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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

Parent or Guardian, on behalf of
Student, ¹

Petitioner,

Date Issued: August 27, 2010

Hearing Officer: Jane Dolkart

v

Case No:

The District of Columbia
Public Schools

Hearing Date: August 18, 2010

Room: 5a

Respondent.

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 is a ward of the state and presently resides with a foster parent in Maryland. The student has serious emotional problems and has received multiple diagnoses over the years. He is eligible for special education under the classification of emotional disturbance (ED) and has a full time out of general education IEP. The student attended the , a full time therapeutic private school for students with emotional issues. The student has aged out of the and requires a new placement for the 2010-2011 school year. A placement meeting for the student was held on May 28, 2010, and DCPS proposed to place the student at the , a full time DCPS school for children with emotional problems. Petitioner does not believe the is an appropriate placement for this student.

On July 9, 2010, Petitioner filed a Due Process Complaint alleging that is an inappropriate placement for the student. Respondent filed a response on July 19, 2010 asserting that can supply all needed services to implement the student's IEP.

A resolution meeting was held on July 20, 2010. No resolution was reached and a Complaint Disposition Form was filed on July 20, 2010. The IDEA 45 day timeline for completion of a hearing and the issuance of an HOD was reset and the HOD is due no later than August 28, 2010.

A pre-hearing conference was held on July 29, 2010, and a pre-hearing order was issued on July 31, 2010.

On August 6, 2010, Petitioner's counsel served Notices to Appear at Due Process Hearing on and both employees of appeared in person and testified. was available by telephone but was not called as a witness.

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 because the _____ is an inappropriate placement for the student given his specific and serious emotional needs?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated August 11, 2010, containing a list of witnesses with attachments P 1-12. The disclosure was admitted in its entirety. Petitioner called as witnesses the student's foster mother, the student's guardian ad litem and surrogate parent for educational issues, a social worker who treats the student outside of school, the Lead Behavioral Coordinator at _____ a psychologist qualified as an expert witness, and the Principal at the _____

DCPS submitted a five day disclosure letter dated April 30, 2010, containing a list of witnesses with attachment R 2 (exhibit R 1 was the student's most current IEP, already contained in Petitioner's disclosure and not re-disclosed). The disclosure was admitted in its entirety. The Parties each called the _____ coordinator as a witness. He was examined only once, starting with Petitioner.

V. FINDINGS OF FACT

1. This is a student with a long history of abuse and neglect. The child first came to the attention of the Child and Family Services Agency (CFSA) in March 1997. At that time the child and his 4 siblings were frequently left unattended and were malnourished. The mother had significant mental health problems. Interventions from CFSA to keep the family together were unsuccessful and the children were removed from their mother's care in April 1999. Since being removed from his mother's care, the student has lived in at least 4 different foster homes. At some point the parents' parental rights were terminated He has been at his present foster home for over 4 years. (P 5)

2. The student has been in individual therapy outside of the school setting since September 2000 at the age of _____ and has been prescribed various psychotropic medications as early as _____ grade. At various times the student has been diagnosed with ADHD, Enuresis (bed wetting), Encopresis, Pervasive Developmental Disorder, Adjustment Disorder, Reactive Attachment Disorder, Post Traumatic Stress Disorder (PTSD), and Bipolar Disorder. The student's most recent psychiatric diagnosis update completed on February 27, 2009, diagnosed the student with Pervasive Developmental Disorder, NOS, Enuresis, and H/O Encopresis. This report was prepared by Scott D. Hagaman, M.D., a child and adolescent psychiatrist who has been observing the student and prescribing medication for him since December 2006. (P 5, 8, 9)

3. _____ a clinical manager and therapist with Launch LLC Community Mental Health Center has been working with the student in individual therapy for 3 years. Launch works with high risk children. In addition to providing therapy, the student has a community support worker who, among other things, addresses problems at school and a team that reviews the student's progress. _____ testified at the hearing and was

extremely knowledgeable about the student and was a credible witness. There is also a January 1, 2010 progress report on the student in the record at P 4. In testimony and documentation, _____ addressed the student's sexual history.

