DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 1st Street, N.E., 2nd Floor
Washington, DC 20002

Parent or Guardian, on behalf of Student, [1]

Petitioner,

v

The District of Columbia Public Schools

Respondent.

Date Issued: October 16, 2010

Hearing Officer: Jane Dolkart

Case No:

Hearing Date: September 8, 2010
Room: 4a

OSSE STUDENT HEARING OFFICE
2010 OCT 18 AM 9:13

HEARING OFFICER DECISION

Counsel for Petitioner:

Pamela Halpern
James E. Brown & Assoc.
1220 L Street, NW, Ste 700
Washington, DC 20005

Counsel for Respondent:

Tanya Chor
Office of the Attorney General
District of Columbia Public Schools
1200 1st Street, NE, 10th Floor
Washington, DC 20002

---

[1] Personal identification information is provided in Appendix A.

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is an year old student who has been found eligible for special education and is classified as Multiply Disabled (MD) with an emotional disturbance (ED) and a learning disability (LD). Pursuant to a September 2008 settlement of a due process complaint, DCPS agreed to place the student at where he has attended school for the 2008-2009 and 2009-2010 school years. is a full-time therapeutic day school for children with disabilities. During the 2009-2010 school year, the student's IEP called for 26 hours of specialized instruction, 2 hours of behavioral supports, 1 hour of speech and language therapy (S/L), and one hour of occupational therapy (OT) per week. A comprehensive psychological evaluation of the student was completed on or about April 29, 2010. Thereafter, two IEP meetings were convened and DCPS informed Petitioner that as a result of the student's evaluation DCPS had determined that the student no longer needed specialized instruction in reading because he was reading on grade level. DCPS proposed to remove the student from a full time special education setting and place him at with 5 hours of specialized instruction, 2 hours of psychological support, and 1 hour each of S/L and OT, per week.

Petitioner filed a due process complaint, Case A hearing in this case was scheduled for August 4, 2010. The day before the hearing DCPS informed Petitioner that it was withdrawing its placement offer. The parties agreed to hold a placement meeting on August 11, 2010. DCPS proposed placement at a DCPS full time special education school for students with ED. Petitioner determined that she could not go forward with the hearing until she could determine the appropriateness of once classes had started. It was agreed that the resolution session in the refiled complaint would take place on or before September 7, 2010 and that the hearing would take place on September 8, 2010. Petitioner withdrew her first complaint.

On August 24, 2010, the present complaint was filed alleging that DCPS had failed to provide the parent with meaningful participation in determining the student's educational placement and program, and that was an inappropriate placement.

The student is presently attending pursuant to the stay put provisions of the IDEA.

A pre-hearing conference was held on September 7, 2010, and a pre-hearing order was issued on September 7, 2010.

A resolution session was held on September 1, 2010. No resolution was reached.

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

1. Failing to allow the parent meaningful participation in determining the student's placement and location?

2. Failing to provide an appropriate placement for the student?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated August 31, 2010, containing a list of witnesses with attachments P 1-27. The disclosure was admitted in its entirety. Petitioner called as witnesses the student's mother, the student's educational advocate, and the admissions director at The

DCPS submitted a five day disclosure letter dated August 31, 2010, containing a list of witnesses with attachments R 1-10. The disclosure was admitted in its entirety. DCPS called as witnesses a DCPS psychologist and the Principal of the lower school at

V. FINDINGS OF FACT

1. This is an year old student who has been found eligible for special education and is classified as Multiply Disabled (MD) with an emotional disturbance (ED) and a learning disability (LD). Pursuant to a September 2008 settlement of a due process complaint, DCPS agreed to place the student at where he has attended school for the 2008-2009 and 2009-2010 school years. is a full-time therapeutic day school for children with disabilities. During the 2009-2010 school year, the student's IEP called for 26 hours of specialized instruction, 2 hours of behavioral supports, 1 hour of speech and language therapy (S/L), and one hour of occupational therapy (OT) per week. (P 5, 6)

2. The student remains at pursuant to the stay put provisions of the IDEA until the present due process complaint is resolved.

