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

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

through

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Date Issued: July 23, 2010

Hearing Officer: Kimm Massey, Esq.

Case No: :

Hearing Date: July 13, 2010

Room: 1

HEARING OFFICER DETERMINATION

BACKGROUND

Student is a _____ year-old boy, who has an IEP that entitles him to receive 29 hours per week of special education and related services, as well as 80 minutes per month of behavioral support consultation services.

On May 10, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS (1) failed to conduct and review evaluations in all areas of suspected disability; (2) failed to develop an appropriate IEP; and (3) failed to provide an appropriate placement. As relief for these alleged violations, Petitioner requested, *inter alia*, funding for and placement at a full-time therapeutic school of Petitioner's choosing, with transportation, an independent FBA and educational evaluation, a meeting within 10 days of DCPS's receipt of the independent evaluation reports, and compensatory education.

On May 20, 2010, DCPS filed its Response to the Complaint. In its Response, DCPS asserted, *inter alia*, that Student's MDT had determined at an April 30, 2010 meeting that Student needed a more restrictive setting due to his behavioral issues, and that the team had scheduled and Parent had confirmed a May 24, 2010 meeting to discuss placement.

On June 17, 2010, DCPS filed a Motion to Dismiss the Complaint. In said Motion, DCPS sought to have the Complaint dismissed due to Petitioner's failure to respond to DCPS's attempt to schedule a resolution session.

On June 24, 2010, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. During the conference, Petitioner represented that a resolution session was scheduled to take place the next day, May 25, 2010, and DCPS agreed to delay consideration of its Motion to Dismiss based on said representation. Petitioner clarified that its evaluation claim concerned an FBA and an educational evaluation, and Petitioner withdrew the portion of the claim concerning the FBA. Petitioner also withdrew its claim alleging failure to develop an appropriate IEP. The parties also advised that subsequent to the filing of the Complaint, DCPS had assigned Student to attend a DCPS school. Based on Petitioner's representation that Parent had not been provided with information regarding the assigned school, DCPS agreed to provide Parent with the necessary information at the resolution session to be held the next day. Moreover, based on the hearing officer's determination that Petitioner had stepped outside of the collaborative process by filing the Complaint before a scheduled and confirmed MDT meeting could be held, and then refused to attend another meeting, the hearing officer placed on Petitioner the burden of demonstrating why the assigned DCPS school allegedly was an inappropriate placement. The hearing officer issued the Prehearing Order on June 29, 2010.

By their respective cover letters dated July 6, 2010, Petitioner disclosed 11 documents (Petitioner's Exhibits 1 through 11) and DCPS disclosed 16 documents (DCPS-1 through DCPS-16).

On July 13, 2010, the hearing officer convened the due process hearing for this case.¹ The parties' disclosures were admitted into the record without objection. After opening statements were received and Petitioner presented its case, DCPS moved for a directed finding on the issue of the appropriateness of the assigned DCPS school. Upon consideration of the evidence and arguments of counsel, the hearing officer denied the motion, noting that said denial did not represent a finding that Petitioner had met its burden of proof but was merely a ruling that Petitioner had produced sufficient evidence to require DCPS to come forward with some evidence regarding the suitability of the assigned school. Thereafter, DCPS presented the testimony of one witness, closing statements were received, and the hearing officer brought the hearing to a close.²

The due process hearing was convened and this Hearing Officer Determination is written pursuant to IDEIA, 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.").

ISSUES

The issues to be determined are as follows:

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

² During the course of the hearing, Petitioner withdrew its claim for compensatory education.

1. Did DCPS deny FAPE by failing to conduct and review an educational evaluation?
2. Did DCPS fail to provide an appropriate placement?

