DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

Parent, on behalf of the Student,[1]*

Petitioner,

v.

Respondent.

Date Issued: October 5, 2010

Hearing Officer: Ramona M. Justice

Case No:

Hearing Date: Room 2006

OSSE STUDENT HEARING OFFICE
2010 OCT -6 AM 9:34

HEARING OFFICER DETERMINATION

I. JURISDICTION

This proceeding was invoked pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17; reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Public Law 108-446 and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; Title 38 of the D.C. Code, Subtitle VII, Chapter 25; and Chapter 30, Title 5 of the District of Columbia Municipal Regulations ("DCMR").

II. PROCEDURAL POSTURE

On July 27, 2010, parent, through her Attorney, filed an "Administrative Due Process Complaint Notice", on behalf of the student, alleging that the hereinafter referred to as PCS or "Respondent", denied the student a free appropriate public education (FAPE), by failing to comply with the July 3, 2010 Hearing Officers' Decision (HOD). The HOD ordered, in part, that Respondent convene a placement meeting with the Office of the State Superintendent of Education (OSSE) to discuss and identify an interim alternative placement for the student in a special education program for emotionally disturbed, attention deficit hyperactive, and learning disabled students, in a therapeutic environment; and issue a Prior Notice of Placement to the parent for the interim alternative placement and extended school year (ESY) services.

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

Petitioner seeks relief in the form of an Order finding that Respondent denied the student a free appropriate public education by failing to comply with the July 3, 2010 HOD; and requiring Respondent to comply with the prior decision.

The due process complaint was assigned to this Hearing Officer on July 29, 2010; and on August 5, 2010, the Hearing Officer issued to the parties a "Notice of Prehearing Conference", scheduling the prehearing conference for August 30, 2010 at 3:00 p.m... The prehearing conference was held on August 30, 2010, as scheduled, and on this date the Hearing Officer issued a "Prehearing Order", summarizing the issue in the complaint, matters discussed, and confirming the due process hearing for September 28, 2010, at 9:00 a. m... The prehearing conference order also provided that:

> "no later than close of business on August 31, 2010, Respondent shall provide the Hearing Officer and Petitioner's Attorney the names and titles of witnesses to testify at the hearing, and in general, a proffer for each witness to testify; the identity of the D.C. Public School proposed to the parent by the Respondent and the OSSE at the June 12, 2010 meeting; an explanation regarding Respondent's failure to issue to student a Prior Notice of Placement to an interim alternative placement; and whether the proposed placements to a D.C. Public School and Academy remain available options for the parent, and if so, what the parties agreed to regarding the student's placement for the 2010/2011 school year."

On August 31, 2010, Respondent filed an answer and affirmative defenses to Petitioner's due process complaint, denying the allegations in the complaint. On this date, Respondent also submitted a written response identifying potential witnesses; and responding to inquiries posed by the Hearing Officer at the August 30, 2010 prehearing conference regarding the student's placement. Respondent indicated that as indicated during the prehearing conference, the Office of the State Superintendent of Education (OSSE) had advised the PCS that with some minor changes, the student's placement at the PCS was not inappropriate. Respondent also indicated that in even with the decision by OSSE, it would continue to offer the parent and as alternative placements.

A second prehearing conference was held on September 10, 2010, to determine the status of efforts by the parties to resolve the issue in the complaint. At the second prehearing conference, Respondent's Attorney reiterated that a placement meeting was held with the Office of the State Superintendent of Education, at which the OSSE determined that with the addition of counseling services, the PCS could provide the student the therapeutic environment he requires; the student's placement is not inappropriate; and the PCS can meet the educational needs of the student.

Respondent's Attorney also indicated that because of OSSE's determination, it decided to maintain the student's placement at the PCS; and failed to issue a Prior Notice of Placement (PNOP) to an interim alternative placement in a therapeutic environment, as ordered by the Hearing Officer in her July 3, 2010 decision. Respondent's Attorney also advised the Hearing Officer that although the Hearing Officer determined that the student's placement at the PCS is inappropriate, and directed issuance of a PNOP to the interim placement, it must comply with the decision of the OSSE that the student's placement at the PCS would not be inappropriate with the addition of counseling services, and OSSE's authority and directive to maintain the student's placement at the IDEA.

The Hearing Officer reminded Respondent's Attorney that on July 3, 2010 it decided that the PCS was not an appropriate placement for the student; and ordered the PCS to identify an interim appropriate placement for the student; which if failed to comply.

The Hearing Officer also reminded Respondent's Attorney that according to the the SEA is charged with the primary responsibility for ensuring that students with disabilities residing in the District of Columbia, receive a FAPE; OSSE delegated that responsibility to D.C. Public Schools (DCPS), as the Local Education Agency (LEA); and the LEA delegated the responsibility of deciding all matters pertaining to the provision of a FAPE to disabled students residing in the District of Columbia between the ages of 3 and 21, to impartial Hearing Officers. Respondent's Attorney reiterated that the PCS was obligated to comply with the OSSE's decision. Respondent's Attorney also inquired of the Hearing Officer whether it is within the PCS' discretion to consider public as well as private schools, in an effort to identify an interim alternative placement for the student, which the Hearing Officer responded in the affirmative.