3. The record is replete with references to the student's behavioral problems in IEP meeting notes, progress reports, and psychological evaluations. The student has difficulty forming positive relationships with peers, difficulty remaining in his seat, difficulty sustaining attention, and needs constant redirection during lessons. The student has poor self esteem. He requires a therapeutic structure, supervision, and constant rewards and consequences to contain his maladaptive behaviors. The student has great difficulty self-regulating which impacts his attention which affects his ability to focus and learn in the classroom. The student can be aggressive and act out, causing disruption in the class. He has feelings of anxiety, sadness and anger. (P 6, 7, 13, 14, 15)

4. In 2008 the student experienced two traumatic events. His grandmother with whom he was close passed away. The student was also the victim of a violent, possibly sexual, attack. He has been reluctant to talk about the attack. (P 10, 13)

The psychologist who conducted the student's April 2010, psychological report noted that "the event threatened [the student's] sense of integrity, security, and identity." (P 11)

5. The student's classroom teacher wrote a Final Report on the student at the end of the 2008-2009sy. The student's classroom behavior is described as follows:

> [The student] is currently on Level 1 of his behavior plan[2]. He is anxious to please and eager to do well in school yet due to his distractibility and impulsiveness, it is difficult for him to achieve success and he often becomes frustrated and saddened over the amount of days he is unsuccessful. [The student] ...has much difficulty ignoring the behaviors of others and is quick to react inappropriately, usually with anger. Due to his impulsivity and inability to follow directions, it is difficult for him to maintain anything above a Level 1 status on his behavior plan. His attention span is very short even in a classroom setting of 4-6 students. He is often out of his seat interfering with others and needs constant redirection in order to stay in his seat or stay on task. When he receives one on one attention, he tends to be able to focus for longer periods of time ....

(P 16)

6. The student's classroom teacher wrote a Final Report on the student at the end of the 2009-2010sy. The student's classroom behavior is described as follows:

> [The student] has a great deal of difficulty in making progress with IEP behavioral goals this year. He has spent most of the year at Level 1 on his behavior plan....[The student] experiences levels of distractedness and impulsiveness that make it difficulty for him to ignore others, stay focused to complete assignments, or participate in class discussions without constant redirection. He is often out of his seat interfering with others and needs constant

---

2 has a level behavioral system in which level 1 is the lowest level and level 5 is the highest level. Students' goal is to move up the levels as their behavior improves.

> redirection in order to stay in his seat or stay on task. [The student] receives one-on-one attention during academic class time whenever possible in order to keep him focused....This year there has also been an increase in disrespectful behavior....He is frequently argumentative and can be defiant.

(P 23)

7. The student's Art Therapist wrote a Final Report on the student at the end of the 2009-2010sy. The therapy focused on managing anger, frustration, and failure, and processing intense and overwhelming feelings of grief and loss. The student reacted to stressful situations with anger and violence. He had trouble ignoring external stimuli and needed constant reinforcement to remain focused. The student was quick to act out, ball up his fists, or be disrespectful to staff/students when he felt a peer was disrespecting him or found tasks challenging.

(P 26, Testimony of Art Therapist)

8. has what is called the BCC room. It is a room students are sent to when their behavior requires that they be removed from the classroom. It is a place for a student to de-escalate with the help of a trained counselor so that the student can return to the classroom. During the 2009-2010sy the student was sent to the BCC room almost 100 times. During the 2008-2009sy the student was sent to the BCC room 68 times. (P 27, Testimony of DCPS psychologist)

9. On March 18, 2010, an IEP meeting was held. In attendance were two DCPS LEAs , Eric Abraham and Allison Turner, the parent, and the student's SET, OT therapist, S/L Pathologist, and art therapist. The meeting was to discuss ESY services for the student and to determine the student's proper disability classification. The IEP team agreed to conduct an independent comprehensive psychological evaluation of the student. (P 7)

10. The evaluation was conducted on April 8, 2010, by Natasha Nelson, a licensed clinical school psychologist working for Parker Diagnostic Solutions. The report was completed on April 29, 2010. The evaluation determined the student's cognitive abilities, academic achievement, and emotional status.

