

RECEIVED
AUG 16 2010

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

Parent or Guardian, on behalf of
Student, ¹

Petitioner,

Date Issued: August 13, 2010

Hearing Officer: Jane Dolkart

v

Case No:

The District of Columbia
Public Schools

Hearing Date: August 3, 2010

Room: 1

Respondent.

HEARING OFFICER DECISION

Counsel for Petitioner:

Christopher Anwah
Law Offices of Christopher Anwah
3800 12th Street, NE
Washington, DC 20017

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 a year old student who is eligible for special education under the classification of Emotional Disturbance (ED) and Learning Disability (LD). Pursuant to an August 15, 2008 HOD, the student was placed at a full-time therapeutic private school primarily for students with emotional problems, at DCPS expense. The student began attending in September 2008. Prior to attending the student attended a DCPS public school for student's with behavioral problems. The August 2008, HOD found that was unable to meet the student's needs. During his time at the student has exhibited increasingly escalating behavioral problems that have made it impossible to keep him in the classroom. During the 2008-2009 school year, the student was hospitalized twice, once for out of control behavior and once for suicidal ideations. An MDT meeting was held on May 6, 2010, at which time the staff indicated that the student had not made academic or behavioral progress during his two years at and required a more restrictive placement, preferably with a psychiatrist on staff. On May 26, 2010, a placement meeting was held at The meeting was attended by a DCPS representative who proposed placing the student at a reformulated version of in the same physical location. Petitioner and all staff opposed the placement. The student's most recent IEP, dated October 21, 2009, provides the student with 26.5 hours of specialized instruction, 1.5 hours of behavioral support services, 1 hour of S/L therapy, and 1 hour of OT, per week, in an outside general education setting.

Petitioner filed a non-disciplinary expedited due process complaint on June 24, 2010, alleging that was an inappropriate placement for the student. The request for an expedited complaint was withdrawn when Petitioner agreed that the student needed a psychiatric evaluation if a residential placement was to be considered. DCPS provided an IEE letter authorizing Petitioner to obtain an independent psychiatric evaluation at DCPS expense. Petitioner invoked the stay put provisions of the IDEA and the student has continued to attend until this complaint is resolved. DCPS filed an untimely response to the complaint on July 12, 2010.

A pre-hearing conference was held on July 2, 2010, and a pre-hearing order was issued on July 5, 2010. A second pre-hearing conference was held on July 29, 2010, and a second pre-hearing order was issued on July 31, 2010.

Petitioner filed a Motion for a Non-Disciplinary Expedited Hearing on June 24, 2010. Because Petitioner's motion did not explain the grounds for the expedited hearing, an Amended Motion for an Expedited Hearing was filed on June 25, 2010. On June 30, 2010, Respondent filed an opposition to Petitioner's motion for an expedited hearing. At the July 2, 2010, pre-hearing conference Petitioner determined that he needed a psychiatric evaluation which could not be obtained in time for an expedited hearing.

Petitioner therefore indicated that he no longer was requesting an expedited hearing. An Order denying Petitioner's motion for an expedited hearing as having been withdrawn was filed on July 6, 2010.

A resolution session was held on July 29, 2010. The meeting was beyond the 30 days provided by the IDEA for the conduct of a resolution meeting. Therefore, the 45 day timeline for the issuance of an HOD automatically commenced on day 31 after the complaint had been filed and did not require resetting. The HOD is due on August 13, 2010.

Pursuant to DCPS' authorization for an independent psychiatric evaluation at DCPS expense, Petitioner submitted a psychiatric report dated July 9, 2010, from Dr. Spencer Johnson, MD. The Hearing Officer reviewed the 21/2 page report and determined that it failed to meet minimum professional standards and would not be considered in reviewing the record in the case. The psychiatrist held one meeting with the student and spoke with the student's grandmother. The psychiatrist did not review any other of the voluminous sources of information, claiming they were not available for review. Based on the lack of information about this student and the cursory evaluation that was conducted, the psychiatrist could not have rendered any credible diagnoses or recommendations. Further, the Hearing Officer ordered, in her second pre-hearing order, that DCPS not be required to pay for the substandard evaluation.

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 provide an appropriate placement in that the student requires a more restrictive placement than _____ and _____ is not a more restrictive setting?

2. Pre-determining the student's placement at _____ prior to the May 26, 2010, placement meeting, which was called to discuss placement options?

