

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

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**STUDENT**, a minor, by and through  
her Parent and her Guardian<sup>1</sup>

Petitioner,

v

Erin H. Leff, Hearing Officer

**DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,**

Respondent.

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OSSE  
STUDENT HEARING OFFICE  
2012 JAN -3 AM 9:30

**HEARING OFFICER DETERMINATION**

**STATEMENT OF THE CASE**

On October 19, 2011 Parent, on behalf of her child (“Student”), filed an Administrative Due Process Complaint Notice (“Complaint”), HO 1,<sup>2</sup> 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”) and by the District of Columbia Office of the State Superintendent of Education (“OSSE”) under the Individuals with Disabilities Education Act, as amended (“IDEA”). 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010).

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<sup>1</sup> Personal identifying information is provided in Appendix A, attached hereto.

<sup>2</sup> 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 DCPS filed a Response to Parent's Administrative Due Process Complaint Notice (HO 6) on November 18, 2011. A resolution meeting was held on November 22, 2011. The parties were not able to reach an agreement and executed a Resolution Period Disposition Form on the same date so indicating. HO 8. The 45 day timeline began to run on November 19, 2011, and my Hearing Officer Determination is due on January 2, 2012.

On October 28, 2011 Respondent OSSE filed *Respondent Office of the State Superintendent of Education's Motion to Dismiss the Petitioner's Complaint* ("Motion") on the grounds the Complaint failed to state a claim against OSSE as a matter of law. Neither Petitioner nor OSSE's co-Respondent, DCPS, filed an opposition to the Motion. I granted the Motion, dismissing the Complaint against OSSE by Order dated November 9, 2011. HO 7.

At all times relevant to these proceedings Petitioner was represented by Donovan Anderson, Esq. and Cherie Cooley, Assistant Attorney General, represented DCPS. I held a telephone prehearing conference on November 22, 2011. HO 9. By agreement of the parties, the hearing was scheduled for December 22, 2011. The hearing was held as scheduled in Room 2003 of the Student Hearing Office.

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<sup>3</sup> are:

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<sup>3</sup> As noted above, Petitioner's Complaint named two respondents, DCPS and OSSE. The second issue contained in the Complaint was alleged against OSSE only. OSSE filed a Motion on October 28, 2011 asking the Complaint against OSSE be dismissed. I granted the Motion by Order dated November 9, 2011. Therefore, Issue 2 which was alleged against OSSE only was mooted and is not addressed herein. During the prehearing conference Petitioner's counsel indicated he did not want to amend the issue to include DCPS. Therefore, the issues identified in this

- 1) DCPS has failed to identify an appropriate school program within 120 days of Petitioner's requesting a placement for Student. Petitioner registered Student at \_\_\_\_\_ as a non-attending student in June 2011. Petitioner requested on-going placement at \_\_\_\_\_ School DCPS has not funded the placement at \_\_\_\_\_ nor offered a different placement; and
- 2) DCPS has not offered an appropriate program. DCPS has offered Student a program at \_\_\_\_\_ is not able to implement Student's IEP.

### SUMMARY OF THE EVIDENCE

#### A. Exhibits

Exhibits admitted on behalf of Petitioner are:

1. IEP dated May 31, 2011
2. Educational evaluation dated November 11, 2010
3. Confidential psychological evaluation dated October 7, 2008
4. Speech and language report dated November 5, 2010
5. Annual Student enrollment profile dated June 1, 2011
6. Parent release of records dated November 1, 2011
7. Student's schedule dated August 10, 2011
8. 5 DCMR 3019.9(c)

Exhibits<sup>4</sup> admitted on behalf of Respondent are:<sup>5</sup>

R 1	Email Correspondence	09/13/2011
R 2	Email Correspondence	07/25/2011
R 3	IEP	12/20/2010

Exhibits admitted by the Hearing Officer are:

- 1 Administrative Due Process Complaint Notice dated October 19, 2011
- 2 Notice of Hearing Officer Appointment dated October 20, 2011

Hearing Officer Determination ("HOD") have been renumbered to reflect the two issues remaining in the instant matter.

<sup>4</sup> Respondent's exhibits were initially numbered differently when the 5 day disclosures were provided. Current R-1 was provided at the 5day disclosures as R 2. Current R 2 was provided at the 5 day disclosures as R 3, and current R 3 was provided as R 1. It took some time at hearing to review the differences in numbering and reach mutual understanding as to the exhibits and their instant numbers.

