DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a year old female, who attended grade at a DCPS Charter School during SY 2010/11.

On April 19, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS (1) failed to conduct triennial evaluations for Student; (2) failed to provide and/or implement a revised IEP that provided not less than 23 hours of specialized instruction in an out of general education, self-contained setting, with 2 hours of speech therapy, revised goals, ESY, 30 minutes of direct occupational therapy per week, and 1 hour of counseling and transition services; (3) failed to reconvene to address placement/location concerns for Student; and (4) failed to provide Student with a suitable placement to meet her individualized needs.

On May 2, 2011, DCPS filed its Response to the Complaint. In its Response, DCPS asserted that it had obtained consent for a new psychological assessment on March 24, 2011, and the assessment was underway; that Student's new IEP was being implemented and the specialized instruction was being provided in an inclusion setting; and the team will reconvene when the psychological is complete to discuss placement and location of services.

On May 11, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Petitioner

clarified that the triennial evaluation at issue was a psychological evaluation. The parties represented that Student's new IEP had been created subsequent to Student's recent IEP meeting and includes 23 hours of specialized instruction out of general education, a self-contained setting, 2 hours of speech therapy, revised goals, ESY, 1 hour per week of counseling, transition services, and 30 minutes per week of OT services that had been inadvertently left off but DCPS agreed to add. Moreover, the hearing officer determined to merge the last two claims concerning location of services into one claim. The hearing officer issued the Prehearing Order on May 16, 2011.

By their respective disclosure letters dated June 15, 2011, Petitioner disclosed twenty-three documents (Petitioner's Exhibits 1 – 23), and DCPS disclosed DCPS-1 through DCPS-9. Also, on June 20, 2011, Petitioner filed a supplemental disclosure containing an additional document (Petitioner's Exhibit 24).

The hearing officer convened the due process hearing on June 22, 2011.[1] DCPS's disclosed documents and Petitioner's Exhibits 1 - 23 were admitted into the record without objection. DCPS objected to Petitioner's Exhibit 24, a recent evaluation, on the ground that DCPS had not had an opportunity to review it in a team meeting; Petitioner responded that the evaluation should be considered in determining compensatory education but not with respect to level of services. The hearing officer admitted the exhibit over DCPS's objection as a relevant evaluation.[2]

As preliminary matters, Petitioner confirmed that the evaluation admitted as Petitioner's Exhibit 24 is the triennial evaluation at issue in claim #1 but Petitioner intended to pursue its claim for untimeliness of the evaluation, DCPS advised that it had identified separate DCPS high schools for Student to attend for ESY Summer 2011 and for SY 2011/12 and issued a Notice of Placement on June 14, and Petitioner advised that Parent had chosen to request a specified private placement as compensatory education instead of filing a plan with 5-day disclosures.

Thereafter, the hearing officer received opening statements, testimonial evidence and closing statements prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS deny Student a FAPE by failing to timely conduct a triennial psychological evaluation of Student?

[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.
[2] *See* 34 C.F.R. § 300.512(b)(2).

2. Did DCPS fail to implement Student's new full-time IEP created subsequent to the March 18, 2011 MDT meeting?

3. Did DCPS deny Student a FAPE by failing to reconvene the MDT to address location concerns and failing to provide a suitable placement to meet Student's individualized needs?

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. Student is a -year old female, who attended grade at a DCPS Charter School for SY 2010/11. Student's IEP for the majority of SY 2010/11 was a June 3, 2010 IEP that identified Student's primary disability as Specific Learning Disability ("SLD") and required Student to receive the following: 20 hours per week of specialized instruction outside general education, 30 minutes per week of speech-language services in general education, 1 hour per week of behavioral support services outside general education, and 30 minutes per month of occupational therapy consultation services.[3]

2. Grandmother voluntarily placed Student at the DCPS Charter School for SY 2010/11 because Student was accustomed to a smaller setting, and Grandmother knew from experience with another grandchild of the small student-to-teacher ratio at the Charter School. Moreover, the SEC at the Charter School stated that she would take Student to the SEC's room from time to time to complete work. However, the enrollment at the Charter School tripled for SY 2010/11, with the result that the student-to-teacher ratio is no longer low. Student was very distracted in the larger classes of approximately 16 children. The school was supposed to get a new building but never did.