In evaluating the student's emotional state, the evaluator interviewed the student's art therapist, the student, and the student's mother. A number of assessments were used. The Behavior Assessment Scale for Children, Second Edition (BASC-2) includes a parent rating scale and a teacher rating scale. The student's mother completed the parent rating scale and the student's primary SET completed the teacher rating scale. The Conners' Teacher Rating Scale and Parent Rating Scale were completed by the same two persons. Additionally, the student's teacher completed a Questionnaire on student progress in the classroom, and the student was administered the House, Tree Person test and the Thematic Apperception Test. The examiner also reviewed previous evaluations conducted from 2007-2009. (P 11)

11. The evaluator's interviews with the student's teacher and art therapist elicited the same information described in their 2010 Final Reports. The evaluator made behavioral observations while the student was being tested for this evaluation. She found that the student evidenced difficulty with sitting in his chair and paying attention. He made extraneous comments, kicked the table and could not keep his legs still. The student had trouble following directions. Overall the student required prompts to remain quiet, stay seated, and attend to work. He had an inability to self-monitor and effectively modify his behavior. (p 11)

12. The student's teacher and mother filled out the BASC-2 rating scale which is a behavioral assessment scale for children. Based on the range of scores, various functioning can be rated as At Risk indicating the presence of significant problems needing treatment but not severe enough to warrant a formal diagnosis. Scores can also be in the Clinically Significant range denoting a high level of maladaptive behavior.

The BASC-2 is broken up into 5 categories, each with subcategories. The 5 categories are externalizing problems, internalizing problems, school problems, behavioral symptoms index, and adaptive skills. The student fell in the Clinically Significant range on externalizing problems, the average range on internalizing problems with an at risk score in the Depression sub-test, the At Risk range on school problems, the Clinically Significant range on the behavioral symptoms index, and the At Risk range on adaptive skills.

Subtests in which the student was in the Clinically Significant range include Hyperactivity, Aggression, Conduct Problems, Atypicality (the student often babbles to himself and picks at things like his own hair, nails, or clothing), Subtests in which the student was in the At Risk range include Depression, Attention Problems, Adaptability, and Functional Communication.

(P 11)

13. The student's teacher and mother filled out the Conners' rating scales which are a standardized test that is used to assess conduct problems, cognitive problems, anger control problems, ADHD, and anxiety problems in children.

On the instrument completed by the teacher, the student received an oppositional score that was mildly atypical, a cognitive inattention score that was mildly atypical, a hyperactivity score that was markedly atypical, and a total ADHD score that was moderately atypical – possible significant problems. This score suggests a diagnosis of ADHD.

On the instrument completed by the mother, the student received an oppositional score of mildly atypical, a cognitive inattention score that was average, a hyperactivity score that was average, and a total ADHD score of average.

A diagnosis of ADHD cannot be confirmed due to discrepancies in the student's reported behavior in the home and in the school.

(P 11)

14. The evaluation noted that the parent had filled out the Connors in June 2008, and her results were positive for ADHD. (P 11)

15. The student's mother is uncomfortable with her son being labeled ED and is entirely resistant to the possibility that he may have ADHD. Her prescription for dealing with the student's traumatic events is to stop talking about them and move on. She was dissatisfied with the therapist the student was seeing at and at some point in the 2009-10sy refused to allow the student to continue with individual psychological counseling. The student's two hours per week of counseling was filled with two hours of art therapy. (P 7, 8, 11, Testimony of mother)

16. The report also evaluated the student's cognitive abilities and academic achievement. The student was administered ten subtests of the Wechsler Scale for Children – Fourth Edition (WISC-IV). The student's full scale IQ was in the low average range. The Verbal Comprehension Index (VCI), measuring the student's ability to reason with the use of words is in the low average range. On the Perceptual Reasoning Index (PRI), designed to measure non-verbal and perceptual reasoning the student received a standard score in the borderline range. The student's low scores on the PRI suggest difficulties with using visual spatial integration skills and may impact on the student's handwriting, the alignment of math problems, and drawing abilities. On the working memory index the student received a score of low average. On the Processing Speed Index the student received a standard score of average. (P 11)

17. The student was administered the Wechsler Individual Achievement Test, Third Edition (WIAT-III) as a measure of his academic abilities. The test measures performance in oral language, basic reading, written expression, and math. It should be noted that the WISC-III does not measure reading comprehension.

