DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

Parents, on behalf of
Student, [1]

Petitioner,

v

District of Columbia
Public Schools,

Respondent.

Date Issued: April 15, 2010

Hearing Officer: Jane Dolkart

Case No: 2010-0231

Hearing Date: May 5, 2010
Room: 4a

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STUDENT HEARING OFFICE
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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 is presently in grade and has been found eligible for special education under the classification of autism spectrum disorder (Asperger's Syndrome). The student's present IEP, dated February 24, 2010, provides for 29 hours of specialized instruction and one hour of behavioral support services per week in an out of general education setting. The student is presently placed in a self contained autism class at This due process complaint was filed on March 5, 2010, alleging that the student's present placement is inappropriate because it cannot provide him with a sufficiently high level of academic work and cannot provide the therapeutic setting he needs for his behavioral problems.

Respondent filed a response to the complaint on March 18, 2010, denying that the student's placement is inappropriate.

A prehearing conference was held on April 3, 2010, and a prehearing order was issued on April 4, 2010.

A resolution session was held on March 29, 2010. No resolution was reached and a complaint disposition form was signed by the parties on March 30, 2010. The 45 day time line was set to begin on March 30, 2010, and end on May 15, 2010.

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 failing to provide the student with an appropriate placement because his present placement cannot provide him with Carnegie Units towards a high school diploma and is not a therapeutic setting that can address his behavioral issues. At the beginning of the hearing, DCPS stipulated that was not an appropriate placement for the student. Thus, the only issue remaining for the hearing was the determination of an appropriate placement for the student.

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated April 26, 2010, containing a list of witnesses with attachments P 1-21. The disclosure was admitted in its entirety. Petitioner called as a witness the admissions coordinator at of D.C.

DCPS submitted a five day disclosure letter dated April 28, 2010, containing a list of witnesses. No documents were attached. DCPS did not call any witnesses.

V. STIPULATIONS

At the commencement of the Due Process Hearing counsel for DCPS indicated that DCPS had two stipulations to admit into the record as follows:

1. On March 24, 2010, a social work report on the student was completed by MSW, LICSW, a clinical social worker at On February 17, 2009, DCPS conducted an educational evaluation of the student. Based on the social work report and the educational evaluation, DCPS stipulates that is not an appropriate placement for the student because the student requires a more therapeutic setting with students who function at a higher level academically. (P 9, 14)

2. DCPS has not determined a new placement for the student.

VI. FINDINGS OF FACT

1. This is a year old student who is presently in grade and has been found eligible for special education under the classification of autism spectrum disorder (Asperger's Syndrome). The student's present IEP, dated February 24, 2010, provides for 29 hours of specialized instruction and one hour of behavioral support services per week in an out of general education setting. (P 10)

2. The student is fairly high functioning academically. The student was administered a Woodcock-Johnson – III, Tests of Achievement on February 17, 2009, when the student was in the grade. The student received a grade equivalent of 8.3 in Broad Reading, a grade equivalent of 4.5 in Broad Math, and a grade equivalent of 4.2 in Broad Written Language. (P 14)

3. The student's academic achievement is significantly higher than that of the other students in his self-contained autism class, particularly in the area of verbal skills. (P 9) The student is unable to earn Carnegie Units towards a high school diploma in his self-contained class. (P 1, DCPS Response to the Due Process Complaint)

4. The student has serious emotional problems. He frequently lives in a fantasy world, has violent and suicidal thoughts, and is disruptive and threatening in the classroom. (P9, 14)

5. has attempted to place the student in several general education classrooms and the experience was not successful because of the student's behaviors. (P 9)

6. The student has been accepted into the program at of D.C., a special education program for students with learning disabilities (LD). the admissions coordinator for the school testified about the program at and its suitability for the student.

has worked for the Co. for 9 years. For 6 years she was the admissions coordinator for the of PG County, and for the past three years she has been the admissions coordinator for of DC, which includes the Academy and an emotional disturbance program (ED) called Upper School.

reviewed the student's most recent IEP, his comprehensive psychological evaluation and his educational assessment. She interviewed the student's parents in February and interviewed the student in early March. She determined that the student was appropriate for the LD program which includes 2 other autism students who have been successful in the program.

