

petitioner through her counsel filed a due process complaint alleging that DCPS denied a Free Appropriate Public Education (FAPE) to the student by failing to provide an appropriate placement for the 2010-2011 School Year by proposing _____ as the student's placement. Counsel for the Petitioner requested as relief that DCPS place and fund the student including providing transportation to _____ in Chillum, Maryland or to a substantially similar non-public placement. The due process complaint also alleged that DCPS failed to provide appropriate related services, modifications and accommodations for the student during the 2008-09 and 2009-2010 School Years. Finally, the complaint alleged that DCPS committed procedural violations in failing to include the parent in the placement decision through failure to consider other options, failure to provide the parent with sufficient information about the placement and failing to provide prior notice of the placement at _____. On June 25, 2010, counsel for DCPS filed a response to the due process complaint. DCPS admits that the student is a _____ year old special education student with a disability classification of multiple disabilities and attended _____ for the 2009-2010 school year. DCPS further admits that the student has been diagnosed with oppositional defiant disorder and attention deficit hyperactivity disorder ("ADHD") combined type and that the student can be verbally and physically aggressive towards peers and teachers and the student does need constant supervision. DCPS asserted that in anticipation of the closing of _____ at the end of the 2009-2010 school year that DCPS convened IEP meetings on February 17, 2010 and April 23, 2010 and proposed _____ which DCPS asserts is an appropriate placement to implement the student's IEP.

On July 19, 2010 a prehearing conference was held with this appointed hearing officer with counsel for the parties. A prehearing Order was issued on that date that determined that the issues were; 1. Did DCPS deny a FAPE to the student by failing to provide an appropriate placement for the 2010-2011 School Year by proposing

as the student's placement and; 2. Did DCPS deny a FAPE to the student by failing to include the parent in the placement decision through failure to consider other options than failing to provide the parent with sufficient information about the placement after the parent raised questions after her site visit and by failing to provide a written Prior Notice of Placement at Counsel for the petitioner agreed that the second issue was incorrect as stated in the due process complaint and should have been was the April 23, 2010 IEP inappropriate for not containing appropriate accommodations or modifications to address the student's attention issues such as frequent breaks, extended time, preferential seating, chunking of work and not including testing accommodations. Counsel for the respondent agreed that DCPS would provide these accommodations and modifications in the student's IEP to resolve this issue and counsel for both parties would inform this hearing officer prior to the hearing if this issue has been resolved.

The due process hearing was held on August 5, 2010 in Room 5A of the Student Hearing Office at 1150 5th Street, S.E., Washington. D.C. The hearing was closed.

Katherine Zeisel represented the petitioner and Linda Smalls represented the respondent.

The parent, Emily Peltzman a former investigator, Murti Patel, a law clerk,

Admissions Director at The and
educational expert, testified for the petitioner. assistant principal at

testified for the respondent. All witnesses were sworn under oath prior to testifying. Petitioner's Exhibits 1-22 were entered into the record without objection and Respondent's Exhibits DCPS 1-12 were entered into the record without objection.

The hearing convened on August 5, 2010 pursuant to jurisdiction under *Public Law 108-446, The Individuals with Disabilities Improvement Act of 2004, Title 34 of the Code of Federal Regulations, Part 300 and Title V of the District of Columbia Municipal Regulations.*

ISSUES

The issues to be determined are as follows:

1. Did DCPS deny a FAPE to the student by failing to provide an appropriate placement for the 2010-2011 School Year by proposing _____ as the student's placement?
2. Did DCPS deny a FAPE to the student by failing to include the parent in the placement decision through failure to consider other options than _____ failing to provide the parent with sufficient information about the _____ placement after the parent raised questions after her site visit and by failing to provide a written Prior Notice of Placement at _____