On oral language the student achieved a composite score in the below average range. On basic reading the student achieved a composite score of average. On written expression a composite score was not possible but the student had difficulty spelling individual words and with organizing words into sentences. On math the student achieved a composite score in the below average range.

The grade equivalent of the student's subtests ranged from K.9 – 1.8. All but one score were below the 1.5 grade equivalent. The student is presently in the 3rd grade. Of particular note, the only test of comprehension was a listening comprehension test on which the student received a grade equivalent of K.9

(P 11)

18. The evaluator's conclusions concerning the student's academic performance stated that his scores suggest difficulties in all academic areas. The student's oral language skills confirm his need for S/L services. The student was also tested on his visual motor integration. He received a standard score in the extremely low range of functioning suggesting the need for OT services.

The student was found to meet criteria for Learning Disorder NOS as he evidenced difficulties with written language, math, reading, and oral language. The student also met the criteria for Mood Disorder Not Otherwise Specified and should be classified as ED.

(P 11)

19. The evaluator indicated that the student required significant therapeutic support and requires a full time private school that is skilled in working with children with both LD and ED. (P 11)

20. Throughout the report there are references to the mother's dissatisfaction with particularly with the student's therapist, her belief that the school is too punitive and that the student did not have a fair chance. She expressed a desire to the DCPS LEA that the student attend a private school other than Her testimony confirmed this information. At the hearing the mother testified that while she wanted her son to go to the she would rather he remains at than go to (P 7, 8, 11, Testimony of mother)

21. An IEP/placement meeting was held on May 26, 2010. Present at the meeting were the mother via telephone, the educational advocate, the OT therapist, S/L therapist, teacher, psychologist, SEC, and art therapist, all from Also present were the DCPS LEA, Eric Abraham, the transition case manager, the psychologist, the placement specialist, all from DCPS, and from via telephone the Principal, SEC, and special education teacher (SET)

The purpose of the meeting was to review the April 2010 comprehensive psychological evaluation, update/revise the IEP, and determine the student's placement and location of services.

Dr. Sonia Pilot, a DCPS psychologist reviewed the evaluation. Dr. Pilot holds a Ph.D in clinical psychology from the University of Virginia which she received in 1996. Since receiving her degree Dr. Pilot has worked as a court psychologist in Alexandria, Va. Juvenile and domestic relations court, a psychologist with the DC Mental Health Commission where she administered assessments to children and adults, as an independent contractor administering the same kind of assessments in both school and non-school settings. From 9/01-11/03, Dr. Pilot administered psychoeducational examinations to children in the DC school system. From 1/10-present Dr. Pilot has been a school psychologist for DCPS where she administers comprehensive psychological evaluations, attends IEP meetings to review evaluations and determine student

interventions. Dr. Pilot was declared an expert in determining eligibility and appropriate programming for students. She was explicitly rejected as an expert in placement.

Dr. Pilot indicated that the student had good behavior this year and had only 6 BCC sends. Dr. Pilot also stated that based on the WIAT-III the student is reading in the average range and does not need special education in reading. Dr. Pilot disagreed with the evaluator who conducted the psychological evaluation as to his conclusions that the student required a full time placement and that he still required special education support in reading. Based on the student's report cards, and the evaluation, and other data, indicated that the student did not need a full time placement. He indicated that the student would be placed at his neighborhood school, and receive 7.5 hours of specialized instruction – 5 hours in math and 2.5 hours in writing – 2 hours of counseling in the form of behavioral support services, 1 hour of S/L and 1 hour of OT, per week.

