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

STUDENT, a minor, by and through her Parent[1]

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

SHO Case No:
Erin H. Leff, Hearing Officer

2011 AUG 24 AM 11:19

HEARING OFFICER DETERMINATION

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STATEMENT OF THE CASE

On June 10, 2011 Parent, on behalf of her child ("Student"), filed an Administrative Due Process Complaint Notice ("Complaint"), HO 1,[2] requesting a hearing to review the identification, evaluation, placement or provision of a free, appropriate public education ("FAPE") to Student by District of Columbia Public Schools ("DCPS") under the Individuals with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A).

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[1] Personal identifying information is provided in Appendix A, attached hereto.
[2] Hearing Officer Exhibits will be referred to as "HO" followed by the exhibit number; Petitioner's Exhibits will be referred to as "P" followed by the exhibit number; and Respondent's Exhibits will be referred to as "R" followed by the exhibit number.

Respondent filed a Response to Parent's Administrative Due Process Complaint Notice (HO 5[3]) on July 4, 2011. A resolution meeting was held on July 8, 2011. The parties were not able to reach an agreement. HO 6. The 45 day timeline began to run on July 11, 2011, and my Hearing Officer Determination is due on August 24, 2011.

At all times relevant to these proceedings Petitioner was represented by Sarah Tomkins, Esq., of the Law Offices of Donna L. Wulkan, and Tanya Chor, Assistant Attorney General, represented DCPS.[4] I held a telephone prehearing conference on July 11, 2011. HO 7. By agreement of the parties, the hearing was scheduled for August 17 and August 19, 2011. The hearing was held as scheduled in Room 2003 of the Student Hearing Office. At the close of the hearing on August 19, 2011 I requested counsel provide me with the citations to the cases cited in their closing statements. I received these citations as requested that day.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

ISSUE(S)

The issues are:

1) Whether DCPS denied the student a free, appropriate public education ("FAPE ") by failing to timely evaluate the student in all areas of disability;[5]

[3] The Proposed Hearing Officer Exhibit List provided to the parties on August 8, 2011 is incorrectly numbered. The numbers of the exhibits have been corrected, *infra*, and these corrected exhibit numbers are referenced throughout this hearing officer determination.

[4] Ms. Chor represented Respondent at the prehearing conference and at hearing. A different Assistant Attorney General originally was assigned to this case and filed DCPS' Response to the Due Process Complaint.

[5] At hearing I raised questions regarding the continued inclusion of Issue 1 in the complaint. DCPS authorized Student to receive an independent comprehensive psychological evaluation and an independent psycho-educational evaluation. These were the two evaluations Petitioner was referencing as not being timely provided in this issue. Petitioner's Exhibit 11 is the independent psycho-educational evaluation completed as a result of DCPS' authorization. As a result of the provision of this evaluation, there is no relief possible in relation to this issue. I, therefore, ruled the failure to timely evaluate student in all areas of disability would be heard in this matter only as a

2) Whether DCPS denied the student a FAPE by failing to develop an appropriate individualized education program ("IEP") for the 2010-2011 school year; and

3) Whether DCPS denied the student a FAPE by failing to provide the student an appropriate placement for the 2010-2011 school year.

SUMMARY OF THE EVIDENCE

A. Exhibits

Exhibits admitted on behalf of Petitioner, found in Appendix B, are:

1. Due Process Complaint, filed on June 10, 2011[6]
2. Resolution Period Disposition Form and Meeting Notes, July 8, 2011[7]
3. Prehearing Order issued July 11, 2011[8]
4. Records Request from Ms. Sarah Tomkins to DCPS March 31, 2011
5. Records Request from Ms. Sarah Tomkins to Registrar's Office, DCPS School, March 31, 2011
6. Records Request from Ms. Sarah Tomkins to Ms. DCPS School, March 31, 2011
7. E-mail from Ms. Sarah Tomkins to Ms. Tanya Chor and Ms. Harsharen Bhuller, July 12, 2011
8. Letter providing Independent Psycho-Educational Evaluation to DCPS, August 8, 2011
9. Psycho-Educational Evaluation completed by Sherry Corley, February 10, 2003
10. Psycho-Educational Evaluation completed by Tara M. Benn, M.Ed., May 20, 2005
11. Psycho-Educational Evaluation completed by Dr. Jessica Gurley, Ph.D., August 3, 2011
12. Speech and Language Evaluation completed by February 24, 2003
13. DCPS IEP School), February 8, 2008
14. MDT Meeting Notes School), February 8, 2008
15. DCPS Progress Report September 23, 2010
16. Student Timetable, October 22, 2010
17. District of Columbia Public Schools Notes Report October 6,

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subset of issues 2 and 3. That is the failure to timely evaluate would be considered in terms of how this failure, if in fact there was such a failure, impacted the development of an appropriate IEP and placement. Therefore, in the remainder of this Hearing Officer Determination the failure to evaluate will only be addressed within the context of the failure to develop and provide an appropriate IEP and placement.