<sup>5</sup> Respondent's exhibits 4 and 5 were withdrawn at hearing.

- 3 Prehearing Conference Scheduling Letter and Timeline Order of October 21, 2011
- 4 Respondent OSSE's Motion to Dismiss the Petitioner's Complaint of October 28, 2011
- 5 Prehearing Conference Notice dated October 29, 2011
- 6 District of Columbia Public Schools Response to Petitioner's Complaint dated 11/3/11
- 7 Order re OSSE's Motion to Dismiss dated November 9, 2011
- 8 Resolution Period Disposition Form executed November 22, 2011
- 9 Prehearing Conference Order dated November 23, 2011
- 10 Miscellaneous emails
- 11 Proposed Hearing Officer Exhibit List of December 12, 2011

B. Testimony

Petitioner Richardson<sup>6</sup> testified and presented the following witnesses:

- Associate Head of Curriculum and Instruction,  
Day School
- Dr. Priscilla Ohouha, Special Education Coordinator,  
DCPS presented no witnesses.

**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 is in the      grade<sup>7</sup> at      School, a private,  
special education school providing special education and related services to students in

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<sup>6</sup> Petitioner Richardson is Student's guardian. All references to Petitioner from this point forward will be to Petitioner Richardson.

<sup>7</sup> Student repeated the 8<sup>th</sup> grade in the 2010-2011 school year. P 1; R 3.

Pre-K to 12th grade. Student has attended \_\_\_\_\_ since January 2011 when she was placed there by OSSE after \_\_\_\_\_ Public Charter School ("PCS"), the school Student had been attending, determined it could not meet her educational needs. Student had been in inclusion settings with support at \_\_\_\_\_. She also had received the services of an educational aide. During her enrollment at \_\_\_\_\_ it served as Student's Local Education Agency ("LEA"). Testimony of Richardson; Testimony of \_\_\_\_\_

2. Student is classified as having multiple disabilities including Specific Learning Disabilities in Reading and in Mathematics, a Mathematics Disorder and an Emotional Disability. Student also has a severe receptive and expressive language disorder.

Testimony of \_\_\_\_\_ P 1; P 2; P 4.

3. In November 2010, Student was evaluated on the Woodcock Johnson III Tests of Achievement when she was 14 years old and in the 8<sup>th</sup> grade. She performed in the Borderline range in overall reading skills and at the Very Low range in overall mathematics skills. Her language skills and written language skills were in the Low Average range. These scores demonstrate significant differences between her actual achievement and her predicted achievement based on her Full Scale IQ of 77 on the WISC-IV. This IQ score is in the Borderline range. Student also earned scores in the low range in math when tested on the WIAT. All of these achievement scores are significantly below those expected of a student of Student's age and grade. Testimony of \_\_\_\_\_

P 2; P 3; P 4.

4. Student has made educational gains while at \_\_\_\_\_ is providing Student a program that is different from that provided to other 9<sup>th</sup> graders. It is a very

individualized program. is actively remediating Student's significant weaknesses and adapting curricula to allow Student to access the DCPS standards. The curriculum is compacted. Compacting the curricula means there is a focus on the critical standards that Student will be able to use to carry her forward academically. Student is taking four classes at English 9, Algebra, Environmental Science and History. She also receives support in remedial math and reading. Much of Student's speech/language therapy is integrated into her history and English classes. Student is doing well in this individualized program. She is earning Bs and Cs. Testimony of Petitioner; Testimony of

5. An IEP meeting was held on May 31, 2011. Student's December 20, 2010 IEP was reviewed. The IEP meeting on May 31, 2011 was attended by Student's guardian and five staff from The IEP dated December 20, 2010 was developed at a meeting attended by Student's mother, Petitioner, four staff from attorney. The two IEPs are identical with one exception. The December 20, 2011 IEP indicates Student is eligible for extended school year services, and the May 31, 2011 IEP does not so indicate.<sup>8</sup> Testimony of P1; R 3.