All of the personnel at the meeting, the mother, and the educational advocate vehemently disagreed with this recommendation. They were adamant that the student's behavior made it impossible for him to learn in the environment of his neighborhood school and that he required a full time therapeutic setting with small classes and constant behavioral support in order to learn. The staff was also clear that although the student had made good academic progress in the two years he had been at his reading comprehension was very low and he still required considerable special education support in reading. (P 8)

22. DCPS arrived at the May 26, 2010 meeting with a Student Reintegration Plan and a PNOP to fully completed. The decision to change the student's placement had been made prior to the meeting. DCPS ignored the extensive comments from the student's teachers and therapists at It was already clear the student would not be returning to so the teachers and therapists had no vested interest in insisting that the student required a full time placement. (P 8)

23. Shortly after the May 2010 meeting the parent filed a due process complaint. A resolution session was held and DCPS remained firm in its placement and location decision. The hearing was set for August 4, 2010. On August 3, 2010, one day before the hearing, DCPS withdrew its PNOP to (Pleadings, Testimony of mother, Dr. Pilot)

24. On August 11, 2010, a resolution meeting was held at which Petitioner was told that the student's placement had been changed from part-time special education in a general education setting to full time special education at a DCPS school for ED students in grades 3-8. There are no notes of this meeting but testimony indicates that DCPS would not discuss any other full time placement. The parent was opposed to sending the student to At the time of the meeting, DCPS had not sent a referral packet to so that the school knew nothing about the student, or even that he was to attend No one from was available to answer any questions about

the school. The PNOP to was issued the same day, August 11, 2010. (Testimony of mother, Dr. Pilot)

25. is the Ass't Principal of the lower school at She has been Ass't Principal since July 2010. Previously she was the SEC for the lower school for 4 years.[3] described the teaching and services available to the student at At the time of her testimony the 2010-11sy had been in session for two weeks. ensures that the lower school runs smoothly and that all standards, lesson plans, and behavioral plans are in place and being implemented.

The school has a level point system to address behavioral problems. Student's can earn points to use at the school's store. Level 4 is the worst behavior level and level 1 is the best. No student at level 3-4 is supposed to go anywhere unaccompanied. There are 30 students in the lower school, 3-6 grade. There are no more than 7 students in a classroom at present but 8 is the maximum. There is a SET and instructional aide in every class, plus any dedicated aides for a particular student.

26. is a failed school. It failed to make adequate yearly progress for at least two years. is in its second year as a reconstituted school. The first year was not successful. The Principal left part way through the year. Almost all of the staff this year is new, including 5 of the 6 SET's and the SEC. In 2009 almost 50% of the students were below basic in reading and 57% were below basic in math. Only 8.5% of the students were proficient in reading and only 7.33% of students were proficient in math. (www.nclb.OSSE.dc.gov\dcas_report cards.usp, Testimony of

27. There are 6 SET's and 6 classes in the 3-6 grades. Two of the teachers are provisionally certified and are completing their training in Teach for American. This is their first year solo teaching, after one year of training. One of these students spent only 1 summer working with ED students and the other has not worked with ED students. One of the teachers just moved to DC from New Jersey and it is not clear what her background is. One teacher is certified and was already working at A second teacher is certified and previously worked at a private therapeutic school. It is not clear if he worked with ED students. All but one teacher are new to this year. (Testimony of

28. All of the staff is to be trained in a behavioral method called Therapeutic Crisis Intervention (TCI). Many of the staff has not yet taken the training course which is 3 days long followed by an exam. At present the SEC, 2 of the behavioral technicians, and many of the SET's have not been trained. All of the social workers and instructional aides have been trained. (Testimony of

29. There are two behavioral technicians assigned to the 30 students in the lower school. They are trained in TCI and have passed an exam for behavioral technician aides. They

---

[3] was the SEC at a school for ED students. Two years ago was merged with The two schools are now called

are to monitor the halls and escort students to the Alternative Behavioral Classroom (ABC). Once in the ABC the student is supposed to get crisis intervention from a school counselor. There is supposed to be a SET and an instructional aide in the ABC room at all times. The ABC room is a last resort when a student is acting up. The teacher or instructional aide is to write a referral to the ABC room.