[6] Withdrawn at hearing as it is duplicative of Hearing Officer Exhibit 1.

[7] Withdrawn at hearing as it is duplicative of Hearing Officer Exhibit 6

[8] Withdrawn at hearing as it is duplicative of Hearing Officer Exhibit 7.

2010 – October 22, 2010

18. DCPS, School, Individualized Education Plan, October 24, 2010
19. MDT/30 Day Review Meeting Notes October 24, 2010
20. DCPS, School, Transcript, April 25, 2011
21. Resume of Dr. Jessica Gurley
22. Resume of
23. District of Columbia Superior Court Truancy Referral Form, October 22, 2010
24. Letter from to Notifying her of Referral of to District of Columbia Superior Court for Truancy, October 22, 2010
25. Program Information on School
26. Acceptance Letter to School
27. Application Materials for School (includes observation and student work)
28. Authorization of Independent Evaluation, July 8, 2011 (*Disclosed at Respondent's Exhibit 1*)

Exhibits admitted on behalf of Respondent, found in Appendix C, are:

1	IEE	7/8/11
2	Resolution Session Meeting Notes	7/8/11[9]
4	LOI	4/27/11
5	LOI	4/26/11
6	IEP	10/4/10
7	Meeting Notes	10/4/10
8	Student's File Communication Log	10/11 SY
9	Progress Report	1/31/2011

Exhibits admitted on behalf of Hearing Officer, found in Appendix D, are:

1 Administrative Due Process Complaint Notice dated June 10, 2011
2 Notice of Hearing Officer Appointment dated June 14, 2011
3 Prehearing Conference Scheduling Letter and Timeline Order of June 14, 2011
4 Prehearing Conference Notice of June 20, 2011
5 DCPS Response dated July 4, 2011 to Administrative Due Process Complaint
6 Due Process Complaint Disposition Form executed July 8, 2011
7 Prehearing Conference Order dated July 12, 2011
8 Miscellaneous emails
9 Proposed Hearing Officer Exhibits

[9] Respondent's Exhibit 3 was not entered into evidence as a result of Petitioner's objection based on relevance. I sustained the objection.

B. Testimony

Petitioner testified and presented the following witnesses:[10]

- Student
- Associate Head of School, School
- admitted as an expert in clinical psychology

DCPS presented the following witness:

- DCPS special education teacher and former Special Education Coordinator school

FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

1. Student is years old. She was in enrolled in grade at School during the 2010 – 2011 school year. Student did not complete the grade. Testimony of Petitioner; Testimony of Student; Testimony of Testimony of Testimony of Petitioner's exhibits 15, 17, 18, 19, 20, 23 and 24; Respondent's exhibits 6 & 9.

2. Student's mother died in 2009. Except for a brief period of time immediately following their mother's death when they lived with their maternal grandmother, Student and her two year old sister have resided with their maternal aunt who is their guardian.[11] Testimony of Petitioner; Testimony of Student.

[10] Petitioner attempted to provide the telephone testimony of After going on the record, indicated she could not testify from a location where others were not present and her testimony was not taken.

[11] Student's maternal aunt meets the definition of parent in the IDEA, 34 C.F.R. § 300.30, and is the Petitioner, herein.

3. Student was abused and neglected prior to her mother's death. This is no longer the case. Testimony of

4. Student has been receiving special education services since first grade as a student with learning disabilities. Initial evaluations of student indicated she had abilities in the average range of intelligence. Testimony of Petitioner; Testimony of Student; P 9; P10; P 11; P12. More recent evaluations reveal much lower tested scores. It is likely these more recent results underestimate Student's abilities. Student's emotional functioning probably caused a decrease in her processing speed and limited her ability to focus, attend and concentrate on the tasks presented. Testimony of P 11.