student exhibits aggressive behavior to peers and staff. The student has frequent rages resulting in removal from class or being held therapeutically. The student's aggressive behavior includes hitting staff and peers. The student does not have his own coping skills to avoid rages and if there is not quick intervention such as a time-out, the student takes a long time to calm down. The student is also very impulsive and does dangerous actions such as leaving school without permission and running into streets. The student also has the eating disorder condition of PICA where he eats inappropriate objects. He must be closely supervised. The District of Columbia Community Services Agency Individualized Plan of Care developed by team members including the parent, teacher, clinical social worker and psychiatrist at states the student "has a history of head banging, hitting himself, fights adults and peers, curses, hyper, easily agitated, eats dirt and at 2 weeks old overdosed on Carbon Neo (wrong dosage given by a pharmacy)." (P-8 p.1) The student also is sexually inappropriate demonstrated by exposing himself and touching others inappropriately and needs staff supervision to go to the bathroom.

4. On February 17, 2010 an IEP meeting convened at _____ with the parent in attendance. The IEP developed called for thirty hours a week of specialized instruction, sixty minutes a week of occupational therapy and ninety minutes a week of behavioral support services. The IEP states as justification for these hours that the student's "behavior requires that he be placed in a therapeutic setting with smaller classroom size." (P-2 at p.8) Because _____ was closing in the 2010-2011 School Year, DCPS proposed The _____ as the student's placement for the coming school year. A Prior Written Notice was faxed on February 17, 2010 by DCPS proposing

as the student's placement for the 2010-2011 School Year. (DCPS-

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5. On April 14, 2010 the parent visited the _____ and did a tour of the facility with the assistant principal.
6. On April 23, 2010 an MDT/IEP Meeting was convened with the parent and her attorney in attendance. The IEP was developed containing the same number of hours for specialized instruction and related services as the February 17, 2010 IEP with the same justification that the student's behavior requires that he be placed in a therapeutic setting with smaller classroom size. The parent wrote on the first page of the IEP: "I consent to services continuing but I have some concerns about proposed placement and I will submit supplemental notes." (P-4, DCPS-4) The parent raised the placement option of the _____ at the meeting. The MDT Meeting Notes have a section on placement that contains the following notes: "Mom states that she visited _____ but does not like the school because it is too big for [student]. Other concerns Mom presented included (a) class size (b) the stairs (c) supervision, and (d) interacting with older students. The Team also rejects Home School/Neighborhood School because it cannot address adequately [student]'s needs." (DCPS-3) The parent's attorney wrote a letter to the special education coordinator at JRC on May 12, 2010 that provided supplemental IEP notes for the April 23rd MDT/IEP meeting. That letter stated that the parent after visiting _____ did not feel the school was appropriate for her son for the following reasons:
 1. The student has asthma and cannot go up and down the three flights of stairs required of him,
 2. The parent expressed concern over the lack of security and

supervision at _____ and would be with older children including interacting with students from _____ and 3. The parent expressed concern about the class composition and student-teacher ratio of the proposed class especially because the class would be a third through sixth grade class. (P-5)

7. On April 23, 2010 DCPS faxed a Prior Written Notice stating DCPS is proposing that the student receive his services at the _____ for the 2010-2011 School Year. (DCPS-2)

8. _____ was qualified as an expert witness on special education programming and placement with students with various disabilities including Emotional Disturbance. _____ observed the student at _____ on May 25, 2010 and May 26, 2010 and on July 14, 2010 at his ESY placement. Based on her observations, her discussion with the parent and teachers and staff at _____ and review of his medical and educational profile, it was her expert opinion that the student needs a full-time structured therapeutic environment with a small class size with absolute consistency and predictability in his school environment. It was also her expert opinion that he needs a productive calm setting and needs to know what he is doing every moment. Downtime is very dangerous for him. It was also her expert opinion that the student needs a behavior management plan with a psychiatrist on staff for ongoing consultation. _____ visited the _____ for this student in May 2010. She observed very few students in school and no instruction in the classroom. She asked to see the class the student would be in and was shown a combination class for 3rd to 6th grade and was told by a teacher that 3-6 grade combination class was offered that school year. She saw no special education materials in the class. She