There was also some discussion regarding the student's enrollment, and and as alternative placements, which Petitioner indicated were not offered to the parent; and if offered, are rejected because the schools are incapable of providing the student the therapeutic environment he requires; and as ordered by this Hearing Officer. Petitioner proposed as an appropriate interim alternative placement; and the Hearing Officer advised Respondent's Attorney that the issue would resolve if the PCS issued a PNOP to

Respondent's Attorney advised the Hearing Officer that he would facilitate issuance of the PNOP by the PCS to and the Hearing Officer ordered Petitioner's Attorney to ensure reenrollment of the student at the to enable to issue the PNOP to and provide the Hearing Officer notice of such enrollment no later than noon on September 14, 2010. The Hearing Officer also ordered Respondent's Attorney to facilitate issuance of a PNOP to and notify the Hearing Officer and Petitioner's Attorney of issuance of the PNOP, no later than close of business on September 14, 2010.

On September 14, 2010, Petitioner notified the Hearing Officer and Respondent's Attorney that the student was reenrolled at the PCS; and Respondent submitted to the Hearing Officer a letter accompanied by a PNOP, placing the student at The letter indicated that a change in placement team determined that a private school placement was not the most appropriate for the student at this time because the student had not exhausted the ladder of services or placements; and was the most appropriate interim placement for the student, providing the therapeutic interventions necessary; and the "academic rigor for a student of his ability".

On September 22, 2010, this Hearing Officer issued a Second Prehearing Conference Order summarizing the matters discussed at the September 10, 2010 prehearing conference, and ordered the parties to appear at the due process hearing prepared to present evidence supporting their positions on the issue in the complaint; evidence of compensatory education services the student is entitled to receive; and evidence regarding the appropriateness of each interim placement proposed by the parties.

The due process hearing convened on September 28, 2010, at 9:00 a.m., as scheduled, at 810 First Street, N.E., 2nd Floor, Washington, D.C.. The hearing was closed to the public, and each party was represented by counsel. Counsels waived opening statements. During discussion of preliminary matters, Respondent's Attorney brought to the Hearing Officers' attention that the Hearing Officers'-

Decision which is the subject of this complaint, indicated on the last page of the decision that the issuance date was June 3, 2010, which appeared to be in error. The Hearing Officer noted for the record that the date of June 3, 2010 was a typographical error and was inadvertently noted on the decision; and noted the correction by indicating that the HOD was actually issued on July 3, 2010 and not June 3, 2010. After discussing and ruling on objections to disclosures, Petitioner's Exhibits 1-14, and a witness list dated September 21, 2010; Respondent's Exhibits 1-7; and a witness list dated September 21, 2010, identifying witnesses 1-9. The Hearing Officer excluded Respondent's Exhibit 8, representing disclosures from the July 3, 2010 due process hearing.

At the conclusion of Petitioner's case Respondent entered on the record a motion for directed verdict representing that Petitioner failed to prove its case. After hearing arguments from the parties, the Hearing Officer denied Respondent's motion, finding that Respondent failed to satisfy the standard for a motion for directed verdict, by demonstrating that Petitioner failed to offer the minimum amount of evidence to prove its case; or that no reasonable jury could decide in Petitioner's favor.

Petitioner presented the parent, student's Education Advocate, and a representative of to testify on behalf of the student. the parent, and Education Advocate testified regarding appropriateness of as an interim alternative placement for the student; and the parent testified regarding placement meetings held with the and OSSE, interim placements proposed by the to the parent, and efforts by the to identify an appropriate placement for the student. The Education Advocate was qualified as an expert in teaching in providing instruction to others, on matters pertaining to students with visual impairments, learning disabilities, emotional disturbance, and ADHD, ages 6-21. The advocate testified regarding discussions held at the placement meetings for the student; and the appropriateness of the and as alternative placements for the student.

Respondent presented the Special Education Coordinator at the PCS to testify regarding his role and responsibility, in ensuring compliance with the Hearing Officers' July 3, 2010 Decision; request for a change in placement meeting with the OSSE in April, 2010, and on June 1, 2010, prior to issuance of the Hearing Officers' July 3, 2010 decision; OSSE's July 12, 2010 recommendations regarding the change in placement request; the basis for the decision to issue a PNOP to which represented a less restrictive environment and offered the student a plan for transitioning back into the mainstream; efforts by the to identify an interim alternative placement for the student, in at therapeutic environment; and intervention by Child and Family Services.