There are 6 licensed social workers assigned to the entire school. They are not DCPS employees but rather are contracted for from a private agency. did not know the educational background or experience of any of the social workers. All of them are working at for the first time this school year.

has reviewed some documents concerning the student but has not seen his IEP. She testified that can implement the student's IEP. is able to provide 2 hours of 1:1 individual therapy and has a S/L therapist who is at 4 days a week and can provide 1 hour of services per week. The student will receive his OT services although there is no OT therapist regularly assigned to the school. The classroom the student would be in presently has 4 students, 2 of whom have dedicated aides, an SET and an instructional aide. It is the only 3rd grade classroom. Testimony of

30. occupies the 2nd floor of the building with the 7-8 graders on one side of the floor and the 3-6 graders on the other side of the floor. The first floor of the building is occupied by a high school to which students who have been suspended or expelled from their regular school are sent. The gym is also on the first floor. The basement houses the cafeteria. The students from the two schools enter the building through different doors, leave the school building at different times, and eat lunch at different times.

The students are all bused in together and eat breakfast together. There is staff outside the school waiting for the buses to escort students to the cafeteria. Staff is in the cafeteria to ensure order. Students are escorted to their classrooms in groups by staff.

(Testimony of

31. Dr. Pilot has spoken with and the SEC about She visited the school once before classes started. Her only other visit was for 30 minutes the same day as this hearing. She has not sat in on any classes. The school seemed calm and quiet. Dr. Pilot is the liaison psychologist with She was involved in evaluations, IEPs and placement decisions for 10 students from for the 2010-11sy. All 3 of the students remaining in full time placements were placed at

32. The mother has made two visits to The first visit was before school started and she was accompanied by her educational advocate. She met with and was given a tour of the school. does not remember ever meeting the mother. She saw the student's proposed classroom, met the SEC, and met the student's SET teacher. She also visited the ABC room. There was a deadbolt lock on the door. indicated it would be removed before school started and that student's were never

locked in a room. The lock was still on the door during the mother's second visit after school had started. The ABC room had a concrete floor and walls and no padding. The parent was concerned about students from interacting with the students.

The mother visited the school a second time at the beginning of the school year. The mother indicated that there were students all over the halls and the staff was running around in the halls. The school was stifling because the air conditioning was not working. She observed the class the student would be in. The student's teacher was the SET who came to from a private therapeutic school. The mother observed that he could not control the class. Things were ripped down from the walls. She did not observe any learning going on in the classroom. The mother indicated that the SEC did not know the student's teacher when they passed in the hall. The mother was told that most related services would be provided in the classroom. The mother is concerned that the student will not benefit from the services if he is in the same room where other activities are going on. He is unable to ignore verbal stimuli. (Testimony of mother, art therapist)

33. The student's educational advocate has visited 2 or 3 times. She has only worked for Petitioner's law firm for 1 month and has never met the student. She accompanied the mother on her first visit to before school started. She returned to on September 3rd to observe another student. She observed 3 students in the ABC room. There was no social worker in the room and no behavioral re-direction was taking place. The educational advocate stopped briefly at the student's assigned classroom. One student was being walked to the ABC room by the teacher, leaving the remaining three students with the instructional aide. One student was throwing a tantrum and no intervention was noticeable. No academic instruction was taking place.

There were students in the hallway and some of the 7-8 grade students were on the 3-6 grade side of the floor. The advocate saw 1 behavioral technician in the ABC room. She did not see any in the hallways or in the classrooms.

The advocate spoke with the Behavioral Coordinator who directs the ABC room. Each time a student is sent to the ABC room the teacher is supposed to generate paperwork as to why the student was sent, etc. and provide the form to the Behavioral Coordinator. The advocate indicated that the referral sheets are not always sent and showed her his own sign –in log indicating that a student had been in the ABC room for 6 days in a row but there were only referral sheets for 2 days.

(Testimony of educational advocate)

34. The student has been accepted at the a full time therapeutic school for students with ED and MD. The director of Admissions reviewed the student's packet, interviewed the student and parent, and had the student meet with faculty members. Each class at the has 2 certified special education teachers. There are no more than 12 students in a class. Each class also has a licensed clinical social worker . The school offers specialized instruction, OT, S/L, a psychiatrist, and 1:1 and group

counseling. There is a school wide behavioral system that uses a cognitive therapeutic approach. Students have behavioral expectations and can earn lightning bolts which allow the student to participate in certain school-wide activities such as bowling or an ice cream social. There are two outdoor calming areas with e.g. a water fall. If a student acts up in class there is early intervention from the social worker in the class. The student may be removed to another area if necessary or taken to the outdoor areas with a staff person. There are also multi-sensory de-escalation rooms which are colorful, have padded walls, play music, have a climbing rope, etc. A staff person is with the student at all times.