observed students playing on the floor. In the hallway, she observed a student being wrestled to the ground by a teacher and saw three students running away from a police officer. Emily Peltzman, a former investigator, also testified she observed in her March 23rd and April 14th visits to _____ five students yelling in the hallways and one student yelling in the library and an aide did not do anything to calm the student. _____ observed the time-out room that was four bare walls and that was staffed by a behavioral technician. She observed that the _____ was on the third floor of the building with the gym and cafeteria on the first floor. There was no elevator. The second floor housed students from The _____ non-disabled older students sent there for long term suspensions for serious disciplinary reasons. _____ observed on her visit one special education teacher and one instructional assistant with ten students in a class. There was no psychiatrist on staff or on consultation at _____. It was _____ expert opinion that _____ was not an appropriate placement for the student because it could not provide the therapeutic consistent calm and productive environment the student needs to be successful.

9. The _____ is located on the third floor of a school building at _____ in Northeast Washington. The _____ is on the second floor and the gym and cafeteria are on the first floor.
10. The 2007-2008 OSSE Highly Qualified Teacher Report Card Addendum revised in June 2009 states that there were no classes out of nine classes with highly qualified teachers at _____ (P-15) The 2008-2009 School Report Card for _____ developed by OSSE states that out of 11 classes 9 are not taught by highly

qualified teachers or 82% are not taught by highly qualified teachers. The OSSE Report Card states: "Federal law requires all public elementary and secondary school students to be taught by teachers who are certified as being "highly qualified," otherwise known as HQT-Highly Qualified Teacher. This means teachers in the core academic areas (defined as: English, reading/language arts, math, science, foreign languages, civics/government/economics, arts, history and geography) must hold a bachelor's degree, have full state certification and demonstrate subject-matter competency." (P-16 at p.14)

11. The _____ was one of six DCPS schools that have consistently underperformed over a period of time and DCPS is required under federal law to take drastic action to improve the schools. DCPS therefore reconstituted these six schools including _____ for the 2010-2011 School Year. Reconstitution requires staff and teachers to reapply for their current positions through an interview process with the school administration. (P-18) Some of last year's staff will be returning for the coming school year. but there will be nine new teachers. Not all of the staff will be trained in crisis intervention or therapeutic holds. There will be no psychiatrist on staff. The social worker will be responsible for two classes. (Testimony of

12. The student has been accepted at the _____ in Chillum, Maryland for the 2010-2011 School Year. (P-14) The _____ is a non-public special education day program certified by the District of Columbia that provides specialized instruction and services to students with multiple disabilities including Emotional Disturbance and Other Health Impaired. The school is located near the District of

Columbia line. The student's classroom will be on the first level of a two floor building. He will be the tenth student in the class with two special education teachers and one licensed counselor as part of the class team. All students in the class have a similar disability profile of Emotional Disturbance and others in his class have ADHD. There are planned supervised transitions between lessons and students can move around the class. The class is a combination 3rd to 4th grade class. All teachers are certified in special education. There is a full-time psychiatrist on staff as well as a registered nurse, speech pathologist and occupational therapist. The psychiatrist provides medical management and provides strategies to staff based on the student's needs. A counselor provides both individual and group counseling and is part of the team working in the classroom to also prevent a student escalating to crisis. There are de-escalation rooms with a qualified staff person and no more than one student at a time in the room. The de-escalation rooms are bright and cheery with themes. Individual behavioral goals are developed with a positive intervention and support system. (Testimony of _____ visited the _____ in the spring of 2010 and observed a very orderly, predictable and productive setting. She observed the work was at each child's level with a lot of hands on activities.

_____ expert opinion is that the _____ is an appropriate placement for the student. This hearing officer gives great weight to the expert opinions of _____ based on her thorough and comprehensive testimony and extensive experience in programming and placement for students with various disabilities including Emotional Disturbance.

