DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

OSSE
STUDENT HEARING OFFICE
2011 DEC -7 PM 4:57

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a year-old female, who currently attends a private special education school located outside of the District of Columbia as a result of Parent's unilateral placement of Student.

On September 23, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to provide an appropriate placement for Student. As relief for this alleged denial of FAPE, Petitioner requested funding of Student's unilateral placement for SY 2011/12, including tuition, expenses and transportation, retroactive to the date of Student's enrollment, and an IEP meeting within 10 days to review and revise Student's IEP as appropriate.

The parties concluded the Resolution Meeting process by failing to reach agreement on October 6, 2011, but the parties did not elect to shorten the 30-day resolution session. Hence, the 45-day timeline for this case started on October 24, 2011 and will end on December 7, 2011, which is the HOD due date.

On October 14, 2011, DCPS filed its Response to the Complaint, asserting therein that Student's IEP, which is the placement, is appropriate, what constitutes a therapeutic placement is determined by the IEP, the location of service is an administrative determination that does not require an IEP determination or parental input or approval, and the chosen location of services can provide Student with all that is required pursuant to her IEP.

On October 18, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. The hearing officer issued the Prehearing Order on October 21, 2011.

By their respective disclosure letters dated November 10, 2011, Petitioner disclosed seventeen (Petitioner's Exhibits 1 – 17) and DCPS disclosed 6 documents (Respondent's Exhibits 1 - 6).

The hearing officer convened the due process hearings on November 18, 2011, as scheduled.[1] Petitioner's Exhibits 1-3, 9-13, and 15-17 were admitted without objection, Petitioner's Exhibits 4-8 and 14 were admitted over DCPS's objection. DCPS's documents were admitted over Petitioner's objection. Thereafter, opening statements were received, the parties presented their testimonial evidence, and closing statements were received before the hearing officer concluded the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issue to be determined is as follows:

1. Did DCPS fail to provide an appropriate placement because the current school cannot provide 31 hours outside general education in a therapeutic environment?

FINDINGS OF FACT[2]

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

1. Student is years old, and she attends a private full-time special education school located outside the District of Columbia as a result of Parent's unilateral placement. Student began attending the school at the start of SY 2011/12, and she's attending "on contingency," which means that no tuition will be charged until the placement is approved through a due process proceeding.[3]

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[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.
[2] To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved..
[3] *See* Complaint; testimony of Assistant Educational Director of private school.

2. Student's primary disability is Emotional Disturbance ("ED"), and her current IEP, which is dated April 27, 2011, requires her to receive 31 hours per week of specialized instruction outside of general education and 1 hour per week of behavioral support services outside of general education.[4]

3. For SY 2010/11, Student attended a DCPS school that offered a full-time program special education program for ED students. Student had a dedicated aide from an outside agency during SY 2010/11, and she performed well with the aide's assistance. As a result, Student's IEP team agreed on February 15, 2011 that Student needs a one-to-one aide to function in an educational setting, and the SEC of Student's previous school explained the referral process for a DCPS aide. Student's "Child and Family team," which consisted of her school aide and her afternoon aide from the outside agency, Parent, the educational advocate and the SEC from the DCPS school Student was attending, also determined at a June 9, 2011 meeting that a dedicated aide should be added to Student's IEP so that the service could be ongoing and provided by DCPS. However, DCPS needed documentation from the outside agency to justify providing an aide, but the required documentation was not received by the end of SY 2010/11. The SEC from Student's previous DCPS school eventually received the documentation in June and forwarded it to the assigned DCPS school for SY 2011/12.[5]

4. Student does not have a dedicated aide at the current private unilateral placement; however, she is making progress at the school, has moved up to the 2nd-3rd level on the behavior management program, has no attendance issues, and received As and Bs on her recent report card.[6]