The student has a history of severe and systematic sexual abuse since early childhood by an older brother. He was forced to participate in sexual activities with a younger and older sister. The student remains reluctant to discuss the abuse. Recently a therapist who specializes in the area of sexually abused children has begun to provide individual counseling specifically to address the sexual issues.

As a result of the student's sexual abuse as a child, he engages in inappropriate sexual activity at present. He sexually molested a male child, he has bullied and assaulted younger children, he engaged in an incident of placing his penis in the mouth of a dog, he rubbed the thigh of an adult male staff member at the school, and made sexual comments to an adult female staff member. The student exhibits sexual confusion about himself. The student does not appear to understand that he is placing himself in danger by engaging in these behaviors with an adult. There is also concern that a parent or older sibling of a young victim could hurt the student.

(Testimony of _____ P 4)

4. Many witnesses, all credible, testified to the student's problems both in and out of school and to the school environment the student requires. The student's foster mother was particularly compelling as a witness. The student has lived with her for 5 years and her knowledge and insights into the student are impressive. The student's _____ was also impressive and credible. She has been working with the student since 2002 and has seen the student numerous times, has been to his school several times, has spoken with his psychiatrist and his outside therapist, and has been at meetings about the student at the _____

Similar information is found in a number of reports placed into the record. One of the witnesses who testified, Dr. James Ballard was not found credible and no weight is given to his testimony. He did not prepare a report. Dr. Ballard had one interview with the student one time, the day before the hearing. His knowledge of _____ is limited to three visits he made recently as the head of a team retained to test 11th and 12th grade students for the Rehabilitative Services Agency. Not surprisingly, some of the students were not cooperative in being tested. (Testimony of Dr. Ballard,

5. One consistent pattern in the student's life is his problems with food. The student hordes food as an outgrowth of his early childhood deprivation. He steals food both at home and in school, shields his food, scarps it down quickly, overeats, sneaks food into his bedroom, and puts his hands on other student's food at school. This behavior has caused other students to get angry with him and bully him. (Testimony of mother, P 6)

6. The student has a long history of wetting his bed, peeing on himself, and defecating on himself. (Testimony of mother, P 6)

7. The student displays a number of problematic behaviors at school (in addition to the sexual behaviors described above). The student is bullied a lot at school, in part because he has poor social skills and is very young for his age both socially and in appearance. The student is only _____ and wears glasses. The student's glasses were broken approximately 7 times as a result of school incidents. The mother was called by the _____ 8-10 times because the student had put his hands on other student's food and in some cases other students had hit him as a result. The student curses peers and teachers and bullies younger children. The student is intimidated by the threat of physical assault and does not do well in an environment with a lot of aggressive students.

The student does not have any friends and can be described as socially backward. He is unable to interact with his peers and is consistently shunned by them. In an effort to be accepted by his peers the student is a follower and tends to follow negative persons in order to be "cool". The student has gotten into several serious incidents as a result of his following others.

The student requires close supervision for a number of reasons. First is his sexual behavior, second is his tendency to follow negative role models, and third is his seeming lack of awareness of the dangers around him. For instance, the student has frequently been found walking across busy streets without looking or caring whether cars were coming.

(Testimony of mother, _____ counselor, P 1, 4, 5, 7, 9)

8. Academically, the student has tested in the low ranges in both cognitive and achievement testing. However, the evaluators have consistently indicated that the test scores may not be a very good measurement of the student's abilities because the student lacked motivation to put effort into the testing. The student is considered to be academically capable. In his most recent IEP, dated April 6, 2010, the student is described as performing on a 5th grade level in math, the 7.5 level in reading, and the 5th grade level in written expression. On his 8th grade report card through the 3rd Q, the student received mostly A's and B's, except for C's in science. (P 1, 3, 5, 6)

9. The testimony of those who are familiar with the student was consistent concerning the type of school the student requires. It needs to have clear, consistent guidelines, be structured, and provide individual and group therapy, and social supports. The school should be small because the student is overwhelmed and intimidated by large numbers of people and has trouble with change. The student would not do well in an environment with a lot of aggressive students because of his fear of violence, his anxiety, and his tendency to follow others negative behavior. The school should provide the student with an academic challenge. (Testimony of mother,