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. Student attended a charter school that serves as its own LEA ("LEA Charter") during the 2008/09 school year.³
2. Student attended a charter school, for which DCPS serves as LEA ("DCPS Charter"), during the 2009/10 school year.
3. Student's May 2009 IEP from the LEA Charter was unsigned and did not contain a primary disability or any academic goals but provided for Student to receive 10 hours of specialized instruction and 1 hour of behavioral support services per week. It does not appear that the IEP was ever implemented by the LEA Charter, and the DCPS Charter maintained that it never learned of Student's special education status until January 2010.⁴
4. On March 17, 2010, DCPS convened an IEP meeting to review Student's IEP from the LEA Charter. During the meeting, DCPS proposed academic goals for Student. Parent initially disagreed with the goals, stating that Student only has a problem in the area of mathematics and does not have problems with reading and writing; however, Parent eventually relented and agreed with the rest of the team to adopt DCPS's proposed goals. The advocate requested new educational testing because, *inter alia*, DCPS had used the DC-BAS to determine Student's present levels of performance, but Student had advised Parent that he did not attempt to correctly answer the questions on the DC-BAS. There was also evidence that an educational evaluation had only been attempted at the LEA Charter but was only partially completed due to Student's resistance. The advocate also requested 15 hours of pullout services for Student, but DCPS noted that Student's current DCPS Charter follows an inclusion model, and DCPS also stated that Student's original IEP should be implemented first, as the least restrictive environment, to see whether Student improved with that level of services before the possibility of more hours was considered. The team designated emotional disability ("ED") as Student's primary disability and determined the accommodations to be provided. The DCPS LEA representative then exited the meeting, having determined that the meeting sufficed to close out a March 10, 2010 settlement agreement.⁵

³ Complaint at 2, ¶ 3; DCPS Response at 1; testimony of Parent.

⁴ See DCPS-13; Petitioner's Exhibit 3; testimony of Parent.

⁵ DCPS-13; Petitioner's Exhibit 3.

5. Subsequent to the end of the DCPS LEA representative's participation in the March 17, 2010 meeting, the team began to discuss the behavior concerns the DCPS Charter was having with Student. The school staff noted that Student was unwilling to do work in class, disruptive in class, late to class, and very playful. Parent indicated that she did not know about these behavior issues. When the school staff suggested that Student's neighborhood school or another school might be the best placement for him, the advocate and Parent began insisting on a full-time special education setting for Student. The team rejected the request and determined to implement the IEP calling for 10 hours of inclusion and 1 hour of behavioral support services. The team agreed to meet again in 45 days, after an FBA had been completed, to review the effectiveness of the IEP.⁶
6. On April 30, 2010, the DCPS Charter convened a manifestation determination review for Student to determine whether his recent behavior, which included fighting/physical aggression on April 28 and/or 27, 2010, was a manifestation of his behavior. The special education coordinator ("SEC") also reviewed other incidents where Student used foul language, disrupted class and showed defiance toward authority. The team determined that Student's behaviors were a manifestation of his ED. The team also noted the DCPS Charter's attempts to implement the existing IEP. The team determined that the DCPS Charter is unequipped to provide the required services to Student due to his behavior and refusal to receive services. The team further determined that Student requires a full-time special education setting that has the ability to provide individual and group counseling, a low student-adult ratio, and specialized instruction in all content areas. The team agreed to reconvene the meeting on May 24, 2010 to review the FBA and BIP, which had not yet been completed, revise the IEP and discuss placement in another setting. (A new placement for Student could not be determined at the April 30, 2010 manifestation determination review because no DCPS representative was present at the meeting.) A DCPS representative agreed to participate in the May 24th meeting to provide placement options for the 2010/11 school year, and the advocate indicated that Petitioner's attorney would also participate in the meeting.⁷
7. On May 10, 2010, two weeks before the agreed upon May 24th meeting could be held, Petitioner filed the instant Complaint, alleging that DCPS had failed to conduct and review an FBA and an educational evaluation, to develop an appropriate IEP, and to provide an appropriate placement.
8. On May 24, 2010, the DCPS Charter reconvened Student's MDT. Petitioner's counsel attended the meeting, and the DCPS LEA representative participated in a portion of the meeting by phone. The FBA was reviewed, and the BIP was reviewed and adopted by the team. Parent and Petitioner's counsel requested one of two specified private schools as Student's new placement, indicating that Parent had visited both schools. The DCPS LEA representative agreed to full-time service hours for Student and directed a meeting to update the IEP to reflect full-time hours; the SEC then suggested June 9th as a possible meeting date and Petitioner's counsel indicated that he would confirm the date. The DCPS placement manager indicated that DCPS would look first at suitable placements

⁶ Petitioner's Exhibit 3; testimony of advocate.