5. Student's February 8, 2008 IEP, developed when Student was years old and in grade at a DCPS middle school, required Student receive 15 hours of special education instruction from a special education teacher each week. It also required she receive 30 minutes of counseling each week. She was to be out of the general education setting 48% of the time. P 13.

6. The meeting notes, from the meeting in which the February 8, 2008 IEP was drafted, indicate the multidisciplinary team ("MDT") requested a complete evaluation for Student's then upcoming triennial evaluation. The notes indicate Student was beginning to demonstrate some behavioral issues, and her mother[12] was concerned. P 14.

7. Student's October 4, 2010 IEP, developed when Student was and in high school, required Student receive 7.5 hours of specialized instruction inside the general education setting. She also was to receive 30 minutes of behavior support services outside the general education setting. P 18; R 6. Student's October 2010 IEP has Present Levels of Performance based on Student's DC-CAS scores alone. It provides no basis for the reduction in service hours or for changing the location of service to general education. This October 2010 IEP does not include

[12] This meeting occurred several months before her death.

goals to address Student's poor social skills or attendance issues. This IEP was developed without Student's guardian's participation ("Petitioner"). Petitioner was not invited to the meeting. She signed this IEP, indicating her agreement with the content, on 10/27/10. A note on the IEP indicates Petitioner met with the team two weeks after its development and signed the IEP indicating her agreement with it. R 6.

8. Student was evaluated in 2003, 2005 and 2011. P 9 – 12.

9. Student has a history reflecting some emotional difficulties. She has poor social skills including a discomfort, if not fear, of her peers. Beginning with middle school Student began to display problems with anger. Since entering high school Student has had attendance problems. Testimony of Petitioner; Testimony of Testimony of P 11; P 13; p 18; P 20; P 23; P 24.

10. The staff at School have a standard practice for attempting to address students' truancy issues. After five days of unexcused absence they call the student's home. Then, if the absences continue, they send a letter and make two home visits. If none of these interventions succeed, the student is dropped from the school's rolls and referred to the District of Columbia Superior Court for truancy. Student only attended class at for two or three days in September 2010. Testimony of R7. Student was identified as having an attendance issue by October 2010. No interventions were attempted prior to her being referred to District of Columbia Superior Court in October 2010.[13] She was dropped from rolls in March 2011. Testimony of The District of Columbia Court referred Student to the after school program in an effort to address her truancy issues. Student was uncomfortable with the number of students in the program. Testimony of Petitioner.

[13] The exhibits contain references to the development of an attendance contract. However, there is no testimony indicating this attendance contract process was implemented.

11. Student was not always absent when she was not in class. Student would enter school but rather than go to class she would go to the library for at least part of the day. Testimony of Student; Testimony of Petitioner. The staff were unable to locate Student when she was not in class. Testimony of The school attendance officer once threatened to have Student removed from her mother's custody for failing to attend school. Student responded with anger. Testimony of Student; P 17.

12. The staff at School were not aware of the Student's mother's death, Student's living arrangement nor the composition of her household. Student's case manager logged telephone calls to individuals who were not educationally responsible for Student, including her two year old sister and her deceased mother One of Special Education Coordinators during the 2010-2011 school year contacted and met with Student's guardian, thinking she was Student's mother. Testimony of R 8. There are other notes indicating Petitioner was contacted by the staff, but she was not. P17; Testimony of Petitioner. Invitations to IEP meetings were not sent to Petitioner. R4; R5; Testimony of Petitioner.

13. DCPS has two computerized systems that maintain student address information. Easy IEP has address information and STARS has address information. These systems are linked and

[14] Notes about several phone calls indicate messages were being relayed to Student's mother. Petitioner suggests this means DCPS was unaware Student's mother was deceased. I am not accepting this interpretation. Parent is defined by IDEA to include a guardian, and the reference to Student's mother in these notes could be a generic reference to the person now her guardian. As no evidence was provided on this point I am not interpreting these notes as suggested by Petitioner. However, I will not recognize these notes as showing diligent effort to contact Student's guardian due to their inherent lack of credibility for the reasons that follow. I am focused in this finding, specifically, on the notes indicating calls were made to Student's two year old sister. I also note specific references made to contacting Student's mother (AM) who was deceased t the time of the alleged contact. The basis for these efforts is not in evidence. The existence of these references to calls to Student's deceased mother and to Student's two year old sister raise questions regarding the fidelity of these notes. The maker of these notes was not called to testify. I cannot determine the basis for these blatant impossibilities and, therefore, decline to use the notes as evidence of efforts to contact Petitioner.