5. On June 9, 2011, DCPS convened an IEP/MDT, at which Parent was advised that the school Student had attended during SY 2010/11 was closing and all the students in the ED program at that school were being sent to the full-time out of general education ED program at another DCPS school as their new location of service for SY 2011/12. The team noted that Student continues to require a full-time out of general education setting to meet her needs, and DCPS explained that the idea was to have an ED program at the assigned DCPS school that would meet the same needs Student's previous DCPS school was already meeting. Hence, the new ED program would be a full-time out of general education program with a separate area for ED students, and it would offer a special education teacher and a content certified teacher in every class, a separate entrance/exit, and a separate lunch area. Student was very upset and vocal in expressing her disagreement with the proposed school. Parent rejected the proposed school, and the advocate expressed an objection to the school on Parent's behalf as well.[7]

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[4] Petitioner's Exhibit 3.
[5] Testimony of Parent; testimony of advocate; testimony of SEC from Student's previous DCPS school; Petitioner's Exhibit 13; Respondent's Exhibits 2, 3 and 5.
[6] Testimony of Assistant Educational Director of private school.
[7] Testimony of Parent; testimony of advocate; testimony of SEC from Student's previous DCPS school; Petitioner's Exhibit 1.

6. On June 16, 2011, DCPS issued a Prior Written Notice assigning Student to attend the ED program at the assigned DCPS school, noting that Student requires a full-time setting and the ED program at the assigned school can meet Student's needs and provide FAPE.[8]

7. Student has never attended the ED program at the assigned DCPS school for SY 2011/12.[9]

8. The ED program at the assigned DCPS school is located in a separate portion of the high school. It offers eight 42 minute class periods on Monday and four 85 minute class periods Tuesday through Friday, for a total of approximately 28.27 hours of instruction per week. The program currently services approximately 130 ED students, all of whom are on the diploma track. All of the academic courses in the program are outside of general education, and the majority of the classes are co-taught by a special education teacher and a general education teacher so that the students can earn Carnegie units/credits toward graduation. Some of the classroom teachers are dually certified. However, the school currently does not have special education co-teachers for the Spanish and Physical Education classes, neither of which Student is currently eligible to take, but special education teachers collaborate with the teachers of those classes to make sure accommodations are provided, and there are plans to eventually get special education teachers for those classes. The official class size in the program is 16 students, but the average class size is only 11 students with 2 to 3 adults. The program also offers after-school tutoring outside of general education, and Student would be allowed to participate in extra-curricular activities with non-disabled students but only with parental consent.

   The ED program utilizes a point system that allows Students the opportunity to earn activities as a behavior program. The students have access to social workers, who provide group and individual therapy and are also available on an as-needed basis. The social workers also lead various groups in different areas of interest to entice Students into receiving therapy, and the program conducts meetings with staff and students to provide positive affirmations, singing, drumming, read alouds, and recognition of positive accomplishments. The program has behavior technicians, behavior specialists, and a Dean of Students who has a background in therapy at non-public schools. Crisis intervention techniques include time-outs, relocation to a smaller environment, relocation of the rest of the class if necessary to allow the student at issue to focus and process the situation, and the safety care therapeutic hold if the child becomes unsafe to him/herself or others. The program offers Students in the program have the opportunity to use a separate entrance, but they may also use the regular school entrance for non-disabled students and will be escorted to the ED program.[10]

9. The assigned DCPS school can substantially implement Student's IEP and is reasonably calculated to enable Student to receive educational benefit.

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[8] DCPS Exhibit 1; Petitioner's Exhibit 13.
[9] Testimony of Parent.
[10] Testimony of Assistant Principal/SEC at assigned DCPS school.

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:

1. Alleged Failure to Provide an Appropriate School Program

Under IDEIA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. IDEA provides that a FAPE consists of special education and related services that, *inter alia*, are provided at an appropriate elementary school in conformity with an IEP. *See* 34 C.F.R. § 300.17. There is no dispute here that Student's current IEP is appropriate. Therefore, the determination of whether the assigned DCPS school is appropriate turns on whether the school can implement Student's IEP. *See Hinson v. Merritt Educational Ctr.*, 579 F.Supp.2d 89, 104 (D.D.C. 2008) (to show placement is inappropriate, plaintiff must show school is unable to implement the IEP as written); *T.T. v. District of Columbia*, 2007 U.S. District Lexis (D.D.C. July 23, 2007) (plaintiffs' challenge to public schools selected by DCPS was rejected where plaintiffs could not prove public schools were unable to implement the student's IEP).

