parent or Guardian, on behalf of
Student, [1]

Petitioner,

v

The District of Columbia
Public Schools

Respondent.

Date Issued: July 6, 2010

Hearing Officer: Jane Dolkart

Case No:

Hearing Date: June 29, 2010
Room: 4a

HEARING OFFICER DECISION

Counsel for Petitioner:

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

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is a year old student who was placed at (Lower) as a result of a December 18, 2008, settlement of a due process complaint. The student's last IEP is dated May 13, 2008, and provides the student with 27.5 hours of specialized instruction in an out of general education setting. The student" special education classification is Learning Disabled (LD). has failed to update the student's IEP over the past two years.

An IEP meeting was held for the student on April 22, 2010, to review new student evaluations and to revise the student's IEP. At the meeting, Petitioner learned that the student's IEP is not being implemented in that he is receiving all of his specialized instruction in a general education classroom and he is receiving little specialized instruction. The student has serious behavioral problems but is not in counseling and does not have a Behavioral Intervention Plan. Further, Petitioner learned that the student is failing all of his classes except physical education.

A draft IEP was developed on May 12, 2010, but has not been finalized. The new IEP would classify the student as Multiple Disability (MD) because he is LD and has an Emotional Disturbance (ED). It provides for 20 hours of specialized instruction/week in an out of general education setting and 2 hours/week of out of general education behavioral counseling. The student's May 13, 2008, IEP and the proposed May 12, 2010, IEP both indicate that the student is on a high school diploma track. DCPS proposed to place the student at in out of general education program. It is not possible to earn Carnegie Units in this program.

Petitioner filed a due process complaint on April 27, 2010, alleging that the student had been denied FAPE because his May 13, 2008, IEP had not been implemented and because the present and proposed placements are inappropriate.

The parties have submitted certain joint stipulations in which DCPS agrees that it has denied the student FAPE and that DCPS does not have an appropriate proposed placement for the student. Therefore, the only testimony required was from a representative of at which the student has been accepted, in order to determine if is an appropriate placement for the student.

A pre-hearing conference was originally scheduled for June 1, 2010. DCPS counsel could not be reached at the scheduled time. The conference was finally held on June 9, 2010, and a pre-hearing order was issued on June 11, 2010.

A resolution meeting was originally scheduled for May 12, 2010, but did not take place. With intervention from the Hearing Officer, the resolution meeting was finally held on

June 18, 2010. A resolution was not reached and a Due Process Complaint Disposition was signed on June 18, 2010.

The hearing in this case was confined to one witness who testified for approximately fifteen minutes. The Hearing Officer was out of town and the parties agreed to allow the Hearing Officer to conduct the hearing via telephone. The witness was also via telephone. The parties were both in the hearing room and the hearing was recorded.

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 implement the student's IEP in that the student received most of his educational instruction in a general education setting and failed to receive 27.5 hours of specialized instruction?

2. Failing to provide the student with an appropriate placement in that Ideal cannot implement the student's IEP, nor can the placement proposed by DCPS.

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated June 23, 2010, containing a list of witnesses with attachments P 1-25. The disclosure was admitted in its entirety. Petitioner called as a witness the Program Director at .

DCPS submitted a five day disclosure letter dated June 23, 2010, containing a list of witnesses with attachment R 1. The disclosure was admitted in its entirety.
DCPS did not call any witnesses.

V. FINDINGS OF FACT

The parties have stipulated to the following findings of fact.

1. The May 12, 2008, IEP is the student's current IEP.

2. is not implementing the student's IEP because it cannot provide 27.5 hours of specialized instruction in an out of general education setting. Ideal will not be able to implement the student's IEP in the future.

3. The student's present IEP indicates that he is on a track to graduate from high school with a high school diploma.

4. does not have a full time out of general education program that can provide Carnegie Units towards a high school diploma.

Additionally, the following findings of fact are supported by the documentary evidence and the testimony of the representative.

5. A comprehensive psychological evaluation report for the student was completed on March 3, 2010. The student was administered ten subtests of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to determine his cognitive functioning. The report indicated that the student's Full Scale IQ is within the Borderline range of intellectual functioning and that his verbal reasoning and nonverbal reasoning also fall in the Borderline range. The student's working memory is in the Average range, as is his processing speed.

The student was administered the Woodcock-Johnson Tests of Achievement, Third Edition (W-J III) to determine his academic achievement. The student's reading scores all fell within the fourth grade level or lower, as did his oral language scores. The student's scores in math were somewhat higher, falling in the fourth to fifth grade level. The student's math fluency score was at the 8.5 grade level. The student's written language scores were between the fourth and fifth grade level. The student's Total Achievement Cluster, a combination of the tests administered to the student was in the Low range at the 4.6 grade level.