STARS is the default standard. If an address is changed in Easy IEP and not changed in STARS, the address in Easy IEP will revert back to the STARS address. Testimony of

14. Student has not developed good social skills. She is uncomfortable and suspicious around her peers. She does not know how to make friends. One method she uses to deal with stress is avoidance. Student also is depressed and sleeps excessively. Testimony of Student; Testimony of DCPS has not recognized these emotional problems and has not attempted to address them in Student's IEP. P 18.

15. Student has post traumatic stress disorder[15] and dysthymic disorder.[16] She requires small class size with a low student to teacher ratio outside the general education environment in order to learn. She also requires social skills training, counseling and remediation in basic skills for reading, written language and mathematics. P 11.

16. DCPS has not developed a plan to address Student's social/emotional needs as well as her educational needs in the upcoming school year. Testimony of

17. The provides a structured, therapeutic environment for students with learning disabilities. Student would be in the grade at The ninth grade is composed of twenty-four grade students divided into classes of 8 with one teacher in each class. The grade is separated from the rest of the upper school to facilitate the transition into secondary school. In addition to academic classes, provides remediation of academic skills through various methodologies. also provides a full range of related services including counseling. implements a positive behavior support program that fosters the development of student respect and accountability. This program would help address Student's anger and avoidant behaviors. Testimony of Student and her guardian

[15] Post traumatic stress disorder is a condition that results from traumatic experience such as child abuse that results in flattened emotions and limitations in concentration.
[16] Dysthymic disorder is a chronic condition. It is a type of depression with mild but extended symptoms.

visited . Student has been accepted at the school. Testimony of Petitioner; Testimony of Student; Testimony of P 25; P26.

18. Petitioner's counsel made many requests for additional educational records and visited the school in an effort to obtain the records. P4 – P7. Respondent's counsel agreed to provide additional educational records if any such records were available. HO7.

DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. While I find all witness testimony presented in this matter to be credible, some witnesses were more persuasive than others. Where these differences in persuasiveness are relevant to my determination, I so indicate.

I. *Whether DCPS denied Student a FAPE by failing to develop an appropriate individualized education program ("IEP") for the 2010-2011 school year*

Under the IDEA each local education agency is required to provide a free appropriate public education ("FAPE") to each student found eligible for special education and related services. A FAPE is:

> Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . .[a]re provided in conformity with an . . .IEP that meets the requirements of [the IDEA regulations]. 34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1.

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the effect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her

disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In addition the extent of the student's participation with nondisabled peers must be addressed. 34 C.F.R. § 300.320. *See also*, D.C. Code § 30.3009. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student. 34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. If a student's behavior impedes the student's learning or that of other students, the team is to consider interventions and strategies to address the behavior. *Id.* An IEP that memorializes the team's FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

The content of an IEP is a team decision 34 C.F.R. §§ 300.320 – 300.323. *See also*, D.C. Code §§ 30.3007.1 & 3008.1. Teams are required to consider all the relevant information before them. *Id.* In reviewing whether an IEP provides a student a FAPE as required by IDEA, a hearing officer must consider whether the district complied with IDEA's procedural requirements and determine whether the program was reasonably calculated to enable the student to receive educational benefit. *Rowley,* 458 U.S. at 207. In the instant matter questions are raised regarding the district's compliance with IDEA procedural requirements in developing the October 2010 IEP and regarding whether the IEP to be implemented in the 2010-2011 school year, the October 2010 IEP, is calculated to enable the student to receive educational benefit.

Petitioner has raised several procedural issues. The first procedural issue is DCPS' development of an IEP in October 2010 without having current evaluations. Student who was in ninth grade and 14 at the time this IEP was developed had been a special education student since first grade. Following her initial evaluation in 2003 Student had been reevaluated in 2005. In February 2008, the MDT requested a comprehensive evaluation for her upcoming triennial re-evaluation. This re-evaluation did not occur. Between the development of the February 2008 IEP in middle school and the development of the October 2010 IEP in high school, Student's mother died. Student's aunt became the guardian for Student and her sister. Student had been starting to show some behavioral issues with anger when in middle school. Following the death of her mother Student became depressed and began to show attendance issues. There is some history suggesting Student had other emotionally based issues as well. Yet none of these factors resulted in a re-evaluation.