She considered ED program but believed the students in the program had more extreme, aggressive, and violent behavioral problems that those of the student. The Academy has a school wide behavioral modification system that uses point sheets and monitors student behavior every 30 minutes. The school can incorporate an individual Behavioral Intervention Plans (BIP), and uses behavioral contracts with students. The school also has 6 licensed social workers who provide 1 hour a week of group counseling for each class and provide individual therapy as required on the student's IEP.

The Academy has 110 students in 12 classrooms, none of which have more than 10 students. Each classroom has a certified special education teacher and a teaching assistant. The assistants must have either a B.A. degree or have taken and passed a professional practice exam. All teachers in content areas are dual certified in their subject and in special education. Students can earn Carnegie Units and can achieve a high school diploma.

The Academy has identified a classroom for the student. He would be the 10th student in the class. Eight of the students are classified as LD and one has autism. The classroom was chosen based on the student's profile.

(P 8, Testimony of

VII. DISCUSSION AND CONCLUSIONS OF LAW

A. Introduction

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 IDEA's 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. In addition, school districts must develop comprehensive plans for meeting the special education needs of disabled students. *See,* 20 U.S.C. ¶ 1414(d)(2)(A). These plans or Individualized Education Programs (IEPs), must include "a statement of the child's present levels of educational performance, … a statement of measurable annual goals, [and] a statement of the special education and related services … to be provided to the child…." 20 U.S.C. ¶ 1414(d)(1)(A).

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.

Petitioner has the burden of proof in this case. *Schaffer et al. v. Weast,* 546 U.S. 49 (2005).

B. Placement

DCPS has conceded that the student's present placement is inappropriate and has not provided any evidence concerning an alternative placement for the student. DCPS has denied the student FAPE.

The Supreme Court has spoken on the level of education that the states are required to provide to disabled children. "[T]he education must be sufficient to confer some educational benefit upon the handicapped child." *Bd. of Educ. of the Hendrick Hudson*

Cent. Sch. Dist. V. Rowley, 458 U.S. 176, 200-01 (1982). While a free and appropriate education (FAPE) does not require the best possible education, it clearly requires more than a program calculated to enable the child to derive *de minimis* educational benefit. *Doe ex rel. Doe v. Smith,* 879 F.2d 1340 (6th Cir. 1989). The IEP must confer a meaningful educational benefit gauged to the child's potential. *T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ.,* 205 F.3d 572, 577 (3d Cir. 2000).

Once an IEP is developed, the school district must determine an appropriate placement for the child that is designed to meet the child's needs as set out in the IEP. Placement decisions must be made in conformity with the child's IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, it is the IEP which determines whether a placement is appropriate, not the other way around. *See, Rourke v. District of Columbia,* 460 F.Supp.2d 32, 44 (DDC 2006).

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 this instance, DCPS has not proposed any public placement that can meet the student's needs. Therefore, it is appropriate to place the student in a private placement that can provide the student with FAPE. of D.C. is an appropriate placement for this student. It provides a small structured therapeutic class setting with a behavioral point system and students of similar academic abilities to the student. The school offers classes from which the student can earn Carnegie Units and a high school diploma. The school can provide the behavioral supports and counseling called for in the student's IEP. can implement the student's IEP and provide the student with FAPE.

DCPS represented at the hearing that an autism specialist was coming to observe the student on May 6, 2010, and that DCPS was evaluating whether the student required a placement focused more on ED students or LD students. DCPS will be given the opportunity to propose another full time private placement within three weeks of the date of this HOD. In order to give the parents options, they will be given the opportunity to visit any such proposed placement and will have sole discretion to choose either or the DCPS proposed placement.

VIII. SUMMARY OF RULING

DCPS has denied the student FAPE by failing to provide an appropriate placement. of DC is an appropriate placement. DCPS will have three weeks to propose an alternative private placement and the parents shall have sole discretion to choose or the DCPS proposed placement.

IX. ORDER

It is hereby **ORDERED** that

1. DCPS shall fund the student, including transportation at one of two full time private special education schools. The student has been accepted at of DC which is an appropriate placement. DCPS shall be given three weeks from the date of this HOD to propose any other private full time placement it wishes to offer Petitioners and shall give Petitioners an opportunity to visit any such placement. Within two weeks of any such offer of placement from DCPS, the parents shall have the sole right to decide whether to send the student to or the placement offered by DCPS.

2. Should DCPS determine that the student is eligible for ESY, the student shall attend ESY at the new private placement at DCPS expense, including transportation.

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

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

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: May 10, 2010