

**DC OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF COMPLIANCE & REVIEW
STATE ENFORCEMENT & INVESTIGATION DIVISION
STUDENT HEARING OFFICE**

CONFIDENTIAL

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OSSE
STUDENT HEARING OFFICE
2009 MAR -2 PM 4: 53

HEARING OFFICER'S DETERMINATION

IN THE MATTER OF:)	
)	
DOB)	DATE OF HEARING
)	February 24, 2009
Student I.D.)	
Petitioner)	DATE OF COMPLAINT
)	January 26, 2009
V.)	
)	
The District of Columbia)	ATTENDING SCHOOL:
Public Schools,)	
Respondent)	

COUNSEL FOR PARENT/STUDENT: Christopher West
James E. Brown & Assoc.
1220 L Street, N.W.
Ste. 700
Washington, D.C. 20005

COUNSEL FOR DCPS: Kendra Berner
Office of the General Counsel
825 North Capitol Street, N.E., 9th Fl.
Washington, D.C. 20002-4232

STUDENT¹, by and through his Parent

Petitioners,

v.

DCPS

Respondent.

HEARING OFFICER'S
DETERMINATION

March 1, 2009

Representatives:

Petitioner – Christopher West
DCPS – Kendra Berner

Hearing Officer:

Jane Dolkart

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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

HEARING OFFICER'S DECISION AND ORDER

I. INTRODUCTION

This is a year old student in the grade at who is eligible for special education under the classification of Multiple Disabilities (MD), including Emotional Disturbance (ED), Learning Disabled (LD), and Other Health Impaired (OHI). At the commencement of the 2006-2007sy, the student attended . The student was first found to be MD in February 2007, and at that time an IEP was developed which provided for 32 hours of specialized instruction and 1 hour of counseling per week. It was recommended that the student be placed in an out of general education setting, and on March 27, 2007, the student was placed at the Center, a DCPS full time therapeutic school for students with ED. The student remained at Center through December 2007. At that time, the student's special education hours were reduced to 22.5 and he was placed in the grade at in their ED cluster. The student began attending at the start of the 2008-2009sy.

This due process complaint was filed alleging that the student has had academic and behavioral problems at and previously at as a result of decreasing his special education hours and moving him to a combination general education and special education setting. The issues in the complaint are whether DCPS denied the student FAPE by failing timely to complete a clinical psychological evaluation, failing to provide an appropriate IEP, and failing to provide an appropriate placement.

A pre-hearing conference was held on February 9, 2009, at which time it was determined that the clinical psychological examination had been completed. A copy of the evaluation was attached to DCPS' response to the complaint. A pre-hearing order was issued on February 9, 2009.

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 timely to complete a clinical psychological evaluation?
2. Failing to provide an appropriate IEP?
3. Failing to provide an appropriate placement?

DCPS stipulated at the hearing that _____ is not presently an appropriate placement for the student, although neither DCPS nor Petitioner had a proposed placement at the time of the hearing. DCPS does not admit that placement at _____ or _____ was inappropriate at the time.

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated February 17, 2009, containing a list of witnesses with attachments P 1- 30, which was admitted in its entirety. Petitioner called as witnesses the student's mother and the student's father.

DCPS submitted a five day disclosure letter dated February 17, 2009, containing a list of witnesses. There were no attachments to the five day disclosure, but DCPS filed an untimely response to the complaint, dated February 17, 2009, attached to which are DCPS 1 – 5. The attachments were admitted in their entirety. DCPS called as witnesses _____ presently Assistant Principal at _____ Academy, and the SEC at _____

V. FINDINGS OF FACT

1. This is a _____ year old student in the _____ grade at _____ who is eligible for special education under the classification of Multiple Disabilities (MD), including Emotional Disturbance (ED), Learning Disabled (LD), and Other Health Impaired (OHI). His most recent IEP, dated December 20, 2007, provides for 21.5 hours of specialized instruction and 1 hour of psychological services per week in a combination general education and resource classroom. (P9)
2. _____ is not an appropriate placement for the student (stipulation of DCPS).
3. At the commencement of the 2006-2007sy, the student was a _____ grader at _____. The student was first found to be MD in February 2007, and at that time an IEP was developed which provided for 32 hours of specialized instruction and 1 hour of counseling per week. It was recommended that the student be placed in an out of general education setting, and on March 27, 2007, the student was placed at the _____ Center, a DCPS full time therapeutic school for students with ED. The student remained at _____ Center through December 2007. The student was initially placed in the _____ grade at _____ Center. For the 2007-2008sy, the student was placed in the _____ grade. (P 10 – 13).
4. In December 2007, the student was referred by the _____ Center for a psycho-educational evaluation. The purpose of the evaluation was to assist in determining an appropriate educational placement for the student. Several staff members at _____ Center believed the student might benefit from a change of placement to a less restrictive setting.

One of the student's teachers reported that the student is not as aggressive as most of the other students and gets picked on. The teacher indicated that the student did not present with significant behavioral difficulties.

The evaluation determined that the student had an FSIQ in the low average range and that his verbal and nonverbal, and visual motor reasoning are equally developed. The student's nonverbal processing speed was in the high average range. The student's academic achievement in reading and writing was below average and lagged behind the levels predicted by his overall cognitive functioning. The student was found to meet the criteria for Reading Disorder and Disorder of Written Expression.

The evaluation recommended that the student would benefit from a clinical evaluation to assess his preparedness for a change in educational placement. The record does not include a clinical psychological evaluation although one is referenced in the MDT meeting notes for the December 20, 2007, placement meeting which followed the evaluations.

(P 11, 20).

5. The student's parents both testified that they had expressed concerns about Center when the student was there. The student's mother was concerned that no academic learning was going on in the classrooms, and both parents were concerned that the school was too violent and that the student would pick up the aggressive behavior of his peers at the school. (Testimony of mother, father).

6. An MDT/IEP meeting for the student was held at Center on December 20, 2007. Present at the meeting were the student, both of his parents, an LEA representative, a social worker, a special education teacher, a psychologist, and the principal's designee.

The psychologist reported the results of the psycho-educational evaluation and indicated that the student was capable of achieving academically with minimal help. The psychologist also completed a clinical evaluation of the student and determined that he had a good self concept and there was no evidence of an emotional disturbance. She indicated that the level of anger discussed in a 2005 clinical report was no longer apparent.

The MDT team determined that the student would be placed in the grade at in a combination general education/resource classroom setting, commencing January 2008.

The parents were in agreement with the change of placement because they wanted the student out of Center. They did not specifically agree to the reduction in hours of specialized instruction.

(P 10, 11, testimony of mother, father,

7. _____ was the placement chosen because its inclusion model could accommodate the student's IEP and because it had a small teacher/student ratio. The student attended _____ from January 2008 through June 2008. (Testimony of _____)

8. The student did not fare well at _____ There are no documents in the record from the student's time at _____ but testimony from the student's parents and _____ is deemed credible.

9. _____ was a social worker at _____ Center during the time the student attended _____ He was present at the December 20, 2007 MDT/IEP meeting in which the decision was made to place the student at _____ continued to keep track of the student's progress while he was at _____ and went to _____ at least two times to speak with the student's teacher about his behavior. The student did well for a short time at _____ and then reverted back to the old patterns of behavior which had caused his placement at _____ Center. _____ testified that the student did not do as well as he should have done at _____ and maybe DCPS should have reconsidered placing the student in a combination setting.

_____ also credibly testified that there were discussions concerning whether the student was ready for the _____ grade since he had essentially skipped a full grade during his placement at _____ Center, that is to say, the student entered _____ as a _____ grader, but was placed in the _____ grade for the remainder of the 2006-2007sy, and was then placed in the _____ grade at the start of the 2007-2008sy. Both the student and his father expressed some concern about placing the student in the _____ grade at _____ for the 2008-2009sy. (Testimony of _____)

10. The student's father testified that when the student was at _____ his behavior reverted back to the behavior he had exhibited at _____ The father was at _____ to speak with school personnel at least 8 times. The student's grades were all D's except for one C. The student was suspended at _____ a number of times. (Testimony of father).

11. The student's mother testified that the student did not do well at _____ She had many meetings with the SEC at _____ concerning the fact that the student exhibited defiant behavior, did not listen to what he was told, and did not do his work. (Testimony of mother).

12. There was no placement meeting to determine an appropriate placement for the student when he graduated from _____ at the end of the 2007-2008sy. The student was simply placed at his neighborhood high school, _____ (Testimony of father).

13. _____ has kept good records of the student's progress while at the school. The student is receiving all F's with the exception of one D in computer applications. It is noted that the student has poor behavior and does not complete assignments. (P 23).

The record contains 7 progress reports from the student's teachers, 4 reports from early fall and three reports from November 20, 2008. Almost all the reports describe the student as disruptive, having attendance problems, and refusing to do the work. (P 25-30). The MDT notes from a November 25, 2008 MDT/IEP meeting also indicate that the student is disruptive and has not respect for adults and the rules. (P 6).

The record does not contain documentation of student suspensions, but the student's parents credibly testified that the student has received a number of in-house and out of school suspensions this school year. (Testimony of mother, father).

14. On October 1, 2008 a consent for evaluation form was signed by one of the student's parents, requesting a reevaluation of the student. (P 8).

15. On October 1, 2008, DCPS conducted a Functional Behavioral Assessment and developed a Behavioral Intervention Plan for the student. (DCPS 5). The student was offered tutoring, which he went to for a short time and then stopped going to, and has been provided mentoring. (Testimony of SEC).

15. On October 13, 2008, DCPS began a clinical evaluation of the student. The student's father told SEC to stop the testing in late October or early November, upon the advice of counsel. (Testimony of father, P 6, DCPS 1).

16. On November 25, 2008, an MDT/IEP meeting was held for the student. In attendance were the SEC, two teachers, the student's case manager/special education teacher and one other special education teacher, a social worker, the father and the educational advocate. The MDT Team agreed they would conduct a clinical psychological evaluation. That evaluation and other current testing would then be used to update the student's IEP. (P 6, 7).

17. The clinical psychological evaluation was conducted on October 13 and December 19, 2008, and January 19, 2009. The report of the evaluation was faxed to Petitioner's attorney on January 30, 2008, along with a letter of invitation (LOI) to an MDT/IEP meeting on February 6, 2008. Petitioner's attorney denies ever having seen the report or the LOI but admits that it probably went to the educational advocate who shortly thereafter left the employ of the law firm. (DCPS 1, 2, representations of Petitioner's attorney).

18. The clinical evaluation determined that

Emotionally [the student] presents a façade of cheerfulness and confidence, which masks feelings of anxiety and depression. He also experiences poor impulse control, low frustration tolerance, and low self-esteem about having learning problems; and can be evasive about his feelings....[H]e is likely to be noncompliant or test limits when asked to perform a task, cease a behavior, or follow a rule. When upset he may avoid unpleasant situations, exhibit verbal or physical aggression, and become oppositional.

The report determined that the student continue to be classified as MD, with diagnoses of oppositional defiant behavior, ADHD, reading disorder and disorder of written expression. The report recommended “[p]lacement in an intense special education program to address multiple disabilities, with an emphasis on emotional behavioral issues, in order to improve receptivity to remedial instruction and academic progress.” (DCPS 1).

19. An MDT/IEP/Placement meeting has been scheduled for March 2, 2009 at 9 a.m.

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). Central to the IDEA’s guarantee of FAPE “is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982).

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).

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

A. Timeliness of Clinical Psychological Evaluation

The IDEA and its implementing regulations are silent concerning what is a reasonable period of time between the ordering of an evaluation and its completion. In this case, DCPS attempted to conduct the clinical psychological evaluation less than two months after the school year commenced, realizing very quickly that the student had serious behavioral problems. It was the father who impeded the completion of the evaluation at that time. The father finally agreed to allow the evaluation to go forward at the November 25, 2008 MDT meeting. DCPS acted expeditiously thereafter. The evaluation was started within weeks of the meeting, and the report was sent to the parent a little over two months after the meeting, along with an LOI to meet the next week to review the evaluation. DCPS completed the clinical psychological evaluation in a reasonable time and there was no denial of FAPE to the student.

B. Inappropriate IEP and Placement

DCPS has already conceded that _____ is an inappropriate placement for the student. The only issue remaining is whether DCPS should have determined that the student's placement was inappropriate at an earlier date, either while at _____ or at _____

The Supreme Court has spoken on the level of education that the states are required to provide to disabled children. "[T]he education must be sufficient to confer some educational benefit upon the handicapped child." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. V. Rowley*, 458 U.S. 176, 200-01 (1982). A free and appropriate education (FAPE) does not require the best possible education. It does require that the IEP and placement must confer a meaningful educational benefit gauged to the child's potential. *T.R. ex rel. N.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000).

In order to make a placement, the school district must develop an IEP that meets the special education needs of disabled the student.. *See*, 20 U.S.C. ¶ 1414(d)(2)(A). 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).

The decision to reduce the student's IEP hours and move the student from _____ Center to _____ is amply supported by the record. Further, the student's parents consented to the change in placement and were, in fact, part of the impetus for it. The real question is whether the student should have been sent to _____. The evidence supports a finding that the student's behavior deteriorated significantly while he was at _____ and reverted back to the behaviors that had led to his earlier placement at _____ Center. _____ testified that the student did not do as well as expected and the decision to move him out of a full time ED setting may have been a mistake. There were also concerns as to whether the student was ready for _____ grade. There was no MDT/IEP/Placement meeting called by DCPS to discuss these concerns. In spite the student's past record and the fact that the student was exhibiting serious behavioral problems, he was sent to his neighborhood school. Petitioner has met his burden of proof that the student should have had his IEP reviewed at the end of the 2007-2008sy, and should have been placed back in a full-time therapeutic school for students with ED. _____ appears to have realized that there were problems early on and attempted to conduct a clinical psychological evaluation which might have led to a determination to revise the student's IEP and placement. This process was delayed by two months because of Petitioner's request that the evaluation be stopped. _____ has acted in a timely and responsible manner in trying to ascertain the educational needs of the student. The problem is that the student should never have been at _____ at all. The student has spent the school year to date with an inappropriate IEP and in an inappropriate placement. DCPS has denied the student FAPE.

VII. SUMMARY OF RULING

DCPS has denied the student FAPE by providing him with an inappropriate IEP and placement since the start of the 2008-2009sy. DCPS provided a clinical psychological evaluation in a timely manner and did not deny the student FAPE as to the evaluation.

VIII. ORDER

It is hereby **ORDERED** that

1. The parties shall meet on March 2, 2009 in order to revise the student's IEP and determine an appropriate placement for him. The student shall be placed in an appropriate program no later than March 31, 2009.
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: March 1, 2009