6. does not have a high school program. It ends with 8<sup>th</sup> grade. As was Student's LEA responsible for providing her a free, appropriate, public education ("FAPE"), Student was required to transfer to a new LEA at the end of 8<sup>th</sup> grade. Student's guardian selected DCPS to be Student's new LEA and enrolled Student as a non-attending student in her neighborhood, DCPS school, on June 1,

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<sup>8</sup> The May 31, 2011 IEP entered into evidence is missing page 7. This page is in the same location as page 6 of the December 20, 2010 IEP. Page 6 of the December 20, 2010 IEP includes social/emotional/behavioral goals 1 through 4. Goals 5 and 6 in this area are on the next page. The May 31, 2011 IEP only has social/emotional/behavioral goals 5 and 6. It is therefore likely that the missing page included goal 1 through 4 in the social/emotional/behavioral area.

2011. The enrollment form indicates Student was attending \_\_\_\_\_ at that time. It also indicates Student does not have an IEP though it provides the date of the last IEP review as May 31, 2011. Petitioner enrolled Student as a non-attending student on the advice of staff from \_\_\_\_\_ Student's prior LEA. Petitioner requested DCPS continue Student's placement at \_\_\_\_\_ in the 2011-2012 school year. Testimony of Petitioner; P 5.

7. Petitioner did not provide a copy of Student's IEP to \_\_\_\_\_ when she registered Student. The registrar at \_\_\_\_\_ told Petitioner she did not need to provide it. DCPS never contacted Petitioner about Student's enrollment, having a meeting about Student's IEP or implementing her IEP. Testimony of Petitioner.
8. On August 11, 2011, Petitioner received a schedule for Student to attend \_\_\_\_\_ in the 2011-2012 school year. Petitioner contacted the registrar at \_\_\_\_\_ who said the schedule had been sent in error, and she would correct this error. Student returned to classes at \_\_\_\_\_ later in August. She had not received a transportation pass. A bus arrived to pick Student up to take her to \_\_\_\_\_ rather than \_\_\_\_\_. In her efforts to resolve Student's need for a bus pass, Petitioner contacted many individuals, including someone at OSSE. The OSSE staff person informed Petitioner that Student was enrolled at \_\_\_\_\_. Testimony of Petitioner; P 7; R 1.
9. Student's current IEP requires she receive 26.5 hours of special instruction outside the general education environment, one hour of speech and 30 minutes of behavior support, also outside the general education environment, each week. The schedule provided Student at \_\_\_\_\_ includes primarily general education classes taught by general

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<sup>9</sup> Approximately 150 of the 227 students enrolled in \_\_\_\_\_ are from DCPS as the LEA. Testimony of \_\_\_\_\_

education teachers. The schedule indicates she would take Extended Literacy 9, Army ROTC 1, Academic Support HS, Environmental Science and Algebra 1A.

does not have a separate, full time special education program for students with learning disabilities. would implement Student's IEP by enrolling her in 3 resource courses and one general education class per semester. The general education class would have an assigned special education teacher in the class. Student cannot earn credits toward a high school diploma in the resource classes. Student's IEP requires that she take regular statewide assessments with accommodations. Testimony of Ohouha; P 1; P 7; R 3.

10. Student requires small classes and a low teacher to student ratio in order to learn. She was not successful in inclusion classes while at . She also needs accommodations, modifications and supplementary aids and services. Testimony of Petitioner; Testimony of P 1; P 2; P3; P 4; R 3.

11. has not held an IEP meeting for Student. Following the filing of the instant matter, DCPS sent Petitioner an email indicating a meeting should be held after Student had attended for 30 days. DCPS told Petitioner Student had to attend in order to receive IDEA services. Petitioner signed a Consent for release of education records from to DCPS on November 1, 2011. DCPS did not communicate its position regarding Student's placement and DCPS not being responsible for providing Student a FAPE due to her registration as a non-attending student. Testimony of Petitioner; P 6; R1; R 2.

## DISCUSSION

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. I find all witness testimony presented in this matter to be credible. Witness' testimony is, for the most part, uncontroverted as Respondent presented no witnesses, and Petitioner's witnesses did not offer conflicting testimony.