(P 13)

6. indicated that the student has had behavioral concerns since he was enrolled there. A Functional Behavior Assessment was conducted on February 24, 2010, and a report was written on March 3, 2010. The student was noted to have behavioral problems while attending a DCPS school from pre-K through 5th grade. He was noted to be verbally disruptive, physically aggressive, and hostile when criticized. The evaluator administered the Behavior Assessment System for children, Second Edition (BASC-2), which is a behavior rating scale. The scale was completed by two of the student's teachers at The student had elevated scores on all of the major indexes: externalizing problems, internalizing problems, behavioral systems, school problems, and adaptive skills. He was described as hyperactive, aggressive, restless, impulsive, and defiant. The student was also described as withdrawn, pessimistic, and/or sad, having difficulty maintaining attention. In sum, the student presented as a child with emotional and behavioral concerns. (P 12)

7. Both the Comprehensive Psychological Report and Functional Behavior Assessment recommend that the student be placed in a small, therapeutic, heavily structured, academic environment, with a low student teacher ratio. (P 12, 13)

8. is a full-time therapeutic special education school located in Springfield Virginia. The Assistant Educational director at testified concerning the program at the school and whether it could implement the student's IEP. The Ass't Educational Director holds a BA and an MA in speech and language pathology and a doctorate in school supervision and administration. She is certified to teach both LD and ED students. She was a credible witness.

has a certification of approval from the DC Office of the State Superintendent of Education (OSSE) that is current through July 2010. There are 105 students at the school, 97 of whom are from DC. The school has a 10 month program and an ESY program. The school has a low student/teacher ratio, uses multi-sensory and language based approaches to teaching, can provide counseling, and has an all-student behavioral management plan. The school has 7 behavioral specialists on staff and provides individual and group counseling. All teachers are certified in special education and are also content certified. The school provides credit towards a high school diploma.
has a transition specialist on staff and a pre-vocational department which exposes the student's to various occupational choices and experiences and prepares students for college.

On May 4, 2010 the student and parents were interviewed by the Ass't Educational Director and met with a school psychiatrist and a transition services specialist. On May 7, 2010, the student spent a day at the school. The decision to admit the student was made by the admissions committee. The committee reviewed the student's Behavioral Intervention Plan (BIP), comprehensive psychological evaluation, vocational evaluation, draft IEP, reports from the teachers who saw the student during his one day in attendance, and the interview with the parent and student. determined it was able to implement the student's IEP and accepted him for admission.

intends for the student to repeat grade. There are three grade homerooms. Two have 7 students each and one has 4 students. The student will take English, algebra, DC government, physical education, and science. There will be 7-8 students in his classes along with a teacher and at least one teaching assistant.

Most DC students who attend are transported by a DCPS bus.

costs per day.

The student's present IEP indicates that the student is eligible for ESY services.
ESY program begins on July 6, 2010.

9. can implement the students IEP and is an appropriate placement for the student.

VI. DISCUSSION AND CONCLUSIONS OF LAW

I. Legal Standard

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.*, guarantees "all children with disabilities" "a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines FAPE as

> Special education and related services that – (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the State educational agency…, (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEAs guarantee of FAPE "is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a "basic floor of opportunity" for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16,* 331 IDELR 10 (3rd Cir. 1988).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See,* 20 U.S.C. ¶ 1413. If there is an appropriate public placement available that is "reasonably calculated to enable the child to receive educational benefits," the District need not consider private placement. This is true even though a private placement might better serve the child, *See Hendrick Hudson Dist. Bd. Of Educ. V. Rowley,* 458 U.S. 176, 207 (1982). However, "[i]f no suitable public school is available [DCPS] must pay the costs of sending the child to an appropriate private school." *Jenkins v. Squillacote,* 935, F.2d 303, 305 (D.C. Cir. 1991). See also, *Burlington School Committee v. Mass. Dept. of Education, 471 U.S. 359 (1985) and Florence County School District Four v. Carter, 510 U.S. 7 (1993).*

In making a determination concerning placement, the IDEA requires that the student be placed in the least restrictive alternative (LRA). "[T]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are [to be] educated with children who are nondisabled". 34 CFR § 300.114 (a) (2) (i). Special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.*

Several Circuits have developed a two pronged analysis for determining the LRA. First, can the student with a disability be satisfactorily educated in the regular classroom, with the use of supplemental aids and services, If it cannot, has the school district provided the student with interaction with non-disabled peers to the maximum extent appropriate. Daniel RR v. State Board of Education 874 F.2d 1036, 441 IDELR 433 (5th Cir. 1989).

Pursuant to IDEA § 1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

Pursuant to IDEA § 1415 (f)(3)(E)(ii), in matters alleging a procedural violation a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

II. Discussion

The burden of proof in an IDEA case is placed on the Petitioner. *Schaffer et al. v. Weast,* 546 U.S. 49 (2005). A Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence. 20 U.S.C. § 1415 (i) (2) (c)

DCPS has already determined that the student cannot be educated in a regular classroom by having provided the student with a full-time out of general education 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). By agreement of the parties, the student's present placement at the cannot implement the student's IEP and a new placement must be found. The only placement proposed by DCPS is a placement at which will not allow the student to earn any Carnegie Units towards a high school diploma. This placement cannot implement the student's IEP and is therefore inappropriate.

The student has been accepted at can implement the student's IEP. It can provide a full-time therapeutic, structured environment with small classes. It has a school-wide behavioral management program and 7 behavioral specialists on staff. All teachers are both special education and content certified and students can receive credit towards a high school diploma. is an appropriate placement for the student and he shall begin attending ESY program as soon as possible.

VII. SUMMARY OF RULING

DCPS has denied the student FAPE by failing to provide him with an appropriate placement. is an appropriate placement for the student.

VIII. ORDER

It is hereby **ORDERED** that

1. The student shall be placed at for the 2010-2011 school year, with transportation, both at DCPS expense.

2. DCPS shall convene an IEP meeting no later than 30 days from the student's enrollment at to review the student's progress and review and revise the student's IEP. If DCPS fails to convene an IEP meeting within the requisite time period, shall convene an IEP meeting and notify the appropriate DCPS liaison of the date and time of the meeting.

3. DCPS shall fund the student to attend ESY at commencing July 7, 2010. DCPS shall arrange for transportation for the student no later than July 12, 2010.

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: July 6, 2010