IV. DOCUMENTS AND WITNESSES

Petitioner submitted a five day disclosure letter dated July 28, 2010, containing a list of witnesses with attachments P 1-12. The disclosure was admitted in its entirety. Petitioner called as witnesses the student's grandmother and guardian, the student's psychologist at

, the student's special education teacher at _____ and the Director of Admissions at the _____

DCPS submitted a five day disclosure letter dated July 28, 2010, containing a list of witnesses with attachments R 1-30. Actual copies of attachments R 11, 26, 27, 28, and 29 were not attached as they were submitted in Petitioner's disclosure at P 3, and P 5. The disclosure was admitted in its entirety. DCPS called as witnesses a DCPS school psychologist who participated in the decision-making concerning the student's placement and attended the placement meeting, and the SEC at l

V. FINDINGS OF FACT

1. This is a _____ year old student who is eligible for special education under the classification of Emotional Disturbance (ED) and Learning Disability (LD). Pursuant to an August 15, 2008, HOD, the student was placed at _____ a full-time therapeutic private school primarily for students with emotional problems, at DCPS expense. The student began attending _____ in September 2008. Prior to attending _____ the student attended _____ a DCPS public school for students with behavioral problems. The August 2008, HOD found that _____ was unable to meet the student's needs. The student's most recent IEP, dated October 21, 2009, provides the student with 26.5 hours of specialized instruction, 1.5 hours of behavioral support services, 1 hour of S/L therapy, and 1 hour of OT, per week, in an outside general education setting. The student also receives the services of a dedicated aide. (P 5, 7)
2. The testimony concerning the student's cognitive abilities, educational achievement, and behavioral problems is not in dispute. All witnesses for both parties provided similar and consistent testimony concerning the student's emotional and behavior problems and their impact on his educational progress. The disagreements lie in determining the best future educational program and placement for the student. R 6-9, R 24, 25, P 6-9)
3. During his time at _____ the student has exhibited increasingly escalating behavioral problems that have made it impossible to keep him in the classroom. During the 2008-2009 school year, the student was hospitalized twice, once for out of control behavior and once for suicidal ideations.
4. During the 2008-2009 school year, the student spent at least part of 170 school days in Accotink's Behavioral Crisis Center (BCC). During the 2009-2010 school year, the student spent at least part of 171 school days in the BCC. (Testimony of Dr. Pilot, DCPS psychologist)
5. A comprehensive psychological evaluation was conducted on February 18, 2009, and a report written on February 24, 2009. In conducting the evaluation the psychologist relied on a review of school records, a clinical interview of the student, an interview with the grandmother, a classroom observation, an interview with the student's teacher, and a number of tests measuring the student's cognitive functioning, achievement, and visual motor integration. The examiner also administered many assessment measures of the

student's emotional and behavioral status, including parent reports and assessments, student reports and assessments, and several other tests. This is a thorough evaluation which relied on many sources of information. It is deemed credible. Additionally, the evaluation is entirely consistent with all other evidence in the record concerning the student,

The student was administered the Wechsler Intelligence Scale of Children – Fourth Edition (WISC-IV). The student's general cognitive ability was found to be within the Average range. Both the student's verbal and nonverbal reasoning abilities were comparable and in the Average range. The student's processing speed was in the high average range. However, the student performed poorly on tasks requiring him to sustain attention, concentrate, and exert mental control. He scored in the borderline range on the Working Memory Index.

The student was also administered the Wechsler Individual Achievement Test – 2nd Ed. (WIAT-II). There were significant differences between actual and predicted achievement scores in many areas of reading, math, spelling and writing. The student is performing at about the 2nd grade level in reading and spelling and in numerical operations.

A diagnosis of Learning Disorder, NOS was provided.

(P 3)

6. The psychological evaluation also included extensive testing and interviews concerning the student's emotion issues and behavior at school. At the time of this testing the student had only been at _____ for 6 months. The student's teacher and school psychologist both reported that the student's behavior was highly distractible, impulsive, and, at times, aggressive. The student frequently walks out of the classroom and has been know to turn over desks, slam walls, and exhibit other attributes of violence. Testing showed the student to be highly distractible, having trouble paying attention, and exhibiting oppositional behavior. The student was also determined to be depressed.

Diagnoses of ADHD and Dysthymic Disorder were provided.

(P 3)

7. An IEP meeting was held for the student at _____ on October 21, 2009. Present at the meeting were the educational advocate, the grandmother (by phone), the DCPS LEA, and from _____ the psychologist, art therapist, S/L Therapist, and the OT therapist. In addition to discussions of the student's academic needs and needs for OT and S/L services, there was extensive discussion of the student's emotional and behavioral needs. Some of the student's academic problems were ascribed to his inability to focus for sustained periods and inability to organize his thoughts. The student was found to have deficits in the areas of emotional expression, adaptive coping, interpersonal skills and self-esteem. The meeting notes indicate that the student constantly interrupts other students and has limited success within the classroom due to his behaviors. The

school psychologist indicated that over the last three weeks the student's behavior had escalated to the point where he was removed from the classroom and will earn his way back in. The IEP included a Behavioral Intervention Plan (BIP), 1 hour of individual counseling, and 30 minutes of art therapy, per week. (P 6)

8. Some time in April 2010, the student was placed with a temporary foster parent. The grandmother retained legal control over the student. (Testimony of grandmother)

9. An IEP meeting was held on May 6, 2010 at . Present were 2 of the student's teachers, the student's foster parent, the DCPS LEA representative, and the school psychologist, art therapist, S/L therapist, OT therapist, and social worker. The parent joined the meeting by phone at a later time. The meeting was called to determine the student's eligibility for ESY, and to discuss the student's academic and behavioral progress. The student was found eligible for ESY.

The personnel at indicated that the student had not been able to spend a full day in the classroom since late October due to his behavior, even with the presence of a 1:1 aide. The staff indicated that the student needs a new placement due to his lack of academic and behavioral progress at . It was the view of the staff that the student required a more structured environment. The student has many mood changes ranging from depression to aggression, and serious attention problems due to his ADHD. The DCPS LEA suggested that the foster mother and grandmother visit a DCPS middle school for student's with emotional problems. The staff were opposed to a placement at because that believed was at best a lateral move and the student needed a more restrictive environment with a psychiatrist on staff, possibly even a residential placement.

The student's grandmother stressed that the student will not attend . The student attended for 3 years and it was a horrible experience. On August 5, 2008, an HOD found that was not an appropriate placement for the student.

(P 9)

10. On May 20, 2010, a placement meeting was held to determine the location of services for the student. Present at the meeting were the educational advocate, the grandmother (by phone), a DCPS LEA representative, a DCPS case manager, a DCPS psychologist, the student's dedicated aide, special education teacher, psychologist, art therapist, and OT therapist, and the student's guardian ad litem (GAL), The SEC at participated by phone during part of the meeting.

The staff reiterated their belief that the student needed a more restrictive placement with a psychiatrist on staff. They proposed placing the student at the

DCPS disagreed because the student has an outside psychiatrist who is currently medicating him.

DCPS proposed placing the student at

(P 6)

11. The student has been accepted at the _____ for the 2010-2011 school year.
(P 12)

12. During the two years the student has been at _____ there have been many problems concerning the student's medications. The student is a difficult pharmacological case because he is both ADHD and depressed. The student has been assigned to four different psychiatrists during this time period. Each one has made a different decision concerning medication. One took the student off all medication. The grandmother has had trouble filling the prescriptions for the prescribed medication and has had trouble obtaining appointments to see the psychiatrist. She has chosen to take the student off medication on a few occasions since she was unable to provide the medication on a consistent basis. The student has inconsistently seen a psychiatrist once a month for approximately 10 minutes. _____ has been unable to get any of the psychiatrists to collaborate with them and have the school report on the effects of the medication on the student's functioning. _____ school psychologist even offered to go with the grandmother and student to one of the scheduled visits with the psychiatrist. (Testimony of student's teacher, student's grandmother, P 6).

The student's teacher testified that when the student was taking appropriate medication for his ADHD he was a different person and able to function in the classroom.
(Testimony of student's teacher)

The grandmother testified that she wants the student on appropriate medication.
(Testimony of grandmother)

13. The student's teacher at _____ testified by phone. She has been the student's teacher the entire time he has been at _____. She was clearly knowledgeable about the student's potential, academic achievement, and behavioral problems, and participated in all relevant IEP meetings and many internal meetings concerning the student. She was a credible witness.

The student's present class consists of 7 students, one teacher, one teacher's assistant, and a dedicated aide for the student. Each student has a team that provides all instructional and related services. Some of these services are provided in the classroom and some outside the classroom. The teacher and the rest of the student's team met on numerous occasions to come up with strategies to address the student's out of control behavior. The student's BIP was modified throughout the two years. The team considered all the supports available at _____ and determined that the only thing lacking at _____ that might make a difference with the student was the availability of a prescribing psychiatrist

on staff. This was the basis for their recommendation of the [redacted] The Team agreed that a lateral transfer to a setting similar to their own was not appropriate. The teacher described the student's behavior in the classroom as unpredictable, compulsive, extremely volatile, and unsafe to himself and others. As a result of the student's behavior he saw the psychologist as often as 1-2 times every day. In October 2009, [redacted] instituted a plan where the student would be instructed 1:1 in a separate room and would be placed back in the classroom when 10 days had passed in which the student was not a danger to himself or others. It proved impossible to get the student back into the classroom.

(Testimony of student's teacher)

14. The student's psychologist at [redacted] testified by phone. She is a licensed clinical psychologist and has been the student's psychologist since September 2008. She is extremely knowledgeable about the student's emotional and behavioral actions and needs. She was a credible witness. It should be noted that neither the school teacher nor the psychologist had any interest in this case except to ensure that the student was placed in a setting that could meet his needs. It had already been determined that the student would not be returning to [redacted]

The psychologist reiterated and confirmed the student's behavioral and emotional problems as previously described. She confirmed that in the 2009-2010 school year, she was called to address the student's behavior on an almost daily basis, in addition to the 1 hour per week she saw the student for individual therapy. The student has a mood disorder as well as ADHD. She is concerned that the student may be bi-polar as there is a history of bi-polar disorder in his family. It is important that a psychiatrist determine the appropriate combination of medicines, that the student is maintained regularly on the medication, and that the student be closely monitored and visit regularly with the psychiatrist. None of this occurred while the student was at [redacted]

[redacted] tried many different behavioral plans with the student, included a plan where the student could earn verbal praise and tangible rewards in 15 minute intervals. The student still could not be maintained in the classroom, frequently walked out of the classroom and sometimes out of the building.

She attended the May 20, 2010 IEP meeting and recalls that the student's grandmother was adamant that the student not be sent back to [redacted] The entire [redacted] team at the meeting was vocal about their opposition to [redacted] because they believed the student needed a more restrictive environment and a psychiatrist on staff if the student was to avoid being sent to a residential placement. Dr. Mosely, the SEC from [redacted] was on the phone during the meeting and there were no supports at [redacted] not also available at [redacted]

The psychologist testified that if there was a good outside psychiatrist who could provide consistent and regular monitoring of the student's medication and collaborate with the school, there might not be a need for an in school psychiatrist.

(Testimony of _____ psychologist)

15. The program at the _____ was described by its director of Admissions. She was a credible witness.

Before a student is accepted at the _____ the admissions staff reads all referred materials, meets with the student and the parent, and discusses the student with the admissions team to determine if the school is able to implement the student's IEP and if there is an appropriate classroom for the student.

The _____ has 3 campuses as well as 3 group homes located in Baltimore. The student was accepted to the Lanham, Md. Campus. The school covers K-8th grade and has approximately 130 students. It is a non-public school in Maryland that serves primarily ED students although many of the students also have LD, S/L and OT problems. There is a separate autism program. The school has a full-time licensed psychiatrist on staff that is able, with the parent's consent, to take over all medical management of the student, including prescribing medication. The same psychiatrist has worked with the school for 10 years. The psychiatrist works closely with the classroom staff in order to properly diagnose and understand the student's behaviors. He conducts classroom observations and collaborates with a student's outside psychiatrist, if there is one. There is also a full-time RN who administers all medication.

The _____ has identified a _____ grade classroom for the student where he would be the 10th student in the class. Each class has 2 certified teachers, a licensed certified counselor (social worker), and any dedicated aides provided for specific students. The school has a full-time S/L therapist and 2 part-time OT therapists. The school has a school-wide behavioral intervention system that works through the use of incentives. Each student receives individual behavior goals. There is a de-escalation room which can serve as a quiet area for de-escalation, or provide climbing ropes, etc. to deal with excess energy. There is always at least 1 staff member in the room at all times.

The admissions director emphasized that an important part of the program is the presence of a psychiatrist and the fact that a therapist is part of each classroom team.

The school has students from DC, PG County, and Montgomery County. It is certified by DC and costs approximately _____ per year.

(Testimony of Admissions Director,

16. Information about _____ and its ability to meet the student's needs was provided by two witnesses, the present SEC at _____ and the DC School Psychologist who was involved in making the placement determination and attended the May 6th and May 20th IEP meetings.

17. The school psychologist has worked at DCPS as an employee since January 2010. She had previously done similar work for DCPS as an independent contractor. She has a

BA in psychology from Boston College and an MA and PhD in clinical psychology from the University of Virginia. She has practiced in the field of psychology for 14 years. Her experience includes three years as a court psychologist conducting evaluations and providing therapy to adolescents involved in the criminal justice system and their families. The psychologist has worked for or been an independent consultant for several governmental entities, including school systems, conducting psychological evaluations and participating in meetings to determine educational programming. In her present position, the psychologist conducts comprehensive psychological evaluations, reviews student response to interventions, and participates in MDT meetings to determine proper methods to improve student functioning and to determine student placements.

The psychologist was qualified as an expert in the administration and interpretation of comprehensive psychological evaluations and in determining the educational and program needs of DCPS students. She was knowledgeable and thoughtful and was a credible witness.

Commencing in May 2010, the psychologist was assigned to 2-3 days/week to help the DC LEA's better understand student's diagnoses and problems. She is familiar with the student because she has observed him in gym class, reviewed his file, and spoken with the DC LEA. She agreed that the student had a lot of behavior problems, including throwing objects, verbally abusing others, and a multitude of other problems that kept the student out of the classroom. The student had a dedicated aide who did not seem to be having a positive impact on the student's behavior.

The psychologist was part of the DCPS team that proposed The DC LEA approached her before the IEP meeting and informed her that was being proposed. She talked with the SEC, Dr. Mosely, who was also on the phone during the May 20, 2010, IEP meeting. Dr. Mosely indicated that was an entirely new program from The program had been restructured, there were more staff, and mostly new staff. There would be a therapist in each classroom who could observe student behavior as it was happening. is able to administer medication and Dr. Mosely indicated that they would coordinate with the student's psychiatrist.

The psychologist admitted that she first met the student very soon before the May 20th placement meeting and that she is not very familiar with The psychologist agreed that it was important that the student "buy in" to the program and it was a point of concern that the student did not want to go to Hamilton. The psychologist agreed that during the meeting, Dr. Mosely indicated that she had not reviewed any records concerning the student, had not met with the parent or student, had not talked with the student's psychologist at had not conducted any evaluations, and had had no meeting with the student's teachers at . She further agreed that all personnel were opposed to and that she was not aware that there were difficulties with consistent medication for the student and with contacting the psychiatrist to discuss the student's school behavior.

The psychologist agreed that the student presented a difficult medication challenge and needed to have regular supervision over his medication and the school needed to have contact with the psychiatrist.

(Testimony of DCPS school psychologist)

18. The school psychologist noted that a reintegration plan had been prepared for the student. Under the plan the student would have a transition case manager assigned for 30 days through First Home Care who would answer questions or concerns with the student's transition. The student was also to be assigned a tutor and a mentor. (R 26)

19. The new SEC at _____ testified. She was credible, but her knowledge was limited since she had only been the SEC for 2 days and had previously been at another school. It is not clear if she has even taken up residence at _____ as yet. The SEC has no training in special education. She testified that _____ had been re-structured as of the coming school year and would have an almost completely new staff. Approximately 62 students were expected. There were to be 6 social workers, each assigned to two classrooms with 8-10 students each. Each class was to have a special education teacher and an instructional aide. There were also to be 2 psychologists, one part-time who would conduct evaluations, and one full-time who would engage in direct intervention with students. _____ was able to provide all of the student's related services on site. There was a school-wide behavioral management plan called the Level Point System which used reward and incentive points. There were two alternative Behavioral Classrooms (ABC's) or crisis spaces staffed by one special education teacher and an instructional aide. Before a student could be returned to class s/he would have to see a social worker. There were also to be at least 4 behavioral technicians trained in the Therapeutic Aggressive Control Technique (TACT). They would be used throughout the program as needed. They were required to complete a 40 hour class in order to qualify to use TACT. It is not clear what other qualifications are needed to by a behavioral technician.

In addition to a new staff and restructuring, the _____ building had been given a major cleaning and painting and security cameras had been installed. The SEC indicated that the student would be provided with a 1:1 aide "as soon as possible."

The SEC has never met the student, was not involved in the decision to place him at _____ has not seen the students records and was provided several evaluations on July 28, 2010.

20. There are two programs located in the same physical location; one is _____ and the other is _____, a placement for students who have been suspended from school. The two programs enter the building through separate entrances. _____ occupies the first level and _____ the 2nd level. The students do not intermingle at all during the school day. The existence of the two school in one building has not been shown to be a concern.

VI. DISCUSSION AND CONCLUSIONS OF LAW

The Individuals with Disabilities Act (IDEA), 20 U.S.C. ¶ 1400 *et seq.*, guarantees “all children with disabilities” “a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. ¶ 1400 (d)(1)(A). The IDEA defines FAPE as

Special education and related services that – (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the State educational agency..., (c) Are provided in conformity with an IEP that meets the requirements of 34 CFR 300.320 – 300.324.

Central to the IDEAs guarantee of FAPE “is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Bd. Of Educ. Hendrick Hudson Central Sch. Dist. V. Rowley*, 458 U.S. 176, 200 (1982). The educational agency must provide a “basic floor of opportunity” for students with disabilities. It need not provide the best education possible, but the educational benefit must be more than de minimus or trivial. *Polk v. Central Susquehanna Intermediate Unit 16*, 331 IDELR 10 (3rd Cir. 1988).

As a condition of receiving funds under the Act, IDEA requires school districts to adopt procedures to ensure appropriate educational placement of disabled students. *See*, 20 U.S.C. ¶ 1413

Pursuant to IDEA § 1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

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

A. Has DCPS denied the student FAPE by failing to provide an appropriate placement in that the student requires a more restrictive placement than and is not a more restrictive setting?

DCPS has already determined that the student cannot be educated in a regular classroom by having provided the student with a full-time out of general education IEP. Placement decisions must be made in conformity with the child’s IEP. 34 C.F.R. § 300.116 (a)(2)(b), D.C. Mun. Regs. Tit. 5 § 3013 (2006). Thus, it is the IEP which determines whether a placement is appropriate, not the other way around. *See, Rourke v. District of*

Columbia, 460 F.Supp.2d 32, 44 (DDC 2006). By agreement of the parties, the student's present placement at _____ cannot implement the student's IEP because the student has failed to make behavioral or academic progress at _____. DCPS was obligated to find a new full-time out of general education placement.

If there is an appropriate public placement available that is "reasonably calculated to enable the child to receive educational benefits," the District need not consider private placement. This is true even though a private placement might better serve the child, *See Hendrick Hudson Dist. Bd. Of Educ. V. Rowley*, 458 U.S. 176, 207 (1982). However, "[i]f no suitable public school is available [DCPS] must pay the costs of sending the child to an appropriate private school." *Jenkins v. Squillacote*, 935, F.2d 303, 305 (D.C. Cir. 1991). See also, *Burlington School Committee v. Mass. Dept. of Education*, 471 U.S. 359 (1985) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

DCPS has proposed _____ as an appropriate placement for the student. _____ is a full-time out of general education public school placement for students in middle school. It arguably² can provide all of the specialized education, related services, and behavioral intervention that _____ was able to provide. The only difference between _____ and _____ is the supposed presence of a social worker embedded in every two classes. This person will provide all individual and group therapy needed by the students in these classes and, when time allows, will be available to provide general behavioral support and observation. Thus, in theory, behavioral support will be on-going and not just reactive. Otherwise, the two schools appear to use similar models and provide similar levels of staffing. The problem with this is that _____ failed to contain the student's behavior and it was the recommendation of all _____ staff that the student required a more structured and restrictive environment than _____ can provide. There is nothing in the record that suggests that _____ is a more structured and restrictive environment than _____.

The other major recommendation made by _____ is that there be a psychiatrist on the staff of any new school the student attended. This recommendation was made because the student is in need of medication to gain access to his education and his grandmother is willing to provide that medication. However, it has been the case over the past two years that the student has not been able to consistently see one psychiatrist, have his medication monitored and adjusted, get his prescriptions filled, or provide any consultation between his psychiatrist and his educational placement. _____ cannot provide psychiatric services. The _____ to which the student has been accepted can provide these services.

This Hearing Officer believes that the student would be better served at the _____ However the IDEA, its regulations and case law place limits on the determination

² I use the term "purportedly" because the services available at _____ remain aspirational until the school becomes operational. DCPS witnesses all agreed that _____ has been restructured for the coming school year and will have almost an entirely new staff. Thus it is impossible to determine exactly what programs, services, and personnel will actual be available at the start of the 2010-2011 school year.

of an appropriate placement. The IDEA regulations explicitly exclude services performed by a physician except to determine a child's medically related disability impacting on the child's need for special education and related services. 34 CFR § 300.34 (c)(5). Thus, a school district cannot be required to provide services which must be performed by a physician in determining a FAPE for a child. A school district may be required to administer medication or other health services so long as they can be delivered by a school nurse or other appropriately trained personnel. *See, Cedar Rapids Community School District v. Garrett*, 526 U.S. 66 (1999); *Irving Independent School dist. V. Tatro*, 468 U.S. 883 (1984). Thus, the Hearing Officer cannot take into account whether the student would be better off with on-site psychiatric services because DCPS is not required to provide such services.

The record in this case does not provide any meaningful distinctions between the program offered at the _____ and that described as being offered this coming school year at _____ except for the existence of a staff psychiatrist at the _____. That cannot form the basis of a finding that _____ is an inappropriate placement and the _____ is an appropriate placement. Added to the fact that the law does not require provision of medical personnel as a related service, are the factors that _____ is a DCPS public school and it is much closer to the student's home.

However, the Hearing Officer has serious concerns about placing the student at _____. First, it remains a program in theory rather than in fact. There is no way of knowing if what is promised will be delivered when the school year commences. Second, almost the entire staff is new to the school and much of it is, I suspect new to DCPS and possibly new to teaching. Third, _____ offers essentially the same program as _____ a program that failed miserably. The goal in locating a new placement was to stave off sending the student to a residential placement and proper medication management was seen as crucial to that goal. Fourth, the student attended the former _____ located in the same physical space as the present _____. Both the grandmother and the student are adamantly against his attending I _____ and the student has many bad memories from his previous time there.

The student's re-integration plan called for a case manager, a mentor and tutoring, although the plan was silent as to how much mentoring and tutoring the student would receive and when it was to commence. Likewise, the student is entitled to a 1:1 aide and the _____ SEC noted that the student would receive one "as soon as possible."

The Hearing Officer will place the student at _____, but will also place stringent conditions and requirements for monitoring the provision of the represented services and the progress of the student.

B. Was the student's location at _____ predetermined?

The IDEA and case law make a distinction between a child's placement and the location of services. Placement is the educational program developed in the IEP which determines

if the student is to be in an inclusive setting, an out of general education setting, etc. Location is the actual physical location where the services will be delivered. Nothing in the IDEA requires that parents must be involved in school selection. *See*, US Department of Education, Office of Special Education, 71 Fed. Reg. 46588-89 (August 24, 2006, *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003), *TY v. New York City Dept of Education*, 584 F.3d 412 (2nd Cir 2009). Thus, DCPS did not deprive the student of FAPE or in any way violate the IDEA in predetermining the location of services.

VII. SUMMARY OF RULING

DCPS has not denied the student FAPE because _____ is an appropriate placement for the student and DCPS can determine the location of services without consulting the parent.

VIII. ORDER

It is hereby **ORDERED** that

1. The student shall be placed at _____ for the 2010-2011 school year.
2. The student's teacher at _____ shall keep a daily log of the student's educational progress and behavior. This log shall indicate each time the student is removed from the class for behavioral problems and the length of time for the removal.
3. The student's teacher at _____ shall retain copies of all of the student's work for the first three months of his attendance at _____.
4. DCPS shall convene an MDT/IEP meeting to review the student's progress no later than November 15, 2010. The student's medication management shall also be reviewed. The student's teacher, counselor, and related service providers shall be at the meeting in addition to the student's grandmother, foster mother if still relevant, and whomever else the grandmother chooses to bring to the meeting. If possible, the student's psychiatrist shall be at the meeting. If the student's behavior and educational progress have not significantly improved over his behavior and educational progress at _____ DCPS shall consider a new placement for the student.
5. Any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, shall extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives.

This is the final administrative decision in this matter. Appeals on legal grounds may be made to a court of competent jurisdiction within 90 days of the rendering of this decision.

/s/ Jane Dolkart
Impartial Hearing Officer

Date Filed: August 13, 2010