The school also has a program for autistic students. There are three classrooms consisting of 24 students who are in the autism program. There are presently 95 students enrolled in total.

The students do not change classrooms except for music, art, PE, or media/library. Students are served breakfast and lunch. When students arrive in the morning there is staff outside to greet them and walk them to their classrooms. The day starts with a class meeting and then the students are escorted to breakfast. There are no more than 2 classes at a time in the cafeteria, along with all classroom staff. At the end of the day students leave as their busses are called out and there are staff throughout the halls and outside.

(Testimony of admissions director,

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. 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).

A. Did the Parent Have Meaningful Participation in Determining the Student's Placement and Location?

This is a procedural question and is governed by IDEA § 1415 (f)(3)(E)(ii). There are two separate times when DCPS might have violated the parent's right to meaningful participation. The first is the May 26, 2010, IEP meeting where it was determined that the student no longer required a full time therapeutic program and was no longer eligible for specialized instruction in reading. The second possible violation occurred at the August 11, 2010 meeting in which DCPS determined that the student was entitled to a full time therapeutic program and placed the student at

In addition to the two separate incidents which might implicate meaningful parent participation, there is a distinction between placement and location.

1. Placement and Location

There is a distinction between a placement and a location assignment under the IDEA. The U.S. Department of Education, Office of Special Education Programs highlighted the difference between placement and location in its responses to comments submitted to the then proposed regulations implementing the IDEA. *See* 71 Fed. Reg. 46588-89 (August 24, 2006). OSEP explained that placement refers to the "continuum of placement options available for a child with a disability, and "location" as the physical surrounding in which a child with a disability receives special education and related services. *See id.* OSEP went on to say that school administrators have flexibility in assigning a child to a particular school provided the assignment is consistent with the decision concerning placement. In *Letter to Trigg,* 50 IDELR 48 (November 30, 2007), OSEP stated that a

public agency with two or more appropriate locations has the flexibility to assign the child to a particular school. *Id.* at 2

Case law is consistent with OSEP's interpretation of educational placement. *See, White v. Ascension Parish School Board,* 343 F.3d 373 (5th Cir. 2003) (the IDEA does not require parental participation in site selection); *TY v. New York City Department of Education* 584 F.3d 412 (2d Cir. 2009) (failure to include the name of the school assignment in an IEP does not deprive parents of their right to "meaningful participation") *Id.* at 419-420; *A.W. v. Fairfax County School Board,* 372 F.3d 674, 682 (4th Cir. 2004) (the term placement as used in the IDEA regulations refers to the setting in which the student is educated, rather than the precise location).

In this case the parent was entitled to meaningful participation in determining that the student would move from a full time special education placement to services within a general education DCPS public school. The parent was not entitled to meaningful participation in determining that would be the student's location.

Likewise, the parent was entitled to meaningful participation in determining that the student would be returned to a full time placement, but not to the choice of location at This does not mean the parent cannot challenge whether is an appropriate placement as a substantive matter.

2. The May 26, 2010 IEP Meeting

The parent was entitled to meaningful participation in the decision to remove the student from a full time placement into a general education placement. The parent was denied meaningful participation in this case. The fact that the parent disagreed with the DCPS placement does not, by itself, show that she did not participate meaningfully. *Paolella v. District of Columbia*, 2006 WL 3697318 (2006) (unpublished opinion). However, in this case the facts show that the decision to place the student in a general education setting with 11 hours of specialized instruction and related services had been predetermined before the IEP meeting was held. DCPS came to the meeting with a fully prepared Student Reintegration Plan (P 8) and with a specific number of hours of special education and related services the student was entitled to. DCPS refused to discuss any full time placements and clearly was not open to listening to the judgment of 4 of the student's present teachers. Had they listened to the teachers and the parent they might have realized their error concerning the student's behavior long before the scheduled August 4, 2010 hearing. DCPS' failure to provide the parent with meaningful participation was a procedural denial of FAPE pursuant to IDEA § 1415 (f)(3)(E)(ii).