1) *DCPS has failed to identify an appropriate school program within 120 days of Petitioner's requesting a placement for Student. Petitioner registered Student at Spingarn as a non-attending student in June 2011. Petitioner requested on-going placement at Kingsbury. DCPS has not funded the placement at Kingsbury nor offered a different placement.*

2) *DCPS has not offered an appropriate program. DCPS has offered Student a program at Springarn. Springarn is not able to implement Student's IEP.<sup>10</sup>*

Under the IDEA each local education agency is required to provide a 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

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<sup>10</sup> The two issues raised in this matter are discussed together herein as they involve similar and overlapping legal issues.

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 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. 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). 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.

In the instant matter, Student was placed at the \_\_\_\_\_ Day School in the 2010 – 2011 school year by OSSE when \_\_\_\_\_ Student's then current LEA, determined it was unable to meet Student's educational needs. Her current schedule at \_\_\_\_\_ includes 9<sup>th</sup> grade English, Algebra, Environmental Science and History. All of these courses are special education classes. \_\_\_\_\_ also is providing Student remediation in reading and math as well as compacting the curricula in order to facilitate Student's learning.

Two Rivers only provides services to students through the eighth grade. Therefore, Student who completed eighth grade in the 2010-2011 school year, could not continue to be registered in the \_\_\_\_\_ LEA. Student was required to register in a new LEA for the 2011-2012 school year. Student's guardian, Petitioner herein, selected DCPS as Student's new LEA.

She registered Student in DCPS at Springarn, her neighborhood school, on June 1, 2011 as a non-attending student. Petitioner asked that DCPS continue Student's placement at DCPS did not respond to this request and took no action regarding Student's program or placement until on or about August 10, 2011 when [redacted] mailed Student's class schedule for the 2011-2012 school year to Student. For the first semester, Student was assigned to 5 classes. Three of these classes, Army ROTC, Environmental Science and Algebra I, are general education classes. A fourth class, Academic Support is a special education class. The fifth class is Extended Literacy.<sup>12</sup> It is taught by the same teacher who teaches Academic Support. The [redacted] class schedule varies significantly from that provided at [redacted] in that at least three of the classes are inclusion classes, an instructional format used at [redacted] which did not provide Student the educational structure and support she required to access her education and receive educational benefit.

Student's current IEP requires full time placement in special education outside the general education environment. Student is receiving this program at [redacted] and is working toward a high school diploma. [redacted] is unable to provide such a program. Dr. Ohouha, the Special Education Coordinator at [redacted] testified that a student's schedule could be adjusted after the student's IEP is received. Yet, the registrar told Petitioner she did not need to provide Student's IEP when she enrolled Student at [redacted] and DCPS still does not have Student's current IEP despite Petitioner having signed a release to allow DCPS to obtain it from

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<sup>11</sup> While the enrollment form incorrectly states Student does not have an IEP, it includes the May 31, 2011 review date for the current IEP and it includes Kingsbury as Student's current school. DCPS is familiar with [redacted] as it has approximately 150 students attending the school and, therefore, knows the school provides special education.

<sup>12</sup> There was no testimony regarding whether this was a general education or special education class.

approximately six weeks ago.<sup>13</sup> Dr. Ohouha also testified she was unaware of any program in DCPS that could provide a full time, special education diploma track program although she did note, without any detail, that Prospect could provide a longer IEP.<sup>14</sup>

DCPS' position in this matter is that it has fulfilled its responsibility to Student. In support of this position DCPS argues first that DCPS' responsibility to Student is limited because she is enrolled as a non-attending student. As a non-attending student, counsel argues, Student is only entitled to equitable share rather than to FAPE. This argument which relies on 34 C.F.R. §§ 300.131 – 300.144, Children with Disabilities Enrolled by Their Parents in Private Schools, fails for several reasons, including, most significantly, that Student was not placed in by her parent. Rather she was placed in by OSSE in response to a request from her prior LEA, This was not, therefore, a parental placement. It was a placement made by an LEA and a state department of education and, as such, is one of the placement options available on the continuum of LRE placements. *See*, 34 C.F.R. §300.115. Secondly, DCPS stated during closing argument that as a non-attending student, not only is Student not entitled to FAPE, but she also is not entitled to a due process hearing. The illogic of this position cannot be overstated. DCPS made this argument at closing, in a due process hearing. That is DCPS, after proceeding through the entire due process hearing process including holding a resolution meeting, filing a response to the Complaint, participating in a prehearing conference, submitting 5 day disclosures, participating in a hearing including the review of preliminary matters, making opening and closing statements and cross-examining witnesses, asserts, in closing, that Student was not eligible for a due process hearing, a process in which Respondent had thoroughly and

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<sup>13</sup> This is evidenced by DCPS entering the December 20, 2010 IEP into evidence rather than relying on the May 31, 2011 IEP.