Moreover, Student had shown on-going social emotional issues for most of her school experience. She did not have well developed social skills, and she was wary of other children. Almost one half of her school time under the February 2008 IEP occurred outside the general education environment, in smaller, more protected environments. Yet, upon moving to senior high school, to a very large school with hundreds of students, the MDT chose to move Student into general education classes with only 30 minutes of behavioral support per week. This move was made without the benefit of evaluations to either support the change or recommend needed supports for the change to be successful. Assigning Student to general education classes where she felt unwelcomed by the students and unsupported by the teachers contributed to her avoidant behavior resulting from the increased stress. Moreover, once having recognized Student was exhibiting school avoidant behavior by not attending class, the MDT failed to attempt to address

Student's attendance issues and did not think to assess the reasons for this change in behavior. Instead the MDT referred her to District Court for truancy. The determination to refer Student to District Court without ever attempting to address Student's avoidant behavior again shows the MDTs lack of understanding of Student and her social emotional issues. The referral to District Court, based on the assumption that she was hanging out with friends in her neighborhood, was akin to blaming the victim. Rather than viewing her lack of attendance as symptomatic of her emotional needs, DCPS threatened to have an all ready insecure student who had recently lost her mother removed from the care of her guardian. In short, DCPS again increased her stress and thereby may have increased her behavior problems since avoidant behavior is Student's means of coping with stress.

DCPS should have been aware Student was undergoing major life stresses that were affecting her ability to access her education. DCPS should have been aware that Student needed to be reevaluated because of these stresses. DCPS should have been aware the Student's reevaluation had not been timely completed at three years as required by IDEA, 34 C.F.R. § 300.303(b), and DCPS should have been aware that the MDT had recommended a comprehensive evaluation almost three years earlier and that this reevaluation had not occurred, but DCPS apparently was not aware of any of these factors. DCPS did not take the appropriate action and order an evaluation. Moreover, Student's academic goals were based on her DC-CAS scores alone. There was no indication that the MDT looked at her prior academic skills, nor her previous assessments. If the team had attempted to review this information it might have alerted them to the significant delay in re-evaluation. There is no doubt a reevaluation should have been ordered in October 2010. It was not, and the IEP developed in October 2010, therefore, was not based on current knowledge of Student's educational needs.

The IEP developed in October 2010 also fails because DCPS did not provide the opportunity for Student's guardian to participate in the process. The IEP was developed on October 4, 2010. Student's guardian did not receive an invitation. Three weeks later, Student's guardian signed the IEP and indicated her agreement. A note on a copy of the IEP from October 27, 2010 indicates it was signed two weeks following the development of the IEP. It was actually signed three weeks after the IEP was developed. [17] IDEA is clear, parents, in this case Student's guardian, are to be invited to IEP meetings and are to participate in the development of the IEP, unless the parent chooses not to participate. 34 C.F.R. § 300.322. This did not occur. DCPS suggests that by signing the IEP and indicating her agreement after the fact, DCPS has met the IDEA requirement. I do not accept this argument. I agree that Petitioner has signed the IEP and indicated her agreement, but this in no way provided her the notification of the meeting and opportunity to participate contemplated by the law. DCPS also suggests that once having signed the IEP indicating agreement, Petitioner cannot subsequently change her mind and question the content of the IEP. This argument has no basis. Clearly an individual can learn through experience that the IEP is not effective. To argue that once signed an IEP cannot be questioned is unsupported by the law which clearly states a parent, here Petitioner, can raise questions about the provision of FAPE in a due process hearing. 34 C.F.R. § 300.507(a). That is exactly what Petitioner is doing.

[17] In general, I would not find the discrepancy between two weeks and three weeks to be significant, but where, as here, the record is replete with references to meetings and/or conversations that either Petitioner credibly testified did not occur or could not have occurred, the discrepancy in this time line also becomes noteworthy. Examples of these references include notes indicating the attendance counselor met with or spoke to Petitioner. There are logs indicating Student's case manager spoke to student's two year old sister or called her deceased mother. Mr. Barnes testified Dunbar's principal knows every student at the school by sight so if he said Student was not in school she was not. This last statement defies reason. Dunbar is a school with hundreds of students. It is unlikely a principal would know every student on sight. Moreover, even if he did know Student on sight, it is even more unlikely that he would personally know whether she was in the building on a particular day. This knowledge would require that he be aware of every student entering the school on a daily basis.