⁷ DCPS-16; Petitioner's Exhibit 4; testimony of advocate.

within DCPS before considering placements outside of DCPS. The placement manager offered either of two DCPS school as a placement that could provide full-time services to ED students. With respect to the school that DCPS ultimately assigned Student to attend, the placement manager offered to take Parent there or meet her there, but Parent asked whether she could go on her own. The placement manager said yes and gave Parent the contact information for a representative from the school.⁸

9. Despite the representations made by Parent and/or Petitioner's counsel at the May 24th meeting, however, Parent had not visited the private schools she requested for Student prior to the meeting. Indeed, Parent did not visit one of the schools until June 24, 2010, and Parent went approximately a week prior to that to visit the other private school.⁹
10. On May 25, 2010, DCPS issued a Prior Notice assigning Student to attend a specific one of the two DCPS schools offered as placements at the May 24, 2010 MDT meeting. The Prior Notice was accompanied by a letter to Parent from the DCPS placement manager which, *inter alia*, explained that DCPS was responsible for determining the location of services and cited to the District of Columbia law requiring consideration of DCPS schools prior to considering private or residential schools. In the letter, the placement manager also noted that he had offered during the May 24th meeting to meet Parent at the assigned DCPS school so that she could meet the contact person for the school and the school staff, and the placement manager asked parent to send him an email with the date and time for said meeting at the newly assigned school.¹⁰
11. On May 26, 2010, DCPS issued a Letter of Invitation ("LOI") inviting Parent to attend a June 14, 2010 meeting for Student.¹¹
12. On June 11, 2010, the SEC from the DCPS Charter sent an email to the advocate and Petitioner's counsel. The email stated that although the June 14th meeting date for Student had been confirmed weeks earlier, the SEC had recently received voice mail message(s) from the advocate and/or Petitioner's counsel that requested a reminder of the meeting date and stated that the advocate and/or Petitioner's counsel did not know about the meeting and would have to reschedule. The SEC then indicated, *inter alia*, that DCPS was ready to meet and wanted to be compliant with its obligations.¹²
13. On June 11, 2010, the advocate sent the SEC at the DCPS Charter a reply email stating (i) that there had been three meetings since mid-March to discuss Student and his academic performance, (ii) that the team had recently met on May 24th to discuss an appropriate location of services and the DCPS placement manager did not want to consider Parent or Petitioner's counsel's placement preferences of either of two private schools but instead indicated that he would issue a Prior Notice to one of two DCPS

⁸ DCPS-9; Petitioner's Exhibit 5; testimony of Parent.

⁹ Testimony of Parent.

¹⁰ DCPS-12; Petitioner's Exhibit 6.

¹¹ DCPS-5.

¹² DCPS-3.

schools, and (iii) that “[t]here does not, therefore, appear to be a clear reason to hold yet another meeting for [Student] at this time.”¹³