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: Petitioner's counsel argues that DCPS denied a Free Appropriate Public Education (FAPE) to the student by failing to provide an appropriate placement for the 2010-2011 School Year by proposing _____ as the student's placement. Counsel for the Petitioner requested as relief that DCPS place and fund the student including providing transportation to

_____ in Chillum, Maryland or to a substantially similar non-public placement. Counsel for the respondent DCPS counters that DCPS's proposed placement of the _____ is an appropriate placement to implement the student's IEP.

The United States Supreme Court in *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359(1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) held that tuition reimbursement is an available equitable remedy under IDEA if the local school district has not made a free appropriate public education available to the child and the private placement is appropriate. *IDEA 2004* and its 2006 *Regulation* codified these requirements stating parents may be reimbursed for a private placement if the local school district fails to provide a FAPE and the private placement is appropriate. *20 U.S.C 14129 (a) (10) (C) (ii) and 34 CFR 300.148 (c)*. The first prong of the above test to be met in this case is whether DCPS's proposed placement of the _____ provides a FAPE to the student. A guiding principle in determining whether a placement is appropriate is provided in the U.S. Department of Education interpretative guidelines to the 1999 Regulations that: "educational placements under Part B must be individually determined in light of each child's unique abilities

and needs, to reasonably promote the child's educational success." *Appendix A to 34 C.F.R. Part 300, Question 1*

The above Findings of Fact show that this student's Emotional Disturbance and Other Health Impairment, as DCPS admits, results in verbal and physically aggressive behavior to peers and teachers that requires constant supervision. As found in Findings of Fact #3, the student has frequent rages resulting in removal from class or being held therapeutically. The student's aggressive behavior includes hitting staff and peers. The student does not have his own coping skills to avoid rages and if there is not quick intervention such as a time-out, the student takes a long time to calm down. The student is also very impulsive and does dangerous actions such as leaving school without permission and running into streets. The student also has the eating disorder condition of PICA where he eats inappropriate objects. He also has highly inappropriate sexual behavior. He must be closely supervised. The student's current IEP calls for a full-time day therapeutic special education placement. The IEP states as justification for this that the student's "behavior requires that he be placed in a therapeutic setting with smaller classroom size." (P-2 at p.8) agreed with this justification and it is her expert opinion that the student needs a full-time structured therapeutic environment with a small class size with absolute consistency and predictability in his school environment. It was also her expert opinion that he needs a productive calm setting and needs to know what he is doing every moment. Downtime is very dangerous for him. It was also her expert opinion that the student needs a behavior management plan with a psychiatrist on staff for ongoing consultation.

A document written by DCPS and entered into evidence admits that the was one of six DCPS schools that have consistently underperformed over a period of time and DCPS is required under federal law to have the school be reconstituted for the 2010-2011 School

Year. (P-18) OSSE documents entered into evidence show that for 2007-2008 there were no classes out of nine classes with highly qualified teachers at (P-15) The 2008-2009 School Report Card for developed by OSSE states that out of 11 classes 9 are not taught by highly qualified teachers or 82% are not taught by highly qualified teachers. (P-16) admitted that of the nine new teachers hired for this coming school year not all have been trained in crisis intervention or therapeutic hold. also testified that will be no psychiatrist on staff and the social worker will be responsible for two classes.

The is located on the third floor of a school with the consisting of older non-disabled students on long term suspensions for serious disciplinary reasons, on the second floor. The gym and cafeteria used by both programs is on the first floor. The student who has asthma would need to go up and down three flights of stairs for gym and lunch. There would also be some interactions on the stairs with students from the

This last school year, the had a combination third through sixth grade class which this student would be placed in. The special education expert observed no instruction when she visited the classrooms in May and did not see any special education materials in the classrooms. She observed three students running down the hall away from a police officer chasing them and another student being wrestled to the ground by a teacher in the hallway. Ms. Peltzman in her visits in March and April 2010 also observed students yelling in the hall and no supervision and one student yelling in the library and an aide did not do anything to calm the student. also observed that the time-out room had more than one student and there was not always qualified staff supervision. It was the expert opinion of that the would not be an appropriate placement for the student because the setting

was chaotic and unstructured with a large staff turnover that would not provide the calm, consistent productive therapeutic environment the student needs to be successful. This hearing officer gives great weight to Dr. Iseman's expert opinion and based on the above Findings of Fact concludes that the placement would not "reasonably promote the child's educational success."