10. The student's most recent IEP, dated April 6, 2010, provides for the student to receive 29 hours of specialized instruction and 1 hour of behavioral support services per week, all in an outside general education environment. (P 1)

11. DCPS issued a Prior Notice of Placement to the
2011 school year, on May 28, 2010. (R 2)

for the 2010-

12. the Lead Behavioral Coordinator at testified concerning the security and behavioral component used at has been in his position for 2 years. He has a B.A. and M.A. in education. He has worked with ED students for over 10 years in a variety of programs including the Riverside lockdown facility, several private day schools, a DCPS public charter school, and now He has been trained in Therapeutic Crisis Intervention (TCI), Therapeutic Aggression Control Techniques (TACT I), and Life, Space, Crisis Intervention (LSCI). was knowledgeable in his field and knowledgeable about He was a credible witness. (Testimony of

13. is a behavioral technician. There are 7 other behavioral technicians (BTs) working under him. BTs are trained in therapeutic crisis intervention, how to mediate problems, and in insuring the safety and the security of the building. The BTs are assigned specific floors with 2-3 BTs per floor. There are 3 floors in the building. There are 3 entrances to the building, only one of which is for students. There are 2 stairwells in the building and BTs are assigned to each stairwell. In addition there are 5 Hawk One Security Guards. Two of the guards stand at the student entrance into and out of the building all day. There are also 2 police officers assigned to the school and at least one officer is there at all times.

All of the BTs have been trained in TCI which trains persons to identify crises before they escalate and how to deal with them. Techniques used are verbal help, proximity help, help articulating what is going on and other such non-physical mediation. Most BTs are also trained in TACT I which provides techniques to help prevent, intervene in, and de-escalate crises. Two of the staff are trained in TACT II which can involve physical restraints, but no physical restraints are used at Two of the BTs have been trained in LSCI, a counseling technique teaching teachers how to talk with students. Two of the BTs are certified trainers. All have prior experience working with ED students. Most of the BTs are male. In addition to providing short term counseling and role modeling, the BTs contact parents when necessary, write behavior reports, and arrange for parent conferences.

Everyone who enters the building is screened through use of a metal detector, a scanner that scans bags, etc., and hand held wands. There have been a few knives confiscated from students. Reports were sent downtown and the school's administrative team determined appropriate discipline. There are no weapons in the school. During the 2009-2010 school year recalls two physical altercations that led to one student involved in each altercation being arrested. Upon return, the students were put in in-house suspension and counseled before being allowed to return to the general population.

There is a school-wide behavioral modification program, the level point system. Students start at the lowest level and must earn points to move up a level. An administrator, BT and the student's counselor will make the decision to move a student up a level. Students

All counseling is done by social workers. There is a part-time psychologist assigned to the school, but only for the purpose of conducting evaluations. The school operates on a cognitive behavioral approach.

Within each classroom there is at least 1 teacher and 1 teacher aide. Where the special education teacher (SET) is not certified in the content subject there will be two teachers in the class. Where the SET is content certified there will be a teacher and a teacher aide. Classrooms have no more than 10 students.

reviewed the student's records in April 2010, before the placement meeting, which he attended. There were two other meetings that day involving placements from the and all were placed at and Dr. Gayle, a DCPS placement specialist made the decision to place the student at can implement the student's IEP.

acknowledged that on some days the students are more challenging than others. The population of students is street wise. They are not shrinking violets and most have tough demeanors. A fair number are involved in the juvenile justice system.

Upon direct questioning from the Hearing Officer, testified that having listened to all of the testimony in the hearing and based on a deeper understanding of the student's unique and substantial emotional problems, was not a good placement for this student.

(Testimony of

15. is not an appropriate placement for this student because it cannot provide an environment that can meet his emotional needs and presents a safety risk to the student.

16. the Principal of the for the past 5 years testified about the school. was the SEC at the school for the previous 5 years and has worked at the school since August 1999. is, to say the least, knowledgeable about the and was a credible witness.