3. The August 11, 2010 meeting did not deny the parent meaningful participation in the decision. The parent was in accord with the placement decision that the student needed a full time placement. The parent's disagreement was with the location of services at

B. Is an Appropriate Placement for the Student

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).* Thus, the central question to be answered is whether Hamilton Academy can provide educational benefit to the student. 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).

This is a student with significant emotional problems that substantially impede his access to educational benefit. Additionally, he has a learning disability in math, writing, and reading. DCPS has handled this student's case in such a manner that it is impossible to have faith that its ultimate placement decision will provide sufficient educational benefit to the student. DCPS' decision to remove the student from a full time special education program was in direct contradiction to the voluminous information in the student's record that he had serious emotional problems. Much of this information is detailed in the findings of fact. The decision also ignored the input from all of the student's teachers at The primary justification for removing the student from a full time program was that his reading score was average. Little consideration was given to the student's serious behavioral problems. And, no consideration was given to the fact that the student could read words but had little comprehension of what he was reading. Reading words without comprehension reduces reading to a meaningless task. The fact that DCPS did not retract its decision to place the student in a general education placement at until the day before the due process hearing was outrageous.

One week after withdrawing the PNOP to DCPS determined to return the student to a full time out of general education placement and proposed as the location. At that time the student's paperwork had not even been sent to and absolutely no information about was provided at the meeting. Every student that Dr. Pilot reviewed who needed a change of location to another full time special education program was sent by her to Yet, she had only visited the school once before classes began and once for 30 minutes after classes began.

This is a student who has been making steady academic progress in spite of his behavioral problems and his learning disability. It is crucial that his educational gains continue. is a failed school that is in the midst of reconstitution. It did not get off to a very impressive start. During the 2009-10sy, the Principal left in mid-year and student scores failed to increase. In fact most of the staff was transferred or fired and the school faces the 2010-11sy with almost an entirely new staff. It is unlikely that a school with almost all new staff can function well for at least several months after the school year has begun. Of the 6 special education teachers in the lower school, 2 are first year provisionally certified teachers and it is not clear if one has any experience with emotionally disturbed students and the second has only 6 weeks worth of experience in summer school. Only two of the teachers are known to have experience working with ED students. One of these would be the student's teacher. However, in two visits to Academy since school has started, the student's educational advocate has seen no academic work going on in the classroom. Two of the 4 students in the class have sufficiently severe behavioral problems to warrant dedicated aides. Approximately half of the school functions academically at the below basic level in both reading and math.

Additionally there are serious concerns about the student's safety. He would be one of 5 graders, the youngest students in the school. The bulk of the students are in 6-8 grade. Security does not appear to be very strong. There are only 4 behavioral technicians covering the entire population. Students have been seen in the halls unescorted and the proximity to is troubling. Some of the staff has not even been trained in the basic three day TCI course.

Lastly, most specialized services are meant to be provided in the student's classroom. This student is particularly vulnerable to outside stimuli and has trouble with attention even when he is alone in the room with the service provider. It will not be possible for him to get much benefit out of S/L and OT services if they are provided in the classroom.

may turn out to be an adequate school for ED students like this student. However, it has not proven itself to be anything near adequate in past years and has a new staff and program this year. This student should not be a guinea pig in what is now an experimental school. is not an appropriate placement for this student.

VII. SUMMARY OF RULING

1. DCPS has denied the parent FAPE by not providing the parent meaningful participation in the decision to remove the student from a full-time therapeutic placement and place him in a general education DCPS school.

2. DCPS has denied the student FAPE because is an inappropriate placement for the student.

VIII. ORDER

It is hereby **ORDERED** that

1. The student shall attend the commencing the week of October 18, 2010, at DCPS expense, including transportation

2. 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: October 16, 2010