   Grandmother was speaking to the SEC 3-4 times per week during SY 2010/11, and all the teachers knew that Grandmother was available. However, Grandmother could see that Student was shutting down. When Grandmother told the SEC that Student needed a different location, the SEC agreed. Grandmother works closely with Student on homework, but Student cannot remember what she worked on when she gets to school the next day.[4]

3. On February 13, 2011, the Charter School issued a Progress Report for Student. The Progress Report indicated that Student was failing her English 1, P.E. and Environmental Science classes. The teacher comments for those classes revealed that, *inter alia*, Student lacked initiative, did not participate, and did not complete class assignments/homework. Student was passing the remainder of her classes with grades of primarily C, and the teacher for one of these classes indicated that Student was a pleasure to have in the class.[5]

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[3]Testimony of Grandmother; Petitioner's Exhibit 7.
[4]Testimony of Grandmother.
[5]Petitioner's Exhibit 13.

4. On March 18, 2011, the Charter School convened an IEP/MDT meeting for Student. DCPS did not send a representative to the meeting. Student's science teacher reported that Student is very easily distracted, was once classified as Mentally Retarded ("MR"), continues to have a low reading level at the 6th grade level, and has memory impairment. Student's speech therapist reported that Student learns by hearing and with pictures, needs constant reminders, is very easily distracted, and was unable to maintain focus in class with a dedicated aide. The speech therapist recommended an increase in Student's hours of speech services to 2 hours per week. After the advocate noted that Student had been in a self-contained class at her previous school, the Charter School stated that the interventions it put in place for Student had not worked due to Student's academic deficits. The occupational therapist stated that Student is very distractible, her handwriting is not legible, and she could benefit from an increase in OT services to the level of 30 minutes of direct services per week. The school psychologist stated that Student is very easily distractible, is overwhelmed and frustrated by the environment, works best 1-on-1, and may not be cognitively ready for a general education setting. At the request of the advocate, the team agreed to increase Student's IEP to a full-time IEP. The advocate also requested a psychoeducational reevaluation.[6]

5. Student's current IEP is dated March 18, 2011, it identifies Student's primary disability as SLD, and it requires Student to receive the following: 23.5 hours per week of specialized instruction outside general education, 2 hours per week of speech-language services outside of general education,[7] 1 hour per week of behavioral support services outside general education, and 30 minutes per week of occupational therapy outside general education. The IEP provides for Student to receive accommodations in the classroom and for statewide assessments, transportation, and ESY. The IEP also includes a Post-Secondary Transition Plan.[8]

6. On March 24, 2011, Grandparent provided consent for the requested psychoeducational reevaluation.[9]

7. On March 25, 2011, the Charter School issued another Progress Report, which revealed that Student's 3rd quarter grades were A-, B+, B, C+, two C-s and an F in English 1. The teacher comments on the Progress Report indicated that Student needs more student and lacks initiative, but one teacher stated that Student had good participation and another repeated the previous comment that Student is a pleasure to have in the class. [10]

8. On April 19, 2011, Petitioner filed the instant Complaint.

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[6]Petitioner's Exhibits 2 and 3; DCPS-1.
[7]The IEP states that the speech services will be provided in the general education setting, but both parties acknowledged at the due process hearing that said services are to be provided outside general education.
[8]Petitioner's Exhibit 4; DCPS-1.
[9]Petitioner's Exhibit 5.
[10]DCPS-3.

9. On May 5, 2011, DCPS sent Grandparent, via counsel, a letter identifying the DCPS high school Student had been assigned to attend for ESY from July 5 – 29, 2011, and indicating that Student was eligible for transportation. Attached to the letter was a form Grandmother was to sign and return to DCPS.[11]

10. Grandmother spoke to the Special Education Coordinator at the assigned DCPS school for ESY, and the SEC indicated that the school is an application school that requires an entrance exam. Based on that conversation, Grandmother concluded that the school is not appropriate for Student for ESY.[12]

11. On May 11, 2011, DCPS issued an IEE letter authorizing Grandparent to obtain an independent psychological evaluation, which includes clinical, educational and social components, for Student.[13]

12. On May 12, 2011, the Charter School issued a Letter of Invitation to a Meeting on May 16, 2011 to discuss placement/location assignment.[14]