Finally, this IEP is not calculated to provide Student some educational benefit as required by *Rowley*.[18] Here, Student has a long history of receiving special education services. In middle school, many hours of special instruction were provided her outside the general education setting. There is a history showing she needed help with social skills, distrusted her peers and was starting to display anger and attendance issues in school. Student's mother died, and she moved in with her aunt who became her guardian. Yet the MDT wrote an IEP that cut Student's services and did not address her attendance and social skills needs. They did this without current information regarding her social emotional needs and with only DC-CAS scores as the basis for educational goals.

I do not intend to suggest these oversights were done with intent to disregard Student's needs. Rather, it is likely that the staff in a large comprehensive high school such as can easily lose track of a student with the array of disabilities, symptoms and issues identified here.[19] Student is generally quiet and withdrawn. She avoided class and only displayed anger in the extreme situation in which she was threatened with removal from her guardians' home shortly after the loss of her mother. Even the truancy referral form does not appear to describe the student herein. It states Student lives with her mother. She did not. It states Student likes to hang out in her neighborhood. There is no evidence this ever occurred. It even refers to Student as a him, demonstrating that some of the information on this referral came from another student's referral. The staff at claims to have made phone calls to Student's two year old sister and

[18] Respondent entered a standing objection to my allowing Dr. Gurley to testify to the appropriateness, or lack of appropriateness, of the October 2010 IEP. Respondent indicated this testimony was outside Dr. Gurley's expertise and that using her assessment of Student to retroactively evaluate the IEP was not appropriate. I overruled the objection because Dr. Gurley's expertise was as a clinical psychologist. She provided the IEE that was authorized by DCPS and entered into evidence. It is this psycho-educational evaluation that compensated for the failure to timely evaluate Student and it, thus, is through this evaluation that it can be determined what programs and services Student requires in order to receive a FAPE. The retroactivity of this analysis is based on Dr. Gurley's clinical expertise.

[19] This is not intended to suggest the staff did not have the responsibility of identifying Student's need s and meeting them. This possible explanation does not absolve them of responsibility.

to Student's deceased mother when attempting to address her attendance issues. They could not find her when she avoided class and went to the library instead. They were unable to locate many of Student's records. They did not evaluate her nor recognize the need to evaluate her and, therefore, wrote an IEP for her that was not based on her educational needs. The academic goals were based only on DC-CAS scores. The IEP did not address her social emotional needs. It did not address her attendance needs. It cut her services in half and moved her to general education classes without taking into consideration her lack of appropriate social skills and distrust of her peers. It did not address her need for a small class with low teacher student ratio. It limited the amount of support provided to her and did not provide the remediation in basic skills she needed. It did not provide counseling to address her depression.

For these reasons, I find the IEP developed for Student for the 2010-2011 school year was not designed to provide Student some educational benefit and, therefore, did not provide Student a FAPE.

II. *Whether DCPS denied Student a FAPE by failing to provide Student an appropriate placement for the 2010-2011 school year.*

After a school district develops an IEP that meets all of a student's educational needs, it must identify a placement in which to implement the IEP. The placement is to be in the least restrictive environment in which the IEP can be implemented. 34 C.F.R. §§ 300.114 – 300.118. *See also*, D.C. Code §§ 30.3011 – 30.3013. The removal of a student with disabilities from the regular education environment is to occur "only 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(a)(2)(ii). Each local education agency must have a

continuum of alternative placements, including instruction is regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, available. 34 C.F.R. § 300.115. The placement decision is to be made by a group of individuals, including the parents. 34 C.F.R. § 300.116(a)(1); 34 C.F.R. § 300.327; 34 C.F.R. § 300.501(b) and (c). Moreover, the placement decision must conform with the LRE provisions cited above. 34 C.F.R. § 300.116(a)(2).

Reviewing these regulations it is clear that placement involves more than the determination of the number of hours of service a student is to receive under his/her IEP. That is, the number of hours of service does not address where along the continuum of services as identified under IDEA a student's program will be implemented. *See* 34 C.F.R. § 300.115. Here, DCPS has proposed Student continue in the large comprehensive high school in which she has all ready been so uncomfortable due to her social emotional needs that she was unable to attend class and failed the ninth grade. When asked what kind of additional programming could be provided student in this setting in the 2011-2012 school year, DCPS was unable to provide an answer. DCPS sole basis for arguing to keep Student in this setting appears to be based on least restrictive environment ("LRE"). While it is true that IDEA provides a clear preference for placement in a student's neighborhood school with his/her age appropriate, non-disabled peers, 34 C.F.R. §§ 300.114 & 300.116, this is not the only placement available. IDEA includes a continuum of placements ranging from the general education classroom to residential or hospital placements. 34 C.F.R. § 300. 115.

Here it has been shown that Student was unable to function in the environment of a large comprehensive high school. Rather than go to class, where she felt uncomfortable and unwelcomed by teachers and students, Student would go to the library. She was unable to access

her education and was unable to pass her classes. The psycho-educational assessment performed by Dr. Jessica Gurley in July 2011 indicates Student would be unable to function in such an environment. Dr. Gurley testified that she is not concerned about Student being educated in a separate, special education environment as Student would not benefit from inclusion in the general education environment. Dr. Gurley found Student to need small classes, small student teacher ratios, and a supportive environment in order to access her education. Kingsbury School can provide this environment and can address Student's needs as identified in the psycho-educational evaluation. DCPS did not provide an appropriate placement for Student in the 2010-2011 school year and provided no evidence they could do so in the 2011-2012 school year.

DCPS references *White v. Ascension Parish School Board,* 343 F.3d 373 (5th Cir. 2003)("*White*") as supporting the proposition that there is no procedural violation in the failure of DCPS to offer Student placement in a nonpublic placement as requested by Petitioner, and in this I agree. DCPS is not required to offer such a placement **if** it has placement available that is able to provide Student a FAPE. The situations in *White* and the case before me, however, are distinguishable. In *White*, unlike the situation herein, the student's parents were present at the IEP meeting and had extensive discussions regarding their concerns about their son's placement. The Court in *White* noted that participation does not mean control of the decision. Unlike that situation, Petitioner here was not even invited to the IEP meeting where the IEP was drafted and Student's placement determined. Petitioner's in-put came after the fact, and the MDT's determination was based on old and limited information. The evidence presented at hearing shows Student's need for small classes, structure and support in her placement. The only expert to testify in this matter stated she was not concerned about Student being removed to a special

education school, that this school would provide Student an environment in which she could access her education.

DCPS also argues that placing Student in a non-public school without allowing DCPS the opportunity to offer her an appropriate placement is problematic. Yet, DCPS has had the opportunity to offer Student an appropriate placement for a year and has not done so. Moreover, the only witness testifying on DCPS' behalf could not offer any information regarding what alternative possibilities in either program or placement DCPS might be able to provide Student in the 2011-2012 school year. Having lost an entire year of school due to DCPS failure to provide her an appropriate program and placement, it would be ill conceived to suggest DCPS be given another opportunity, without specific plans being presented, to try again in the 2011- 2012 school year..

I find DCPS failed to provide Student a FAPE by failing to provide her an appropriate placement in the 2010- 2011 school year.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1) DCPS denied Student a FAPE by failing to develop an appropriate IEP for the 2010-2011 school year; and

2) DCPS denied Student a FAPE by failing to provide Student an appropriate placement for the 2010-2011 school year.

ORDER

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

1. Within 10 business days of the receipt of this Hearing Officer Determination, DCPS shall provide Student a prior notice of placement to the School. Student shall attend the School at DCPS expense for the 2011-2012 school year.
2. DCPS shall provide funding for all related costs required for Student to attend the School including related services and transportation to and from the School, as required, for educational and IEP program purposes;[20] and
3. DCPS is to convene an MDT meeting, within 15 business days, to include relevant staff from the School and Petitioner and her educational advocate, to develop an IEP for the 2011 -2012 school year. This IEP shall identify the School as the school Student will be attending for the 2011- 2012 school year. This IEP also shall include, but not be limited to, goals addressing Student's need for remediation in math, reading and written language. There also shall be social emotional goals specifically addressing Student's need for social skills training, anger management and counseling to address her depression.

IT IS SO ORDERED:

8/24/11
Date

Erin H. Leff
Hearing Officer

[20] DCPS asked that should I order Student be placed at Kingsbury that I make continued funding of this placement contingent on Student's attending 90% of the time. I decline to do so. Kingsbury is a therapeutic environment that includes systemic approaches to addressing Student's social emotional needs and thereby her attendance. Moreover, Student will be riding a bus to Kingsbury which will support and encourage her attendance. Under these circumstances I find there is no need to make funding contingent on 90% attendance.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).