Respondent also presented the PCS' Social Worker/School Counsel to testify regarding the provision of counseling services to the student, the parent's involvement in the provision and termination of counseling services, and Child Protective Services involvement with the student. The PCS' school Psychologist testified regarding evaluation of the student, recommendations and the benefit of medication intervention to address the student's ADHD, and outside counseling. Respondent also presented a PCS Consultant of Mental Health Resources Plus to testify regarding evaluation and diagnosis of the student, efforts to obtain information from the parent to complete the student's social history component of the evaluation, and revision of the student's Behavior Intervention Plan (BIP).

The due process hearing concluded on September 28, 2010, with the parties agreeing to submit written closing arguments to the Hearing Officer no later than 4:30 p.m., on October, 1, 2010. Written closing arguments were submitted by the parties on October 1, 2010, officially closing the record in this matter.

III. ISSUE

The issue to be determined by the Hearing Officer is as follows:

> Whether the PCS denied the student a free appropriate public education by failing to comply with the June 3, 2010 Hearing Officers' Decision; which required among others:
>
> "...that within ten (10) calendar days from the date of this decision, the shall convene an IEP and placement team meeting with the D.C. Public Schools, Office of Special Education (OSE), parent, and a placement specialist to discuss request for a meeting to discuss the students' placement, and the provision of a FAPE to the student; identify an interim alternative placement for the student, in a special education program for emotionally disturbed, ADHD, and learning disabled students, in a therapeutic environment; and issue to parent a Prior Notice of Placement for the interim placement, and ESY services"?

IV. 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. The student is years of age; and an grade special education student at a public charter school (PCS), located in the District of Columbia. The public charter school is an independent, full inclusion, para-military school; and is subject to the provisions of the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), and its implementing regulations. The student began attending the school in August, 2009.

2. The student resides in the District of Columbia with his mother, and a younger sibling; and is identified as disabled and eligible to receive special education and related services pursuant to the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA). The student's disability classification is multiple disabilities (MD), including emotionally disturbed (ED), learning disabled (LD), other health impaired (OHI), specifically identified as attention deficit hyperactivity disorder (ADHD). The student also received a prior diagnosis of disruptive behavior disorder.

3. In April, 2010, the PCS requested a placement meeting with the OSSE, to discuss the student's placement, due to behavioral difficulties the student had at school; and the adverse impact that such behavior continued to have on his learning.[2]

[2] Testimony of PCS, SEC.

4. A due process complaint was initially filed in this matter on April 19, 2010, and one of the issues in the complaint pertained to the appropriateness of the student's placement at the PCS. Due process hearings were held on June 22, 2010 and June 23, 2010; and on July 3, 2010, this-Hearing Officer issued a decision, finding among others, that Respondent failed to develop an appropriate Individualized Education Program ("IEP") for the student; failed to adhere to the proper procedures in suspending the student; and failed to provide the student an appropriate placement, during the 2009/10 school years.[3]

   The Hearing Officer also decided that the nature and severity of this student's disability was such the education in a regular education classroom even with the use of supplementary aids and supports could not be accomplished satisfactorily; that the student requires a more restrictive therapeutic environment, in order to access the general education curriculum and receive educational benefit; and that this PCS is an inappropriate placement for the student because of its inability to provide the student the therapeutic environment which he requires, due to its para-military approach to education and students.

   Based upon these findings, the Hearing Officer ordered, in pertinent part, the following relief:

   - Within ten (10) calendar days from the date of this decision, the shall convene an IEP and placement team meeting with the D.C. Public Schools, Office of Special Education (OSE), parent, and a placement specialist to discuss request for a meeting to discuss the students' placement, and the provision of a FAPE to the student; identify an interim alternative placement for the student, in a special education program for emotionally disturbed, ADHD, and learning disabled students, in a therapeutic environment; and issue to parent a Prior Notice of Placement for the interim placement, and ESY services; and it is further

   - The students' tuition and transportation at the interim and permanent placements shall be the responsibility of should the student remain a student at its school; or the OSE, should it assume responsibility for the provision of a FAPE for the student; and it is further

   - The student shall remain at the interim and/or permanent placement, until such time as the or OSE identifies an appropriate alternative permanent placement for the student, in a small, structured, therapeutic environment for emotionally disturbed, ADHD, and learning disabled students; and it is further

   - The shall fund an independent Functional Behavioral Assessment, and Psychiatric Evaluation for the student; and it is further

   - Within thirty (30) days of the student's enrollment at the interim alternative placement, the Special Education Coordinator at the interim placement shall convene an IEP team meeting with and/or OSE to:

     review all current evaluations; review and revise the student's IEP, consistent with all evaluation findings and recommendations; develop a Behavioral Intervention Plan (BIP), based on the findings and recommendations in the independent Functional Behavioral- Assessment; revise the IEP to include individual and family counseling; identify an appropriate permanent placement for the student, in a therapeutic environment for emotionally disturbed, ADHD, and learning disabled students; and issue a Prior Notice of Placement to the parent, authorizing tuition funding and transportation, within five (5) school days, if the placement is a public school, and thirty (30) calendar days, if the placement is a non-public or private school..."

[3] Petitioner's Exhibit 7.

5. On June 6, 2010, the Office of the State Superintendent of Education, Department of Special Education (OSSE DSE) received a change in placement request from the Public Charter School (PCS).[4]

6. On July 12, 2010, the PCS convened a placement team meeting. Meeting participants included the D.C. Public Schools, Office of the Student Superintendent of Education (OSSE), Change in Placement Coordinator; Respondent's Attorney; the Special Education Coordinator (SEC); SPED/Individual Resource Specialist (via telephone); parent; student's Education Advocate; and the PCS' Social Worker (via telephone). Members of the team discussed the student's behavior, medication intervention, counseling, and placement.

   The OSSE representative reviewed its placement policy; inquired regarding any issues within the student's home that may impact his behavior, school discipline and attendance, and the student's academic status. The OSSE representative advised the parent that it did not recommend a more restrictive environment for the student; and that if the student receives counseling services, his placement at the PCS would be adequate[5]. The Education Advocate advised the team that the student requires a more restrictive and therapeutic environment; and the provision of counseling services and placing the student in a self contained classroom, as suggested by the PCS, does not make the academic setting a therapeutic environment; and the school must consider the student's educational program in its entirety, in identifying a therapeutic environment for the student.[6]

   The Education Advocate also advised the team that including counseling to a student's IEP may be sufficient for other students, however, would not address this student's unique needs, because the student requires a Behavior Intervention Plan (BIP) and more restrictive class setting. The SPED/Individual Resource Specialist advised the team that the student requires a small student/teacher ratio that is structured; the student requires a more restrictive environment; the students' ADHD and behavior are significant factors impacting his lack of success; and that the student is unavailable for learning at the PCS, and with medication intervention, and counseling the student could be successful in an inclusion setting.[7] The parent stated that she did not support medication intervention for the student, to address his ADHD.[8]

   Respondent's Attorney requested that the parent identify and propose to the PCS interim alternative placements for the student. The Education Advocate responded that at that time it had not identified alternative interim placements for the student, however, would identify and proposed placements for the student, by July 15, 2010.[9] Respondent's Attorney also indicated that upon receipt of recommendations for schools by the parent, he and the SEC would review the schools and follow up with Petitioner's Attorney.[10]

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[4] Respondent's Exhibit 3.
[5] Petitioner's Exhibit 6.
[6] *Id.*
[7] *Id.*.
[8] *Id.*
[9] *Id.*
[10] *Id.*

The OSSE Change in Placement Coordinator advised the parent and Education Advocate that OSSE was uncertain as to what it would do, however, they would meet with their Attorney and communicate with the parents' Attorney the following day.[11] After the July 12, 2010 placement meeting, parent nor her Attorney were contacted by the PCS to discuss the student's placement for the 2010/2011 school years; as agreed at the July 12, 2010 meeting.[12] The SEC testified that a letter of invitation was provided to the parent, and faxed to her Attorney; however, Respondent presented no evidence that a letter was issued to the parent or faxed to her Attorney.

7. On July 12, 2010, the OSSE Change in Placement Coordinator forwarded a letter to the PCS indicating that after a thorough review of documents, assessments/evaluations, and discussion with key stakeholders it is the *recommendation* of the OSSE that a change in placement (CIP) into a more restrictive environment was not warranted at that time, for the student.[13] OSSE also recommended training and technical assistance for the charter school, including: effective development of IEPs that place emphasis on the student's area of difficulty and include goals and objectives that are specific, measurable, and aligned to identified student's needs; effective behavioral support planning, including Functional Behavior Assessments (FBSs) and Behavior Intervention Plans (BIPs) that are: strengths based; designed to specifically address the student's areas of behavioral difficulty; and include goals that are specific, measurable and aligned to the student's identified needs.[14]

   Finally, OSSE recommended utilization of appropriate supplementary aides and services (i.e. one-on-one aide, behavior specialist) that assist students in accessing the general education curriculum and allow for instruction in the least restrictive environment.[15]

8. At some time prior to the July 12, 2010 placement meeting, the PCS suggested that the parent visit as an alternative interim placement for the student. Upon parent's visit to the school, she was discouraged from entering and considering the school as a potential interim placement for the student, because of the presence of out of control students at the entry of the school, and students' use of profanity. The parent did not enter the school, or discuss with the school its educational program.[16]

9. On July 16, 2010, Petitioner's Attorney forwarded an email to Respondent's Attorney indicating that she continued to wait for certain documents that the SEC attempted to provide her on July 15, 2010, however was unable to do so due to some reported difficulty accessing the data bases. Petitioner's Attorney also advised Respondent's Attorney that the Petitioner would proceed to a due process hearing; and expressed concern that at the July 12, 2010 placement meeting it appeared that OSSE and the PCS completely disregarded the July 3, 2010 HOD; and that the parent was requesting placement of the student at Petitioner also inquired regarding the PCS's position.[17]

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[11] *Id.*
[12] Testimony of the Education Advocate and parent.
[13] Respondent's Exhibit 3.
[14] *Id.*
[15] *Id.*
[16] Testimony of parent.
[17] Petitioner's Exhibit 10.

10. On August 13, 2010, issued a letter to the parent notifying her of the student's acceptance at the school, placement of the student in a small student-teacher ratio classroom, and implementation of his incoming IEP, pending evaluations/recommendations that may be made at the initial 30 day review meeting.[18]

11. On September 10, 2010, the PCS issued to the parent a Prior Written Notice, indicating that based upon a review of all relevant documents, the change in placement team proposed that the notice of placement be issued to The notice indicated that the placement would allow the student to receive the therapeutic interventions necessary while also providing the academic rigor for a student of his ability. The notice indicated that the basis for the decision to recommend the student's placement at is that the program if implemented properly with the IEP would allow the student to access the curriculum while also gaining the benefit of behavior support therapy.[19]

    The notice indicated that the change in placement team reviewed the current IEP (April 9, 2010), Counselor's notes, Clinical Evaluation (November 4, 2009), Educational Evaluation (May 7, 2009), FBA and BIP for 2009, in addition to statements of recommendation from all key stake holders. The notice indicated that the change in *placement team discussed a private school placement* and determined that this was not the most appropriate action at this time because the student had not exhausted the ladder of services or placements.[20] The notice also indicated that the team recommended outside therapy by taking the child and evaluations to the pediatrician for outside counseling and, if recommend medication therapy as additional interventions. The notice concluded that it is the opinion of the team that "the student can function normally and transition without issue if the trigger of interventions are in place in the home and in the school".[21] There is no indication that the parent participated in this decision.

12. On September 14, 2010, pursuant to the order of this Hearing Officer, parent reenrolled the student at the PCS, and provided the school with the documents necessary to complete the student's enrollment. During the enrollment process, the SEC requested a meeting with the parent; which parent indicated she would only participate with her Attorney present. Thereafter, Parent contacted the school on two (2) occasions, to verify the student's enrollment at the PCS; however, was unsuccessful.[22]

13. On September 12, 2010, the SEC contacted Child and Family Services (CFS) because the PCS was not enrolled in any school.[23] On September 23, 2010, the parent was contacted by the CFS, inquiring regarding the student's truancy. Parent advised CPS of failed efforts to verify the student's enrollment; and on September 24, 2010 the student returned to school.

14. The student is currently on medication for ADHD, and as a mood stabilizer[24]; which makes the student more available for learning, and as a result, his behavior may improve.[25]

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[18] Petitioner's Exhibit 12.
[19] Respondent's Exhibit 7.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] Testimony of PCS SEC.
[24] Testimony of parent.
[25] Testimony of PCS Psychologist.

15. The student struggled in the inclusion setting with non-disabled students, at the PCS; and although on medication, since returning to the PCS, there are times when he continues to exhibit problematic behavior.[26] The PCS is not an appropriate placement for this student; and the student requires a more restrictive therapeutic environment for learning.

16. is a full-time special education therapeutic day program, located in Springfield, Virginia. The school has a total of 104 students. The school provides educational and emotional support for students between the ages of 5-21; with disabilities including learning disabled, emotionally disturbed, multiple disabilities, speech and language impaired, mental retardation, and traumatic brain injury.[27]

The school offers a low student to teacher ratio, individual and group counseling, speech and language and occupational therapy. Each student attending the school is placed on a behavioral intervention plan. The school has seven (7) full-time behavior counselors, eight (8) clinical Psychologists, Social Worker, and Art Therapists. The school offers options of a 3 to 1, 10 to 2, and 1on 1, student teacher ratio, depending on the needs of the student.[28]

The special education teachers are certified in each content area and have a certificate in special education. A therapeutic school is dictated by the level of behavior support available for student, and at counselors and therapists are available at all times to support the students; and as needed a student's BIP will be adjusted to address behavioral changes. In addition, a Psychologist is available at all times for medication reviews. During observation of a couple of D.C. Public School special education programs, school therapists were not available for the students full-time; and the student may have a full-time special education program, however, participated in electives with general education students, and transition between classes also allowed for interaction with non-disabled students.[29]

The parent and student met with staff, discussed the program, and toured the school, during the week of August 13, 2010. The student participated in a class at the school, and was provided a behavior sheet. The school has a system for managing problematic behavior, and daily monitors and addresses a student's attendance. The student will be placed in the High School, in a grade class with other students with similar academic functioning.[30]

V. 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:

1. The burden of proof is properly placed on the Petitioner, the party seeking relief in this matter.[31] Petitioner must prove the allegations in the due process complaint, by a preponderance of the evidence.[32]

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[26] Testimony of PCS SEC.
[27] Testimony of Assistant Program Director.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Shaffer v. Weast*, 546 U.S. 49, 56-057 (2005) and 5 D.C. M.R. §3030.3.
[32] 20 U.S.C. §14115(i)(2)(c). See also *Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir.2005) (standard of review)

2. The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 et seq., reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), is the federal statute governing the education of students with disabilities; and the Federal regulations promulgated under the IDEA, are codified at 34 C.F.R. Part 300.

3. The IDEIA provides that States receiving federal assistance under the IDEA are obligated to: (1) provide a "free appropriate public education" to each disabled child within its boundaries, and (2) *ensure that such education is in the "least restrictive environment" possible.*

4. In the District of Columbia, the LEA must ensure that all children with disabilities, between the ages of three and twenty-one, have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.[33] This student is a child with disabilities entitled to receive special education and related services, pursuant to the IDEIA.

5. The District of Columbia is also governed by a Memorandum of Agreement under Title I of the Elementary and Secondary Education Act, established between the United States Department of Education and the District of Columbia Office of the Statement Superintendent of Education. This agreement is reflected in a consent decree, referred to as the Blackman/Jones Consent Decree.

   The Consent Decree consists of two subclasses. The first subclass referred to as the "Blackman class" refers to that part of the class addressing a public agency's failure to timely conduct due process hearings; and the "Jones" subclass refers to that portion of the class addressing the public agency's failure to timely implement Hearing Officer Determinations and Settlement Agreements. The "Jones" portion of the consent decree applies in this matter.

   The Blackman/Jones Consent Decree requires full and timely implementation of Hearing Officer Determinations; and agreements concerning a child's identification, evaluation, educational placement, or provision of a FAPE; which is significant in ensuring that the student receives the services he/she is entitled to receive under the IDEA; and any delay in full and timely implementation of a HOD compromises that entitlement, and harms the student.

   In fact, the Blackman/Jones Consent Decree creates a ***rebuttable presumption of harm to the student***; when there is an untimely implementation of a HOD, as in this instance. The burden is then placed upon the Respondent to present evidence rebutting the presumption of harm to the student. The parent is not required to present evidence at the hearing, that the student has been harmed, until after Respondent introduces evidence at the hearing to rebut the presumption of harm to the student. In such case, the Respondent may then present evidence, at the same hearing, to defend against the claim of harm."

   In establishing a rebuttable presumption of harm to the student, as a result of any delay or failure to timely implement an HOD, the courts not only consider the period of time associated with the delay or failure to timely implement the HOD, however, also consider the total amount of time involved since the initial violation; and the services the student is entitled to receive under the IDEA, however failed to receive during this period.

[33] 20 U.S.C. §1400(d)(1)(A) and §1412(a)(1).

According to paragraph 78 of the Blackman/Jones Consent Decree, in order to rebut the presumption of harm; at the hearing, the PCS has the ***burden of proving*** one of the following situations:

(1) The PCS already provided or agreed to provide compensatory education to the class member for Blackman/Jones delays;
(2) The issue of compensatory education has already been determined by a Hearing Officer and the Hearing Officer has either ordered compensatory education or has determined that the child is not entitled to compensatory education for Blackman/Jones delays;
(3) the class member has been found ineligible for special education services;
(4) the student graduated with a regular diploma;
(5) the student no longer is a resident of the District of Columbia;
(6) the student graduated with a certificate of IEP completion;
(7) the student has been in general education on a full-time basis for at least one academic year because the student met his/her IEP goals;
(8) the student has been in a non-public general education school for at least three consecutive grading periods or (27) weeks, whichever is greater; or
(9) the sole unimplemented HOD or SA provision pertained to reimbursement for services the parent obtained privately.

Paragraph 78 of the Consent Decree also provides that ***"if the defendants introduce evidence at a hearing to rebut the presumption, the student shall have the opportunity, at the same hearing, to present evidence to show that he/she has been harmed.***

VI. DECISION

It is the decision of this Hearing Officer that Petitioner established by a preponderance of the evidence that Respondent failed to comply with the Hearing Officers' July 3, 2010 decision.

On July 12, 2010, within ten (10) days from the date of the July 3, 2010 Hearing Officers' Decision (HOD), Respondent convened a change in placement meeting with a Change in Placement Coordinator, from the OSSE to discuss the student's placement, however, the PCS failed to comply with paragraph 1 of this decision by ensuring that the team identified an interim alternative placement for the student, in a special education program for emotionally disturbed (ED), attention deficit hyperactivity disorder (ADHD), and learning disabled(LD) students, in a therapeutic environment; and issue to parent a Prior Notice of Placement for the interim placement identified by the team; within ten (10) calendar days from the date of the HOD, as ordered by the Hearing Officer on July 3, 2010.[34]

The PCS also failed to ensure that, within ten (10) days from the July 3, 2010 HOD, it convened a placement meeting to include, among others, a *placement specialist* to discuss request for a meeting to discuss the students' placement, and the provision of a FAPE to the student, as decided and ordered by this Hearing Officer in her July 3, 2010 decision; *placement options; and failed to identify an interim alternative placement for the student, in a special education program for ED, ADHD, and LD students, in a therapeutic environment; and issue a PNOP to the interim placement identified by the team,* as directed by the Hearing Officer in her July 3, 2010 decision and order.

[34] Testimony of Education Advocate and Petitioner's Exhibit 6.

Placement options were not presented or discussed with the parent at the July 12, 2010 placement meeting, instead the OSSE representative advised the parent that the PCS was adequate if the student received counseling services, and the SEC advised the parent that the PCS could provide the student a continuum of services; suggesting that the PCS was inclined to allow the student to remain at the school, and not identify an interim alternative placement as ordered by this Hearing Officer.

Additionally, although the July 3, 2010 HOD ordered the PCS to identify and determine an interim placement for the student within ten (10) days of its decision, at the July 12, 2010 placement meeting, the PCS requested that the parent identify alternative placements for the student, indicating that the team would reconvene to discuss placement options. The PCS failed to reconvene a meeting with the parent within the ten (10) day timeline, to discuss placement options for the student.[35]

The PCS admittedly disregarded the Hearing Officers' July 3, 2010 decision that the PCS was not an appropriate placement for the student, and order that the school identify and issue a PNOP to an interim alternative placement for the student, in a therapeutic environment; and instead, decided to adopt the *recommendation* of the OSSE that a change in placement into a more restrictive environment was not warranted for the student, at that time; that with the provision of counseling services to the student's IEP, the student's placement at the school would be adequate; and the PCS decided to maintain the student's placement at the PCS.[36]

Additionally, a PNOP for an interim alternative placement was not issued until September 10, 2010, more than two (2) months after issuance of the July 3, 2010 HOD; and after the September 10, 2010 prehearing conference, wherein Respondent's Attorney agreed that the PCS would issue a PNOP to to resolve the issue in the complaint; and the Hearing Officer subsequently reduced said agreement to an Order. However, instead of issuing a PNOP to as agreed by Respondent's Attorney, and ordered by this Hearing Officer, the SEC at the PCS unilaterally issued a PNOP to which was the placement proposed by the SEC to the parent prior to the July 12, 2010 placement meeting, and subsequently rejected by Petitioner's Attorney at the September 10, 2010 prehearing conference, because it failed offer the student the therapeutic environment he requires.

Prior to issuance of the PNOP, the SEC independently identified and considered three (3) alternative interim placements for the student, specifically,
School, and located in Laurel, Maryland; and on September 10, 2010, issued a PNOP to without reconvening a follow-up meeting with the parent to discuss placement options proposed by the parent, as well as, the PCS, for the 2010/2011 school year. The SEC also failed to carefully consider input from the SPED/Individual Resource Specialist who appeared at the July 12, 2010 placement meeting to be most familiar with the student and his educational needs, was the most concerned regarding the student's continued placement at the PCS; and recommendation that the student requires a more restrictive setting in a therapeutic environment. [37]

[35] Respondent's Exhibit 7, Petitioner's Exhibit 6, and Testimony of the Education Advocate and parent.
[36] Respondent's Exhibit 7.
[37] *Id.*

The SEC recommended primarily because the school offered a plan for transitioning the student back into the mainstream, which the other schools failed to provide; although it also offered a therapeutic environment.[38] Although the SEC testified that can offer the student a therapeutic environment, and can meet the student's educational needs, Respondent presented no reliable witness testimony or documentary evidence in support of these assertions. Whether the PCS can provide the student a continuum of services as represented by the SEC, is irrelevant, because this Hearing Officer determined in the July 3, 2010 HOD that the school is not an appropriate placement for the student.

Assuming arguendo, the PCS issued the PNOP to within ten (10) days of the July 3, 2010 HOD, and is an appropriate interim alternative placement for the student, Respondent failed to present testimony of individuals having knowledge of the educational program at its ability to implement the student's IEP; provide the student the therapeutic environment he requires; or the schools' ability to meet the student's academic, developmental, and functional needs, particularly the student's social/emotional needs. There is also no evidence that the student can receive educational benefit by attending the school; all of which are critical in the Hearing Officer's determination regarding an appropriate interim placement for the student. For these reasons, the Hearing Officer must find that there is insufficient evidence regarding as an appropriate interim placement for the student. For the reasons represented herein, the PCS failed to comply with paragraph 1 of the July 3, 2010 HOD.

It is the Hearing Officers' decision that the PCS also failed to comply with paragraph 2 of the July 2, 2010 Order, which provides that the student's tuition and transportation at the interim and permanent placements shall be the responsibility of the PCS should the student remain a student at its school, that is, should OSSE decide not to intervene and assume responsibility for the provision of a FAPE to the student. On July 12, 2010, the OSSE decided that the LEA could meet the educational needs of the student, and that it would not intervene and assume responsibility for the provision of a FAPE to the student;[39] therefore, said responsibility remained with the PCS. As a result of the PCS' failure to identify an appropriate interim alternative placement for the student, in a therapeutic environment, or issue a PNOP, it failed to comply with paragraphs 2, 3, and 5 of the Order provision of the July 3, 2010 HOD.

It is the Hearing Officers' Decision that the PCS also failed to comply with paragraph 4 of the July 3, 2010 HOD; by failing to issue to the parent an independent educational evaluation letter authorizing funding of the independent Functional Behavioral Assessment (FBA) and Psychiatric Evaluation ordered by this Hearing Officer. The SEC testified that student has a FBA, however, there is no evidence to this effect; and the Hearing Officer ordered the PCS to fund the independent evaluations; which it failed to comply.

It is the Hearing Officers' Decision that the PCS also failed to comply with paragraph 6 of the July 3, 2010 HOD; by failing to schedule all meetings through the parent's Attorney, in writing, via facsimile. The SEC provided parent a letter of invitation for a meeting to discuss reentry of the student at the PCS, and the student's IEP; and faxed a copy to Petitioner's Attorney, however, there is no evidence supporting the witness testimony.[40] The PCS failed to schedule all meetings through parent's Attorney, and thus, failed to comply with paragraph 6 of the July 3, 2010 HOD.

[38] Testimony of SEC at PCS.
[39] Petitioner's Exhibit 11.
[40] Testimony of PCS SEC.

It is also the Hearing Officer's decision that the PCS also failed to introduce evidence that any of the criteria set forth in paragraph 78 of the Consent Decree applies in this matter, which is necessary to rebut the presumption of harm to the student. Therefore, the parent was not required to present evidence that the student has been harmed, and the presumption of harm to the student remains with the Respondent.

It is the Hearing Officers' Decision that there is sufficient evidence that is an appropriate interim alternative placement for the student, because it can implement the student's April 9, 2010 IEP, provide the student access to the general education curriculum, and educational benefit. The school can provide the student a full-time special education program for emotionally disturbed, ADHD, and learning disabled students; in the therapeutic environment which he requires. Of particular import is the fact that will address the student's academic and social/emotional needs, utilizing the therapeutic approach, which he requires.[41]

Finally, it is the Hearing Officer's Decision that the PCS' failure to comply with the July 3, 2010 HOD represents a procedural and substantive violation of the and a continuing denial of a FAPE to the student; entitling the student to compensatory education services from July 3, 2010, the date of the prior HOD, through the date of compliance with this decision and order.

VII. ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby:

1. **ORDERED**, that within five (5) school days from the date of issuance of this decision, the PCS shall issue to the parent a Prior Notice of Placement, authorizing the student to attend for the 2010/2011 school years; and it is further

2. **ORDERED**, that the PCS shall fund the students' tuition and transportation to attend and fund extended school year (ESY) services, for the student during the 2010/2011 school years; and it is further

3. **ORDERED**, that within five (5) school days from the date of this decision the PCS shall issue to the parent an individual education evaluation (IEE) letter authorizing the parent to obtain an independent Functional Behavioral Assessment, and Psychiatric Evaluation for the student, at the expense of the PCS; and it is further

4. **ORDERED**, that within thirty (30) days of the student's enrollment at the Special Education Coordinator shall convene an IEP team meeting with the PCS, to:

review all current evaluations; review and revise the student's IEP, consistent with all evaluation findings and recommendations; develop a Behavioral Intervention Plan (BIP), based on the findings and recommendations in the independent Functional Behavioral- Assessment; revise the IEP to include individual and family counseling; identify an appropriate permanent placement for the student, in a therapeutic environment for emotionally disturbed, ADHD, and learning disabled students; and issue a Prior Notice of Placement to the parent, authorizing tuition funding and transportation, within five (5) school days, if the placement is a public school, and thirty (30) calendar days, if the placement is a non-public or private school; and it is further;

[41] Testimony of Education Advocate.

6. **ORDERED**, that shall schedule all meetings through the parent's counsel, Attorney Pamela Halpern, in writing, via facsimile at (202) 742-2000; and it is further

7. **ORDERED**, that in the event of the PCS' failure to comply with the terms of this Decision and Order, Petitioner's Counsel will contact the Special Education Coordinator at the student's placement; and the DCPS Office of Mediation & Compliance to attempt to obtain compliance prior to filing a complaint, alleging DCPS' failure to comply with this decision and order; and it is further

8. **ORDERED**, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. DCPS shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

VIII. 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 USC §1415(i).

Date: *October 5, 2010*

Ramona M. Justice
Attorney Ramona M. Justice
Hearing Officer