The student's current IEP states that the student's "behavior requires that he be placed in a therapeutic setting". The record in this case shows that at the for example the following: 1) there is no psychiatrist on staff to provide therapeutic interventions and strategies to the staff and student; 2) the social worker must cover two classes and may not be available when this student goes into a crisis; 3) some of the new teachers for the coming school year are not trained in crisis intervention and therapeutic holds; 4) the time out room has more than one student at times; 5) there is a lack of supervision in the hallways and library with out of control student behavior . Based on Findings of Fact #8-#11, this hearing officer concludes that the cannot implement the IEP's requirement for a therapeutic setting. Following the development of an IEP, the public school system is required to provide a appropriate educational placement that meets the needs set forth in the IEP. See *Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 25 (D.D.C. 2004) (citing *Petties v. District of Columbia*, 238 F. Supp. 2d 114, 116 (D.D.C. 2002).

The petitioner has met the first prong of the *Burlington* and *Carter* test that DCPS has not provided a FAPE to the student in offering the as the student's placement for the 2010-2011 School Year. Once a court or hearing officer finds that the public school district has failed to offer a FAPE, the court or hearing officer is authorized to "grant such relief as the court determines is appropriate." 20 U.S.C. Section 1415(i) (2) (C) (iii). "Under this provision,

equitable considerations are relevant in fashioning relief, and the Court enjoys broad discretion in so doing.” *Carter*, 510 U.S. at 16.

Petitioner has requested as relief placement of the student at the _____ The second prong of the *Burlington* and *Carter* test and the *IDEA Regulation at 34 CFR 300.148 (c)* is that the private placement must be appropriate. It is the expert opinion of Dr. Iseman after visiting _____ that it offers a therapeutic structured calm productive setting that can meet the student’s needs. Based on the description of the program by the admissions director and Dr. Iseman, it is the conclusion of this hearing officer that _____ is an appropriate placement for the student that will meet his unique needs. (See Findings of Fact #12) This hearing officer finds Dr. Iseman’s testimony very credible and gives great weight to her expert opinion. *See Shore Reg’l High Sch.Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004

The second issue raised by petitioner’s counsel is whether DCPS denied a FAPE by failing to include the parent in the placement decision through failure to consider other options than _____ failing to provide the parent with sufficient information about the _____ placement after the parent raised questions after her site visit and by failing to provide a written Prior Notice of Placement at _____. The regulations require that “the parents of a child with a disability, be afforded an opportunity to participate in meetings with respect to... [the] educational placement of the child.” *34 C.F.R. Section 300.501 (b) (1)*; *see also 20 U.S.C. Section 1414 (e)*. Counsel for the petitioner’s argument that the parent was not included in the placement decision is not supported by the record. The parent participated in both the February 17^t and April 23rd MDT/IEP meetings with her counsel present in the April meeting. The parent did visit the proposed placement at _____ on April 14, 2010 and

had an opportunity to ask questions about the placement to the assistant principal

The parent and her counsel also raised their concerns at the April IEP meeting and in their supplemental letter to the IEP Meeting Notes. The record also indicates that DCPS sent out written Prior Notice of Placement at the February and April MDT meetings. (DCPS-2, DCPS-6)

This hearing officer concludes that the petitioner has not met her burden of proof on this issue.

See accord T.T. v. D.C., 2007 U.S. Dist. LEXIS 52547 (2007)

ORDER

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

DCPS shall fund and place the student at The _____ in Chillum, Maryland including transportation for the 2010-2011 School Year with “stay put” protections.

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: August 12, 2010

Seymour DuBow /s/
Hearing Officer