<sup>14</sup> It is unclear what this means.

completely participated up to and including the moment at which this assertion was made. In these circumstances the argument is at best an afterthought, not reasonably cognizable at the point it was made. Were this a viable position, Respondent should have made a motion, so alleging, when the Complaint was filed or, if not then, during the prehearing process.

DCPS' alternative argument is that it fulfilled its responsibility to Student because, although it took no action to provide FAPE, it did provide FAPE based on Student's IEP. Again, I find no basis for this argument. Student's IEP was drafted in May 2011. It requires Student receive a full time placement outside of general education. When Petitioner enrolled Student at Springarn on June 1, 2011, the registrar told Petitioner she did not need to provide Student's IEP. In August, DCPS then sent Student a schedule for the 2011-2012 school year without having reviewed the IEP. Even after receiving consent to obtain the current IEP from \_\_\_\_\_ in November, DCPS did not attempt to obtain it. Thus an argument that DCPS has offered Student a FAPE is again lacking in foundation. DCPS did not review Student's current IEP nor did it develop a proposed new IEP for Student. The proposed program appears to be based on a guess as to Student's needs, a guess, I add, that does not meet the requirements of Student's current IEP and thus does not offer Student a FAPE. Student's needs are clearly identified in her IEP. The Associate Head of Curriculum and Instruction at \_\_\_\_\_ understands these needs and testified as to how Student's unique needs were being addressed at \_\_\_\_\_ through a highly individualized program. The program offered by DCPS does not meet these needs.

Furthermore, Student is working toward a high school diploma at \_\_\_\_\_. She is receiving remedial services and compacted curricula so that she can meet the DC standards. DCPS argues that there is nothing on the IEP that identifies her exit category as requiring that she receive a high school diploma. While this may be true, there also is nothing on the IEP that

states Student is not able to meet the academic standards required for her to exit with a high school diploma. Moreover, the IEP does indicate Student is to take the Regular Statewide Assessment with Accommodations. Not only does this imply Student is working toward a regular high school diploma, it is in keeping with both IDEA and the No Child Left Behind Act that special education students are to access general education and receive high school diplomas whenever possible.

The Springarn special education coordinator has testified she does not think a student in a full time special education program can earn a regular high school diploma at Springarn or anywhere in DCPS. While it is true that DCPS is not required, as counsel argued, to provide the same program offered by another school, such as \_\_\_\_\_ even if the other school provides a better program, it is clear that eliminating the possibility of earning a high school diploma is eliminating a viable option for Student. DCPS is not required to provide IDEA eligible students the best possible education, but providing an appropriate program that provides some educational benefit must include the possibility of earning a diploma. The IDEA is clear that students are to have access to and progress in the general education curriculum. \_\_\_\_\_ provides this opportunity. DCPS does not such a program available for this student.

Even if I were to accept DCPS' position that Student is entitled only to equitable share rather than a FAPE, Respondent argued, and I agree, that DCPS never provided notice to Petitioner of Student's alleged status resulting from enrolling her as a non-attending student. While DCPS argued that another LEA, here \_\_\_\_\_ cannot bind DCPS through its assertion of policy, neither can DCPS assume that a lay person has knowledge of the intricacies of special education law and policy. DCPS failed to inform Petitioner that enrolling Student as a non-attending student would result in her losing FAPE eligibility. It cannot be assumed that

Petitioner understood this. She received advice from her previous LEA, followed that advice and requested DCPS continue Student's placement at \_\_\_\_\_ DCPS did not respond. I, therefore find DCPS did not provide Petitioner the information necessary to register Student in the district and DCPS is to be deemed responsible for providing a FAPE to Student.

IDEA requires an LEA to provide notice each time it proposes to change the educational placement or provision of FAPE to a child. 34 C.F.R. §300.503(a)(1). Here DCPS proposed to change Student's placement from a full time special education program in a separate school to an inclusion program in a general high school. Moreover, DCPS not only failed to provide Petitioner notice of this proposed change in any way other than by sending a proposed class schedule, it also did not attempt to hold a meeting to review and, if appropriate, revise the IEP to reflect this change.

As I have found DCPS is responsible for providing Student a FAPE, I must address DCPS responsibility to a student who transfers into the district from another LEA in the state such as occurred in the instant matter. DCPS misconstrues its responsibility to a student who enrolls in DCPS from another LEA. The IDEA requires each school district to have an IEP in place for each eligible student within its jurisdiction at the beginning of the school year. 34 C.F.R. § 300.323(a). In the instant matter, the IEP in place for Student at the start of the 2011-2012 school year was the IEP developed on May 31, 2011, requiring full time special education instruction and related services outside the general education environment. The IDEA further provides that when a student with an IEP transfers to another school district within the same state, the receiving school district must implement the student's existing IEP or develop a new IEP for the student.

If a child with a disability (who had a disability that was in effect in a previous public agency in the same State) transfers to a new public agency in the same State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency) until the new public agency either adopts the child's IEP from the previous public agency or develops, adopts and implements a new IEP that meets the applicable requirements in §§ 300.320 through 300.324.

34 C.F.R. § 300.323(e).

Here Student transferred from \_\_\_\_\_ to DCPS on June 1, 2011 with an IEP requiring she receive full time special education services outside of general education. Student was placed at \_\_\_\_\_. DCPS chose not to implement this IEP, and while it might be argued that Student never enrolled in \_\_\_\_\_ this argument does not overcome DCPS' responsibility to implement the IEP or provide comparable services until it is able to meet to develop another IEP, if appropriate. The IEP in effect was and is the May 31, 2011 IEP. Again, DCPS never provided notice to Petitioner regarding an intent not to implement the IEP. Instead, when Petitioner contacted DCPS regarding the problems with Student's proposed schedule and transportation, Petitioner was told these errors would be corrected. They never were.

As part of the transfer process, the new LEA, here DCPS, also is required to "... take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and other records relating to the provision of special education or related services to the child, from the previous agency in which the child was enrolled." 34 C.F.R. § 300.323(g)(1). DCPS did not make such efforts. At registration, the registrar told Petitioner she did not need to

provide a copy of Student's IEP. DCPS did not obtain consent to obtain Student's records from Kingsbury until November 1, 2011, five months after she had registered, and once the consent was obtained DCPS did not seek to obtain Student's educational records as evidenced by the out of date IEP provided in DCPS' 5 day disclosures.

In sum, DCPS did not attempt to implement Student's IEP at the start of the 2011-2012 school year. It did not attempt to provide Student comparable services. DCPS made no efforts to obtain Student's educational records in a timely manner or to schedule a meeting to review and revise Student's IEP. DCPS, at hearing, argues that it was not obligated to provide FAPE to Student because she was enrolled as a non-attending student, but even in this, DCPS failed to meet its obligation to notify Petitioner that this was their position, a position contradicted by its involvement in the instant due process hearing process. DCPS alternative argument is that it has provided FAPE through the program captured on the proposed class schedule (and the possibility of amending it should Student leave and attend This program does not provide services comparable to those required by Student's current IEP and Dr. Ohouha's testimony indicates DCPS is not able to provide comparable services or a program that would allow Student to earn a high school diploma, something she is currently doing.

I reject DCPS' arguments and find by a preponderance of the evidence that DCPS has denied Student a FAPE by failing to offer Student an appropriate program or placement for the 2011-2012 school year. The program offered at is not able to implement Student's IEP, and DCPS is not able to offer Student a program that will both meet her special education needs and allow her to earn a high school diploma.

### *The Remedy*

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 in 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 to 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 a program combining general education classes with a small amount of pull out services in separate special education classes. The documentation and testimony indicate this is not an appropriate program and placement for Student.

In the instant matter, the only evidence addressing Student's educational and related service needs was provided by Petitioner. The IEPs of December 2010 and May 2011 and the testimony of Petitioner and \_\_\_\_\_ provide consistent evidence regarding Student's special

education and related service needs. DCPS has not attempted to address these needs. Student needs both small classes and a small student staff ratio. She requires remediation and adapted curricula. DCPS has proposed a program consisting of inclusion with some pull-out support, a program type in which Student has been unsuccessful in the past. Student is currently working toward earning a high school diploma. The only DCPS employee who testified, stated DCPS could not provide a full time, special education program that would lead to a high school diploma.

In the seminal case of *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U. S. 359 (1985), the Supreme Court found parents may be reimbursed for the costs of a private school placement when a public school fails to provide a FAPE and a child's parents place the child in an appropriate private school without the school district's consent.. *Id.*, at 370. The Supreme Court reached a similar conclusion in *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484 (2009) stating, "IDEA authorizes reimbursement for the cost of private special education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school." In these instances the parents have placed the student in a private school and the Supreme Court has found they could be reimbursed when the LEA fails to provide the students a FAPE. It is therefore logical that Petitioners would be eligible for reimbursement when the LEA, here DCPS, fails to offer an appropriate placement and the student's then current placement was made by a prior LEA and the state department of education.

[T]he failure of the District to comply with its statutory obligations and provide appropriate educational placements can have a devastating impact on a child's

well-being. 'Any agency whose appointed mission is to provide for the education and welfare of children fails that mission when it loses sight of the fact that, to a young, growing person, time is critical. While a month in the life of an adult may be insignificant, at the rate at which a child develops and changes, especially one at the onset of biological adolescence with or without special needs like those of our plaintiff, a few months can make a world of difference in the life of that child.'

*Blackman v. D.C.* 278 F. Supp. 2d 1, 4 (D.D.C. 2003) citing *Blackman v. District of Columbia*, 185 F.R.D. 4, 7-8 (D.D.C.1999) (quoting *Foster v. District of Columbia*, Civil Action No. 82-0095, Memorandum Opinion and Order of February 22, 1982 at 4 (D.D.C. Feb. 22, 1982).

Here, DCPS has been aware of the Student and her request for placement at [redacted] since June 1, 2011 and has not addressed the request or offered Student an alternative placement that provides her FAPE.

I find, by a preponderance of the evidence, Respondent has failed to offer Student a program that complies with her current IEP nor has it offered her comparable services. The failure to offer Student a FAPE has continued for almost seven months, despite both the time and opportunity to take the steps necessary to offer Student a FAPE. [redacted] on the other hand, has established it provides Student with a FAPE. I further find, by a preponderance of the evidence, [redacted] is an appropriate placement for Student based on her identified needs. The match between Student's needs and the services offered at [redacted] meets the *Branham* standard. *Branham v. District of Columbia*, 427 F.3d 7 (D.C.Ct. of App. 2005). In addition, tuition reimbursement is an appropriate remedy if the responsible LEA has not made a free appropriate public education available to a child in a timely manner prior to a private school

enrollment. *District of Columbia v. Abramson*, 493 F. Supp. 2d 80, 86 (DC D. Ct. 2007) citing *Alfono v. District of Columbia*, 422 F.Supp.2d 1, 5 (D.D.C. 2006); *Roca v. District of Columbia*, 2005 WL 681462, at \*4 (D.D.C. March 14, 2005); *Goldstrom v. District of Columbia*, 319 F.Supp.2d 5, 8 (D.D.C.2004).

### **CONCLUSIONS OF LAW**

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

1. DCPS has denied Student a FAPE by failing to offer Student an appropriate program or placement for the 2011-2012 school year.
2. Placement at \_\_\_\_\_ School is an appropriate placement.
3. Petitioner is entitled to tuition reimbursement as DCPS has made a FAPE available to Student in a timely manner.

### **ORDER**

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

1. Within 10 business days of receipt of this Hearing Officer Determination, Respondent is to provide a Prior of Notice of Placement for Student to attend the \_\_\_\_\_ School for the 2011- 2012 school year.
2. Respondent is to pay all costs associated with Student's attendance at \_\_\_\_\_ School including, but not limited to, tuition, related service costs and transportation.
3. Respondent is to reimburse Petitioners for any costs incurred, including, but not limited to, tuition, transportation and related services, for Student to attend \_\_\_\_\_ School during the 2011-2012 school year. In order to receive reimbursement Petitioner is

1. to provide Respondent with receipts for all out-of-pocket costs incurred. Respondent is to reimburse Petitioner within 30 calendar days of receipt of the documentation of Petitioner's out-of-pocket costs for Student to attend School.

**IT IS SO ORDERED:**

Dec. 31, 2011

Date

Erin H. Leff

Erin H. Leff  
Hearing Officer

**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).