14. On June 14, 2010, the DCPS Charter reconvened Student’s MDT meeting to revise his IEP to provide for full-time services outside of general education pursuant to the team decision at the May 24, 2010 meeting, and to review the new educational goals and accommodations to be added to the IEP. The educational advocate informed the SEC and DCPS’s placement specialist that Parent would not be attending the meeting but requested a copy of the meeting notes and all other documentation from the meeting. The team reviewed and adopted the proposed IEP goals, determined that the IEP would be revised to provide Student with 27.5 hours per week of specialized instruction, 1.5 hours per week of behavioral support services, and 80 minutes per month of behavioral support consultation services, reviewed and adopted accommodations for classroom and state assessment, determined that ESY, a dedicated aide and transportation were unwarranted but agreed to review transportation after the first 30 days at the new location of services for SY 2010/2011, and reviewed Student’s post-secondary educational transition plan. DCPS also issued another Prior Notice for the newly assigned location of services, and the team determined that Student was being appropriately placed in an educational setting that could meet his needs.¹⁴
15. Petitioner’s counsel did not advise Parent of the June 14, 2010 meeting prior to the meeting. Petitioner’s counsel did not inform Parent of the LOI when it arrived. Parent found out about the Monday meeting on the Friday before the meeting, and she received that information from the administrative staff at the DCPS Charter.¹⁵
16. On June 25, 2010, DCPS convened a resolution session meeting concerning Petitioner’s May 10, 2010 Complaint. Parent and Petitioner’s counsel attended the meeting. The academy coordinator from Student’s new DCPS placement also attended the meeting discuss the school’s program and what the school can provide. Parent recalls the coordinator stating that at that time, he did not yet have a copy of Student’s IEP. However, the coordinator is not the SEC at the school and he indicated that the SEC would have received a copy of the IEP before it came to him. Parent agreed to visit the school at 10:00 am on June 29th, and the coordinator agreed to take Parent on a tour of the school at that time. However, Parent did not go to visit the school on the date and time she agreed.¹⁶
17. On some day at or near the beginning of the summer session for Summer 2010, Parent went to observe Student’s new DCPS placement. Parent is unclear of the actual date. She did not have an appointment to visit, and the contact person was not present at the time of her visit. The contact person is actually the academy coordinator. The secretary told Parent that she needed to see the coordinator, who was not in, but the secretary took Parent on a tour and gave Parent information about the school. The secretary told Parent

¹³ DCPS-4.

¹⁴ DCPS-6, DCPS-7, and DCPS-8; Petitioner’s Exhibit 7.

¹⁵ Testimony of Parent.

¹⁶ DCPS-2 at 2; testimony of Parent.

that there were 2 to 3 teachers and 10 children per classroom, that there was a blue room where the students could go to calm themselves down, that the psychologist and therapist work with the child to help the child calm down if necessary, and that therapy is given on an as-needed basis. Parent saw one child having a crisis in a particular classroom and saw that all three teachers in the room were trying to calm that child down, while the other students began to get loud. The secretary indicated that the teachers handle these matters as necessary depending upon the situation, but Parent was concerned that none of the teachers were watching the other students. Parent felt that she did not need to see anymore after that and left. Parent is also concerned that she was not told about the academics at the new DCPS school, that the school only gives therapy as needed, and that the school looked like a detention facility.¹⁷

18. On July 12, 2010, the day before the due process hearing in this case, Student and his aunt (Parent's sister) went to visit Student's new DCPS placement. Parent indicated at the due process hearing that she did not attend the visit because of a previous doctor's appointment. The academy coordinator gave Student and the aunt a tour of the school and provided them with information about the school. Student felt the school looked like a jail because it had metal detectors, because he was pat down at the entrance to the school, and overall, because of the appearance of the inside of the school. Student is concerned that he knows people who attend the school and he has come to believe that he can only succeed at a school where he does not know any of the other students.¹⁸
19. Student's new DCPS placement is a DCPS school for ED student on the diploma track. It has 6 social workers, 8 to 9 behavior technicians who are stationed throughout the building, a transition specialist, and itinerant occupational therapy and speech/language providers. The school can accommodate 110 students, but during the 2009/10 school year there were only 86 students. The school has a ratio of 8 to 10 students per class with 2 to 3 adults in each classroom. The special education teachers are special education certified, the general education teachers are certified in their content areas, and the behavior technicians are bachelor's or master's level with special education certification and TAC-2 therapeutic hold training. There are no consulting psychiatrists on staff. The school offers 3 "blue rooms" on each floor, which are rooms to be used for brief time outs as needed. Students are usually escorted to and from the blue room upon the students' request. There is a therapeutic intervention center ("TIC") downstairs at the school for longer time outs. If a student is in the TIC for more than approximately 15 minutes, class work is sent with the student and a certified teacher is placed in the room with the student. Also, either the academy coordinator or student's therapist will go into the room to discuss/process the incident with the student. The school can provide Student with the services and accommodations listed on his IEP.¹⁹

¹⁷ Testimony of Parent.

¹⁸ Testimony of Student; Testimony of Parent.

¹⁹ Testimony of academy coordinator.

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. Educational Evaluation

Under IDEIA, DCPS must ensure that a reevaluation of each child with a disability is conducted if DCPS determines the child requires a reevaluation, or if the child's parent or teacher requests a reevaluation. 34 C.F.R. § 300.303(a). In this case, the evidence demonstrates that the advocate requested, on Parent's behalf, that DCPS conduct an educational reevaluation of Student, but DCPS failed to do so. Therefore, the hearing officer will order DCPS to conduct an educational evaluation of Student within the first 30 days of the 2010/11 school year. Although Petitioner has requested an independent evaluation of Student, because the evidence in this case suggests that Student has a tendency to resist evaluations, the hearing officer concludes it would be best to have Student tested at his school where multiple attempts can be made if necessary.

2. Placement

IDEIA provides that 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. In assigning a placement for a student, DCPS must consider whether a DCPS school or DCPS charter school can serve as an appropriate location of services prior to considering private or residential facilities or schools located outside of the District of Columbia. *See* D.C. Code § 38-2561.02.

In this case, the evidence indicates that DCPS adopted an initial IEP for Student in March 2010. At that time, DCPS rejected Parent and advocate's request for a full-time IEP, deciding instead to implement the IEP that DCPS had developed for Student based, in part, on the draft IEP that had been prepared for Student at his prior placement. DCPS stated that it would determine how/whether Student progressed under the initial IEP prior to considering a full-time IEP for him. A month later, after Student was involved in physical aggression/fighting at the school, his IEP team determined that he required a full-time setting, and DCPS and the DCPS Charter began attempting to provide a full-time IEP and an appropriate placement to implement same. This initial decision was made on April 30, 2010, near the end of the 2009/10 school year, and by June 14, 2010, DCPS had provided Student with a full-time IEP with new goals and a DCPS school that could implement the IEP during SY 2010/11 and moving forward.

However, before DCPS could even hold the first meeting after the April 30th decision was made to provide Student with a full-time IEP, Petitioner filed the Complaint that initiated the instant action. Thereafter, Parent and her representatives participated in the first IEP meeting held for Student after the April 30th meeting, and when it became clear that DCPS intended to focus on DCPS schools prior to considering whether there were private schools that could implement Student's IEP if necessary, Parent and her representatives declined to participate in any further meetings. Parent did not visit the DCPS school Student ultimately was assigned to attend until

the 2009/10 school year had already ended, and indeed she had not even visited the private schools she requested for Student until well after the meeting where she requested them.

DCPS has placed Student in a full-time DCPS school for ED students that can implement his IEP and offers a low student-teacher ratio. Student will be provided with specialized instruction in all academic areas, and the school offers trained behavior support staff, time-out rooms and a therapeutic intervention center.

Based upon the evidence outlined herein, the hearing officer concludes that DCPS has complied with its obligation under IDEIA to provide Student with an appropriate educational placement where his needs for special education and related services can be met. Moreover, although it took DCPS from April 30, 2010, when the MDT made the decision that Student required a full-time IEP, to June 14, 2010, when DCPS finally issued the full-time IEP, to totally resolve the question of Student's placement, the hearing officer concludes that as the end of the school year was rapidly approaching, the minor delay on DCPS's part did not impede Student's right to a FAPE or cause a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2). Furthermore, as DCPS invited Parent to attend all meetings as well as the school DCPS ultimately assigned Student to attend, the hearing officer concludes that DCPS's actions in this case did not significantly impede Parent's opportunity to participate in the decision-making process concerning Student. *Id.* As a result, Petitioner has failed to meet its burden of proof on this claim.

ORDER

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

1. Within 30 days of the start of the 2010/11 school year, DCPS shall administer an educational evaluation to Student. If it becomes necessary due to Student's resistance to participating in the evaluation, DCPS shall attempt to administer said evaluation at least three times.
2. All remaining requests for relief in Petitioner's May 10, 2010 Complaint are **DENIED**, and the Complaint is **DISMISSED**.

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: 7/23/2010

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