On April 7, 2010, the student was accepted at the for the 2010-2011 school year which begins on September 7, 2010.

is a program of the and is housed in the same building as the center, although with its own entrance and space. provides other programs, mostly for adolescents and their families, and mostly in the evening. The programs include a substance abuse program.

The school has approximately 40 students from 3rd – 12th grade, but most students are in grades 8-12. Approximately 30 of the 40 students are diagnosed with ED.

The school uses a cognitive therapy based therapeutic model. Emphasis is placed on the fact that for each action there is a reaction. Each student is assigned a home room teacher. There are up to 8 students in a class along with 1 SET and 1 mental health provider. The counselor provides all individual and daily group counseling for that particular home room. The counselor is also a resource for the teacher if a particular student is struggling and communicates with outside providers. There are monthly family meetings, a bi-monthly parent support group, guest speakers for the parents, and daily communication between the school and the parent. Each day the student is sent home with a goal sheet describing what happened that day and what the goals are for the next day.

There are no content certified teachers at _____ There is a reading specialist. The school is accredited in Virginia and can award credit for coursework that is completed. The DC Office of the State Superintendent of Education visited the school for certification purposes and issued a new certification. DCPS has awarded diplomas to _____ Students.

School discipline is based on the point based level system where students may earn or lose points towards the next level.

Almost all the students at _____ receive a high school diploma and about 40% go on to college.

There are no behavioral technicians or any staff of that ilk. Behavioral management is achieved through a series of strategies including redirection in class, self time out, a meeting with the case manager, a directed time out in which the student walks to another location for a few minutes, and if all else fails, in school suspension. There is a room supervised by a staff member. Students earn their way out of the room in 15 minute intervals. Students do act out, they do swear and have negative interactions with peers. There is very little fighting.

Any student who is unwilling or unable to buy-in to _____ voluntary behavioral program will be asked to find another school.

(Testimony of

17. _____ can implement the student's IEP and is an appropriate placement for the student.

VI. DISCUSSION AND CONCLUSIONS OF LAW

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.

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).

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

A. The Applicable Law

The sole issue in this case is whether DCPS’ proposed placement of the student at Transition Academy is appropriate. Thus a discussion of the relevant law concerning placement is necessary.

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 _____ cannot implement the student’s IEP because the student has failed to make behavioral or academic progress at Accotink. DCPS was obligated to find a new full-time out of general education placement.

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).

as described by and is an out of general education ED school that appears to have the staff and programs to provide a FAPE to many if not most DCPS ED students in the 9-12th grades. However, it is not an appropriate school for this student. Most telling is the testimony of one of the two individuals who made the decision in April 2010, to place the student at came to the hearing as the DCPS representative, fully expecting to testify that is an appropriate school for this Student. However, heard the extensive testimony about the student’s specific emotional problems and needs and, being a true professional with knowledge of he admitted that was not an appropriate placement for this student.

The student would be in physical danger were he to attend His size, immaturity, complete lack of socially appropriate peer interactions, tendency to follow negative students, habit of touching other student’s food, and possible sexual behaviors put this student at great risk of physical harm at is simply too big and has too many street wise, battle hardened students for this student to survive. It is not an appropriate placement for the student. on the other hand, is very small, very structured, has a counselor in each room, and does not tolerate students who are unwilling to follow its rules. The school has an excellent academic record with almost all of its students receiving high school diplomas and 40% going on to college. It can provide the academic challenge this student needs. can implement the student’s IEP and is an appropriate placement for the student.

Because the does not begin classes until September 7, 2010, the student has not lost any school days and has not been disadvantaged educationally by DCPS’ placement of the student at

VII. SUMMARY OF RULING

DCPS failed to provide the student a FAPE because the cannot meet the student’s emotional needs and is therefore an inappropriate placement for this student.

VIII. ORDER

It is hereby **ORDERED** that

1. The student shall attend the _____ in Fairfax, Virginia for the 2010-2011 school year at DCPS expense, including transportation. The student shall start classes at the _____ on the first day of classes, believed to be September 7, 2010.
2. DCPS shall complete all the paperwork necessary to officially authorize the student's attendance at the _____ no later than 30 days from the date of issuance of this HOD.
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: August 28, 2010