In the instant case, Petitioner argues that the assigned DCPS school is an inappropriate location of services because it cannot provide Student with the 31 hours of specialized instruction outside of general education called for in her IEP and does not offer a therapeutic environment. Petitioner further asserts that unilateral placement is a less restrictive environment for Student because Student does not require a dedicated aide at the unilateral placement, whereas she would require a dedicated aide at the assigned DCPS school.

DCPS disputes Petitioner's assertions in this case. Hence, DCPS argues that Student's IEP can be implemented at the assigned DCPS school and strict compliance with the IEP is not required. DCPS disputes that the assigned school's ED program does not offer a therapeutic environment and further asserts that Student no longer needs a dedicated aide, because she is thriving without one is a non-public program very similar to the public program she would attend at the assigned DCPS school.

A review of the evidence in this case reveals that the assigned DCPS school can substantially implement Student's IEP by providing a full-time out of general education separate ED program with approximately 28.25 hours per week of instruction. The hearing officer acknowledges that Student's IEP calls for 31 hours of specialized instruction per week. However, the difference between what the IEP requires and what the assigned DCPS school can offer is *de minimis* under the circumstances of this case, since Student would be placed in the full-time out of general education setting her IEP team envisioned, and she would be in a segregated ED program that offers therapeutic components, such as counselors, behavioral support personnel and a behavior plan. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS failed of offer an appropriate placement or location of services for Student, and the hearing officer denies Petitioner's request for funding of Parent's unilateral placement for SY 2011/12. *See Matthew J. v. Massachusetts Dept. of Educ.*, 27 IDELR 339

(D.C. Mass. 1998) (*citing Florence County School District Four v. Carter*, 510 U.S. 7, 13 (1993)) (school placement was appropriate where it was reasonably calculated to enable student to receive educational benefit); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) (LEA must provide placement that furnishes basic floor of opportunity); *Melissa S. v. School Dist. of Pittsburgh*, 45 IDELR 271 (3rd Cir. 2006) (citation omitted) (plaintiff claiming a school district failed to implement an IEP must show failure to implement substantial or significant provisions of the IEP, and not a mere *de minimis* failure); *R.D. v. District of Columbia*, 374 F.Supp.2d 84 (D.D.C. 2005) (school district that provided FAPE in public setting was not responsible for reimbursing costs of unilateral parental placement).

With respect to Petitioner's assertion that Student will require a dedicated aide if she attends the ED program at the assigned DCPS school, the hearing officer notes that Student's current IEP does not require a dedicated aide, and as pointed out by DCPS, Student has progressed well in her current nonpublic school without a dedicated aide. However, in light of the previous determination by Student's IEP team that Student required a dedicated aide to function in the educational setting, the hearing officer will order DCPS to convene an MDT meeting 30 days after Student begins attending the ED program at the assigned DCPS school, if Parent chooses to send Student to the assigned DCPS school as a result of this Decision and Order, to determine whether Student requires a dedicated aide to function in that educational environment.

ORDER

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

1. The claim of an inappropriate placement in Petitioner's September 23, 2011 Complaint is **DENIED AND DISMISSED WITH PREJUDICE.**

2. If Petitioner chooses to send Student to the ED program at the assigned DCPS school subsequent to the issuance of this Decision and Order, DCPS shall convene an MDT meeting 30 days after Student begins attending the assigned DCPS school to determine whether Student requires a dedicated aide to function in that educational environment. If the MDT determines that Student does require the services of a dedicated aide, then DCPS shall provide such an aide within fifteen school days of the team's determination.

3. All other requests for relief in Petitioner's September 23, 2011 Complaint are **DENIED AND DISMISSED WITH PREJUDICE.**

NOTICE OF RIGHT TO APPEAL

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

Date: 12/7/2011

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer