OSSE
STUDENT HEARING OFFICE
2011 AUG 25 PM 2:28

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

STUDENT,[1] through the Parent,	)	
Petitioner,	)	Date Issued: August 25, 2011
v.	)	Hearing Officer: Virginia A. Dietrich
District of Columbia Public Schools	)	Case No:
Respondent.	)	Hearing Date: August 12, 2011 Room 2009 August 15, 2011 Room: 2009

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of year old Student, filed a due process complaint notice on May 18, 2011 alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA").

Petitioner alleged that District of Columbia Public Schools ("DCPS") had failed to timely evaluate Student and determine eligibility, DCPS had failed to provide Petitioner access to Student's records, DCPS had failed to develop a behavior intervention plan ("BIP") in May 2011, DCPS had failed to provide Student with sufficient specialized instruction and behavioral support services beginning in May 2011, DCPS had failed to provide Student with a placement that could implement a full-time IEP since May 2011, DCPS had failed to formally address its refusal to grant Petitioner's request for a full-time therapeutic placement in May 2011, and DCPS had failed to provide Student with Extended School Year ("ESY") services during the summer of 2011.

DCPS asserted various defenses to the many allegations in the complaint and that it had not denied Student a FAPE.

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

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

The due process complaint was filed on 05/18/11. This Hearing Officer was assigned to the case on 05/20/11. A resolution meeting did not take place. The 30-day resolution period expired on 05/17/11, the 45-day timeline to issue a final decision began on 06/17/11, and the final decision initially was due on 08/01/11. The parties appeared for the first due process hearing date on 07/14/11. At that time, an unopposed continuance request by Petitioner was granted, which extended the final decision due date to 08/25/11.

The due process hearing was a closed hearing that took place on 08/12/11 and 08/15/11. Petitioner was represented by Domiento C. R. Hill, Esq. and DCPS was represented by Tanya Chor, Esq. Neither party objected to the testimony of witnesses via telephone. Petitioner participated in the hearing in person.

Petitioner presented three witnesses: Petitioner; Petitioner's educational advocate; and Admissions Coordinator at Foundations School. DCPS presented three witnesses: Special education teacher ("SET"); Special education coordinator ("SEC"); and Principal at Prospect Learning Center.

Petitioner's disclosures dated 08/05/11, containing a witness list and Exhibits P-1 through P-62, were admitted into evidence without objection except for Petitioner's documents that were prepared by counsel, which were admitted into evidence over objection. DCPS' disclosures dated 04/05/11, containing a witness list and Exhibits R-01 through R-62 and Supplemental Disclosures R-64 through R-66, were admitted into evidence without objection. R-63 did not exist.

The issue of whether DCPS denied Student a FAPE by failing to include a social worker at the Multidisciplinary Team ("MDT") meeting on 05/05/11 so that social emotional goals and a behavior intervention plan could be included in Student's IEP, was withdrawn by Petitioner and dismissed with prejudice.

The seven issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS denied Student a FAPE by failing to evaluate Student within 120 days of the initial referral.

Hearing Officer Determination

Whether DCPS denied Student a FAPE by failing to provide Petitioner with access to Student's behavioral incident school records, beginning on 09/23/10.

Whether DCPS denied Student a FAPE by failing to develop a BIP as part of his 05/05/11 IEP.

Whether DCPS denied Student a FAPE by failing to develop an IEP on 05/05/11 that included sufficient specialized instruction and behavioral supports to enable Student to receive educational benefit.

Whether DCPS denied Student a FAPE by failing to provide Student with a placement that could implement a full-time IEP in a therapeutic setting, beginning on 05/05/11.

Whether DCPS denied Student a FAPE by failing to issue a Prior to Action Notice on 05/05/11 that addressed DCPS' refusal to place Student in a full-time therapeutic placement.

Whether DCPS denied Student a FAPE by failing to include ESY services in Student's 05/05/11 IEP.

For relief, Petitioner requested a finding that Student was denied a FAPE on each of the issues presented, that DCPS provide Petitioner with records of Student's behavioral incidents for the 2010-2011 school year, a determination that Student requires 27.5 hours/week of specialized instruction outside of general education and ESY services, DCPS to place and fund Student at Montgomery County, MD, and an award of compensatory education for missed services since May 2011.

The parties stipulated to the following facts:

1) At the IEP meeting on 07/22/11 and 08/02/11, an IEP was developed that prescribed 28 hours/week of specialized instruction outside of general education and 2 hours/week of behavioral support services outside of general education. The IEP hours and type of services are appropriate and placement in a highly structured classroom with a low student to teacher ratio is also appropriate.

2) The 2010-2011 school year ended on 06/20/11.

3) The summer 2011 ESY dates are 07/07/11 through 07/28/11, with four hours/day of instruction.

4) Parties agreed on 07/14/11 that the meeting to be convened on 07/22/11 would go forward regardless of the composition of the team.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

#1. DCPS timely acted on Petitioner's 09/07/10 written referral for evaluation and determination of eligibility for special education services. On 10/07/10, DCPS met with Petitioner and obtained written consent for DCPS to begin the evaluation process.[2] By mid November 2010, DCPS had completed the necessary evaluations that included a comprehensive psychological evaluation, a speech and language evaluation, social work assessment, educational evaluation and an occupational therapy evaluation.[3] On 12/13/10, DCPS convened a meeting with Petitioner and at that time, DCPS was prepared to discuss evaluations, determine eligibility and develop an IEP.[4] The meeting on 12/13/10 did not start on time due to the late arrival of Petitioner's advocate, and despite four hours of discussion and review of several evaluations, the MDT was unable to review the comprehensive psychological evaluation, determine eligibility and develop an IEP.[5] Parties agreed to reconvene on 01/05/11 for a meeting to complete the eligibility determination process.[6] A few days after the 12/13/10 meeting, Petitioner requested funding for independent evaluations because Petitioner was dissatisfied with the evaluations conducted by DCPS, and DCPS granted Petitioner's request on 12/17/10.[7] On 01/05/11, DCPS was prepared to complete the review of DCPS evaluations, determine eligibility and develop an IEP;[8] however, Petitioner cancelled the 01/05/11 meeting to allow for the independent evaluations to be completed.[9] On 03/10/11, the team met again, reviewed evaluations, determined that Student was eligible for special education services and DCPS was prepared to develop an IEP, but could not do so because Petitioner was not present.[10] On 03/18/11, DCPS began scheduling efforts for an IEP development meeting; however, development of the IEP was delayed until 05/05/11 due to Petitioner's lateness in responding to scheduling e-mails and Petitioner's unavailability on dates offered by DCPS and the need for DCPS to include Petitioner in the IEP development process.[11]

#2. Petitioner initially requested a copy of Student's records from DCPS on 09/23/10 and all available records were timely provided to Petitioner's representative by the SEC just as soon as the records became available.[12] Additionally, all behavior incident reports that were generated by DCPS personnel were included in Student's school binder, and the contents of the binder were made available to Petitioner and Petitioner's advocate at all meetings. Petitioner made no further requests for records after the 05/05/11 meeting.[13]

---

[2] R-11.
[3] R-12 through R-16; SEC.
[4] SEC, SET.
[5] SEC,SET.
[6] SEC, SET, Advocate.
[7] P-14, Advocate.
[8] SEC, SET.
[9] P-38, Advocate.
[10] SEC, SET.
[11] R-22, R-53, SEC.
[12] R-6, R-22, SEC.
[13] SET.

#3. Student's behavior fluctuated drastically during the 2010-2011 school year. There were times when Student had severe behavior problems consistently, times when his behavior problems ceased and times where his behavior problems were severe, but infrequent.[14] Student's acting out or externalizing behaviors in the first half of the year were replaced with internalizing behaviors such as crying and sadness during the second half of the year.[15] DCPS was very responsive to Student's constantly changing behaviors and over the course of the 2010-2011 school year, behavior interventions were developed and applied that included a behavior support plan, counseling, a large amount of one to one instruction with the SEC, take-a-break cards, and small group social-emotional groups.[16] More specifically, in September 2010, a behavior support plan was created by Petitioner and the principal.[17] From Sep – Dec 2010, DCPS met regularly to discuss and address Student's behavior and academics. From Sep - Dec 2010, the SET was aware of Student's depression and acting out behaviors and made sure that he had a safe place to go and people to talk to.[18] DCPS conducted behavioral observations in September 2010 and completed a Functional Behavioral Assessment in November 2010,[19] and these assessments were used to develop and administer behavioral interventions to the extent they could be used because Student's behavior changed constantly in type and duration.[20] For a short period of time in Oct-Nov 2010, an intervention strategy was developed by DCPS and Petitioner, whereby Student would receive services from the SEC and SAM coach at the local public library.[21] After Dec 2010, Student spent a lot of 1:1 time with the SEC, with whom he had an excellent rapport and who was very successful in deescalating Student.[22] Student's behavior and the interventions utilized were discussed extensively at the 12/13/10, 03/10/11, and 05/05/11 meetings.[23] At the 12/13/10 meeting, Petitioner was happy about the interventions applied and the success of Student due to 1:1 interventions with the SEC.[24] At the 05/05/11 meeting, a BIP could not be developed due to time constraints.[25]

#4. Student was academically competent, had a high Average cognitive ability, had achievement testing scores in the Average range and was able to achieve at a higher rate than many of his peers.[26] During the 2010-2011 school year, Student had made growth in both math and reading as demonstrated by his performance on the DC-BAS, Fountas and Pinnell and teacher-made assessments. Student had limited academic deficits; his problem was his emotionality that affected his performance in school.[27] When the team developed the IEP in May 2011, Student was performing well in mathematics and accessing the curriculum and his

[14] SEC.
[15] SEC, SET.
[16] R-53, SEC, SET.
[17] R-10.
[18] SET.
[19] R-18, R-9.
[20] SEC, SET.
[21] SEC, SET.
[22] SEC, SET.
[23] R-23, R-29, R-47.
[24] P-23, SET.
[25] SEC.
[26] R-29, R-53.
[27] R-53.

behavior problems had been in remission.[28] In reading, Student was one year below grade level; however, it was his behavior that impacted his ability to comprehend the general education curriculum; it was not his inability to comprehend the material. Student had shown 1.09 years growth in reading over the 2010-2011 school year; however, he required specialized instruction to improve his ability to read grade level texts with fluency and comprehension.[29] Student's disability of Emotional Disturbance impacted his progress in the academic area of written expression because he was often resistant to feedback and change and he needed direct instruction in spelling and grammar.[30] Student's emotional disability impacted his ability to navigate the school environment and he required specialized instruction in behavior support services to address his poor interpersonal skills and his resentment of directives from adults, and to help him understand what constituted socially acceptable behavior.[31] Student's SET and SEC, both of whom had worked very closely with Student in school over the 2010-2011 school year and knew him well, were well equipped with current information that yielded an appropriate decision on 05/05/11 that Student could receive educational benefit with 5 hours/week of specialized instruction in reading, 1.5 hours/week of specialized instruction in written expression, and 60 minutes/week of behavioral support services, with all services to be provided outside of general education.[32]

#5. At the lengthy IEP team meeting on 05/05/11, Petitioner requested a full-time therapeutic placement.[33] During the meeting, there was much discussion about Student's behavior and educational needs.[34] DCPS properly determined that Student did not require a full-time IEP to receive educational benefit; Student had shown growth in reading and writing over the 2010-2011 school year, he did not require specialized instruction at all in mathematics, and his behaviors were not so severe at that time.[35] DCPS appropriately determined that Student had the cognitive ability to benefit from instruction with less than a full-time IEP, and that a full-time placement was not warranted at that particular time. Moreover, the SEC had sent a request for a placement determination three times to the DCPS least restrictive unit during the 2010-2011 school year in an effort to ascertain the appropriate placement for Student. The first referral was sent in Nov 2010 after Student climbed over a locked gate; the second request was in Jan-Feb 2011; and the third request occurred on 05/31/11 which was after the 05/05/11 IEP was developed and after Student's behavior became very severe after a two week unexcused absence from school.[36]

#6. Lengthy discussions took place at the 03/10/11 and 05/05/11 meetings about Student's educational needs and the services required to address his needs. On 05/05/11, Petitioner requested a full-time therapeutic placement and DCPS did not agree that segregation with all disabled peers was the least restrictive environment in which Student could receive

[28] R-47, SEC, SET.
[29] R-47, R-48, SEC, SET.
[30] R-48, SEC, SET.
[31] R-48.
[32] SEC, SET.
[33] R-47, Advocate.
[34] R-47, SEC.
[35] SEC, SET.
[36] R-18, SEC.

educational benefit.[37] Each party's position was documented in the 05/05/11 MDT Notes, but DCPS did not issue a prior written notice at or following the 05/05/11 meeting explaining why it refused to provide Student with the full-time therapeutic placement that Petitioner requested.[38]

#7. When the IEP team met and developed the initial IEP on 05/05/11, Student was progressing well in math and achieving above grade level on his math assessments and he had shown 1.09 years growth in literacy (a combination of reading and writing) over the past year.[39] Although Student was still exhibiting resistance to adult authority and had difficulty accepting responsibility for his actions and demonstrated behavioral regression after school breaks, Student was still able to experience academic growth in spite of his disability.[40] On 05/05/11, Student did not require ESY services because he had not experienced any academic regression, he had made progress in math and reading and writing, DCPS proposed to implement services for reading and writing until the end of the school year, and it was too early to determine whether Student required ESY services because the services identified in the newly created IEP had not yet been implemented.[41]

Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast,* 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

---

[37] R-47, SEC, SET.
[38] R-47, Advocate.
[39] R-28, R-48, SET.
[40] R-47, SEC.
[41] R-48, SEC, SET.

Hearing Officer Determination

The first issue to be determined is whether DCPS denied Student a free appropriate public education ("FAPE") by failing to evaluate Student within 120 days of the initial referral.

DCPS complied with the statutory requirement to evaluate Student and determine eligibility within 120 days, pursuant to 38 D.C. Code 2561.02, 34 C.F.R. 300.301. Petitioner made a written request for DCPS to evaluate Student on 09/07/10 and by 12/13/10 when the MDT met, DCPS had completed appropriate evaluations and was prepared to determine eligibility and develop an IEP. The discussions on 12/13/10 did not conclude within the four hours allotted for the meeting and that was the only reason that eligibility was not determined and an IEP developed. DCPS again was prepared to meet on 01/05/11 to determine eligibility and develop an IEP; however, Petitioner cancelled the meeting in order to allow for the completion of independent evaluations that she had requested after the meeting on 12/13/10. Delays in completing the process after 12/13/10 were due to Petitioner's request for independent evaluations, Petitioner's non-responsiveness to e-mails and DCPS' statutory requirement to include Petitioner in the meeting.[42] See 34 C.F.R. 300.322, 300.323.

Petitioner failed to meet her burden of proof that DCPS failed to evaluate Student within 120 days of the initial referral. DCPS had completed evaluations, was prepared to determine eligibility and develop an IEP on 12/13/10 and 01/05/11; both dates were within 120 days of the initial referral. The delays in determining eligibility and developing an IEP were attributable to the actions of Petitioner.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to provide Petitioner with access to Student's records, beginning on 09/23/10.

Pursuant to 34 C.F.R. 300.613, DCPS must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by DCPS. DCPS must also comply with a request to review records without unnecessary delay and before any meeting regarding an IEP, and in no case more than 45 days after the request has been made.

Petitioner argued that Student's behavioral incident reports had never been provided to her by DCPS; specifically stating that she did not receive an incident report about Student climbing over a locked gate. Not only did Petitioner not prove that the missing behavioral report(s) actually existed; DCPS' SEC credibly testified that she conscientiously and timely gave every report contained in Student's file to Petitioner and that DCPS never prepared a report about the locked gate incident. Also, all of Student's school records were made available to Petitioner and/or her representative by the SET at all meetings with DCPS.[43] Petitioner failed to show by a preponderance of the evidence that there were behavioral reports generated by the school that were not provided to Petitioner. Petitioner failed to meet her burden of proof.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to develop a BIP as part of his 05/05/11 IEP.

---

[42] Finding #1.
[43] Finding #2.

Hearing Officer Determination

34 C.F.R. 300.324(a)(2), 5 D.C.M.R. 3007.3 requires the IEP team to consider strategies, including positive behavioral interventions, strategies, and supports, to address a child's behavior that impedes the child's learning or the learning of others, in the context of developing an IEP. And, 5 DCMR 3007.3 requires that a BIP be developed and incorporated into the IEP only if a child's behavior impedes the child's learning or the learning of others. In this case, Student's behavior did not impede his learning.

Student's behaviors and behavioral interventions were discussed extensively at the 05/05/11 meeting. Since Student had behavioral problems since the beginning of the 2010-2011 school year, it was prudent and necessary to develop a BIP as part of Student's 05/05/11 IEP. A BIP was not developed on 05/05/11 due to time constraints; but Petitioner failed to demonstrate harm from the failure to develop the BIP. DCPS responded quickly and appropriately to all of Student's behavioral ups and downs during the 2010-2011 school year and many interventions were developed and employed throughout the school year. Student also made progress despite his disability. As it was, the behavior intervention plans were only as good as for the moment they were written because Student's behaviors changed all the time.[44] The evidence was clear that Student's behaviors constantly changed in frequency and form throughout the school year, and even if a BIP had been developed on 05/05/11, it likely would have been ineffective to address Student's behaviors when he returned to school after a two week unexcused absence because Student's behaviors then become very severe and beyond the behaviors he had previously demonstrated.

The Hearing Officer determines that Student was not denied a FAPE by the failure of the 05/05/11 IEP to include a BIP because DCPS already was using appropriate behavioral intervention strategies and Student's behavioral problems changed drastically right after 05/05/11 which likely would have rendered the BIP inappropriate, obsolete and non-responsive to his immediate needs.

The fourth issue to be addressed is whether DCPS denied Student a FAPE by failing to develop an IEP on 05/05/11 that included sufficient specialized instruction and behavioral supports to enable Student to receive educational benefit.

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch .Dist. of the City of Newark,* 336 F.3d 260, 264 (3d Cir. 2003).

Petitioner alleged that the 6.5 hours/week of specialized instruction outside of general education and 1 hour/week of behavioral support services prescribed by Student's 05/05/11 IEP were insufficient to meet Student's educational needs. Petitioner argued that Student required a full-time IEP of 27.5 hours/week of specialized instruction outside general education to address his chronic disruptiveness in the classroom and continuing behavior problems in school.

[44] Finding #3.

In May 2011, as a grader, Student was reading on a 2.75 grade level equivalent. He had made measurable progress in reading and writing. Student's cognitive ability was in the high Average range. Student's behavior problems in class were not a consequence of his inability to grasp academics, they were related to his emotionality and his inability to respond to constructive feedback. Student was able to handle grade level work when focused and on task. Moreover, Student was able to access the curriculum without any specialized instruction in mathematics. And, at the time the 05/05/11 IEP was written, Student's behavior was not so severe or consistently problematic that he required a full-time IEP.[45]

Student did receive some educational benefit during the 2010-2011 school year and that is all that is required in order to provide Student with a FAPE. DCPS provided the "basic floor of opportunity" that consisted of access to specialized instruction and related services which was individually designed to provide educational benefit to Student. *See Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley,* 458 U.S. 176 (1982). The credible testimony of the experienced SEC and SET was that on 05/05/11, Student could receive educational benefit from an IEP that provided 5 hours/week of specialized instruction in reading, 1.5 hours/week of specialized instruction in written expression and 1 hours/week of behavioral support services, with all services to be provided outside of general education. Petitioner failed to meet her burden of proof that on 05/05/11, Student required an IEP with full-time specialized instruction.

The fifth issue to be addressed is whether DCPS denied Student a FAPE by failing to provide Student with a placement that could implement a full-time IEP in a therapeutic setting beginning on 05/05/11.

Petitioner argued that Student required a full-time therapeutic setting with a low student to teacher ratio, individual and group therapy, and an individual and school wide behavior intervention program and that Student's needs could not be adequately addressed with the part-time IEP developed on 05/05/11.

The placement is where the IEP is implemented and Student must only be removed from an educational setting with non-disabled peers if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114, 300.116.

In the present case, DCPS worked with Student intensively over the entire year in an effort to meet his educational needs; making appropriate behavior intervention adjustments in response to Student's behaviors that constantly changed in type and intensity. Under this paradigm, Student was able to experience academic growth.[46] Additionally, over the course of the 2010-2011 school year, the SEC queried the DCPS least restrictive environment unit three different times in an effort to ascertain the appropriate placement for Student. On 05/05/11, Student had made progress in his academics, he had the cognitive ability to access the curriculum and make progress, and the only impediment to more progress was his behavior, which at the time the 05/05/11 IEP was developed was not so severe as to warrant a segregated disabled peer

[45] Finding #4.
[46] Finding #4.

environment in order for Student to make academic progress and receive educational benefit.[47] It was only after Student returned to school after a two week absence immediately following the development of the 05/05/11 IEP, that his behavioral acting out escalated to the point that it impeded his ability to access the general education curriculum.[48] The 05/05/11 IEP appropriately identified Student's needs at the time it was developed.

The Hearing Officer determines that on 05/05/11, Student did not require a therapeutic placement that could implement a full-time IEP. Petitioner failed to meet her burden of proof that on 05/05/11, Student required a placement that could implement a full-time IEP in a therapeutic setting.

The sixth issue to be addressed is whether DCPS denied Student a FAPE by failing to issue a Prior to Action Notice on 05/05/11 that addressed DCPS' refusal to place Student in a full-time therapeutic placement.

Pursuant to 34 C.F.R. 300.503, written notice must be given to the parents of a child with a disability a reasonable time before the public agency refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. The notice must include a description of the action refused by the agency, an explanation of why the agency refuses to take the action, a description of each evaluation procedure, assessment, record, or report the agency used as a basis of the proposed or refused action, a statement about the procedural safeguards, sources for parents to contact to obtain assistance in understanding the IDEA, a description of other options that the IEP team considered and the reasons why those options were rejected, and a description of other facts that are relevant to the agency's decision.

At the 05/05/11 meeting, Petitioner requested a full-time therapeutic placement and DCPS did not agree. Prior to that meeting, two other meetings took place on 12/13/10 and 01/05/11, where Student's needs were discussed in depth. At each meeting, DCPS indicated to Petitioner that Student's educational needs did not warrant a full-time IEP and placement.[49] In fact, Petitioner requested independent evaluations in December 2010 because DCPS did not agree that Student required the extensive supports that Petitioner felt that Student needed. Although there was general discussion about the disagreement at the 05/05/11 meeting and slight documentation was contained in the 05/05/11 MDT Notes, DCPS failed to provide Petitioner with the written notice required by 34 C.F.R. 300.503. However, Petitioner failed to show harm by this violation of the IDEA. Petitioner's rights were timely preserved. Thirteen days later, on 05/18/11, Petitioner filed a due process complaint on the very matter that was in disagreement at the 05/05/11 meeting. Petitioner failed to meet her burden of proof that Student was denied a FAPE.

The seventh issue to be addressed is whether DCPS denied Student a FAPE by failing to include ESY services on Student's 05/05/11 IEP.

---

[47] Finding #5.
[48] Finding #7.
[49] SEC.

Hearing Officer Determination

Petitioner alleges that Student demonstrated behavioral regression during breaks in instruction for holidays and summer and these regressions evidenced the need for ESY services over the summer of 2011.

ESY services are special education and related services that are provided to a child with a disability beyond the normal local education agency school year, in accordance with the IEP. 5 D.C.M.R. 3001.1. Extended year services must be provided only if the IEP team determines, on an individual basis, in accordance with IEP development regulations, that the child needs those services in order to receive a FAPE. 5 D.C.M.R. 3017.

In May 2011, Student had not shown any academic regression despite breaks for holidays.[50] Student's 05/05/11 IEP required specialized instruction only in the academic areas of reading and written expression and those were the areas that Student had shown 1.09 years growth; he had not shown academic regression in those areas. The DCPS personnel who knew Student best because they had worked very closely with him over the course of the school year, i.e., the SEC and SET, didn't believe that Student required ESY services because he had not experienced any academic regression despite his disability and despite new behavior problems that emerged after school breaks. Their assessment of Student's needs was given the greatest weight because they had both worked intensively and extensively with Student in the school setting over the entire academic year.

The Hearing Officer determines that on 05/05/11, DCPS properly determined that Student did not need ESY services because Student had not demonstrated any academic regression over the 2010-2011 school year. Petitioner failed to meet her burden of proof on this issue.

Summary

Petitioner failed to meet her burden of proof that Student was denied a FAPE on any of the issues presented. All requests for relief are **DENIED.**

ORDER

The complaint is **DISMISSED** with prejudice.

IT IS SO ORDERED.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

[50] Finding #7.

Hearing Officer Determination

Date: August 25, 2011

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner's Attorney: Domiento C. R. Hill, Esq. (electronically)
DCPS' Attorney: Tanya Chor, Esq. (electronically)
DCPS (electronically)
SHO (electronically)