13. On May 16, 2011, the Charter School convened an MDT meeting for Student, but neither Grandparent nor her representative(s) attended. The Meeting Notes indicate that DCPS's LEA representative and the SEC from a specified DCPS high school had reviewed Student's files, and DCPS had determined to issue a Prior Written Notice to the specified DCPS high school. The Notes further indicate that Student would receive the following at the DCPS high school: 2-3 staff members assigned to each class period; students rotate to classes, remedial math programming, assigned behavior specialist, academic achievement hub, physical and mental health hub, college and career success hub, workforce development hub, out-of-school hub, and family support and engagement hub. The Notes further indicate that parent refused on May 12, 2011 to submit the document required for ESY and that Parent refused to have OT services changed from consultation to direct services.[15]

14. On May 16, 2011, DCPS issued a Prior Written Notice proposing/offering the specified DCPS high school as the out of general education setting for Student.[16]

15. Grandmother spoke to the Special Education Coordinator at the specified DCPS high school and was told that there is no LD program and there are approximately 1200 to 1300 students at the school. Grandmother concluded that the school is not appropriate for Student, because Grandmother feels that Student needs a small setting that has an LD program.[17]

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[11]Petitioner's Exhibit 20.
[12]Testimony of Grandmother.
[13]DCPS-2.
[14]DCPS-4.
[15]DCPS-5.
[16]DCPS-6.
[17]Testimony of Grandmother.

16. The Special Education Coordinator at the specified DCPS high school maintains that the school can implement Student's IEP. The school's staff would look at Student's transcript and IEP and place her in the appropriate Carnegie unit earning courses and make sure she gets all the services and hours listed on her IEP.

    Enrollment at the high school for the coming school year is not yet complete. During SY 2010/11, there were 16 children in an out of general education LD class with 2 teachers and 1 aide. That was a 9th grade class, and all of the students in the class were out-of-general education LD. The students rotated from class to class with a special education teacher who went to 3 of 4 classes with the students. These 3 classes were co-taught by a core content teacher and a special education teacher. The 4th class, such as remedial English or math, was taught by a special education teacher.

    For SY 2011/12, the LD program at the high school will consist of two LD classes – one class for 9th graders and one class for 10th graders. The schedule will also change so that the students attend all 8 of their classes on Monday, and then go to half of the classes on Tuesday and Thursday, and the other half of the classes on Wednesday and Friday. This change will be made so that the students can take English for the entire school year, instead of just for one semester.

    The high school has social workers and speech providers. Services providers such as OT, vision, and PT providers are contracted in by DCPS. The school is projected to have approximately 1,000 students next year, with 350 in special education. To make the environment smaller, the school separated the students into the following academies: 9th grade academy, 10th grade academy, and upper class which consists of 11th and 12th grade students. A transition academy will also be added for SY 2011/12.

    The LD program is located on the same floor as the 9th grade academy. The students travel to all out of general education classes, although they interact with general education peers in the hallway. The students will have out-of-general education electives, or if necessary, they can take electives with all non-disabled children.[18]

17. On June 3, 2011, the Charter School issued a Letter of Invitation to a Meeting on June 14, 2011 to discuss placement/location assignment.[19]

18. On June 10, 2011, Petitioner's advocate sent an email to the Charter School SEC indicating a lack of availability to participate in a meeting on June 14th and asking for information regarding the proposed school site(s) and additional proposed dates for the MDT meeting.[20]

19. On June 10, 2011, the Charter School issued a Letter of Invitation to a Meeting to discuss placement/location assignment. The Charter School proposed June 22, June 23 and June 24, 2011 as possible meeting dates and indicated that the meeting would take place on June 24, 2011 at 9:000 if no confirmation was received.[21]

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[18]Testimony of SEC from assigned DCPS high school.
[19]Petitioner's Exhibit 6; DCPS-7.
[20]Petitioner's Exhibit 1.
[21]DCPS-8.

20. On June 14, 2011, DCPS issued another Prior Written Notice proposing the specified DCPS high school for Student for SY 2011/12.[22]

21. On June 15, 2011, an independent evaluator issued Student's comprehensive psychological evaluation report. Student's performance on the Wechsler Intelligence Tests for Children-Fourth Edition resulted in a Full Scale IQ score of 78, which is in the Borderline range; scores in the Borderline range on the Verbal Comprehension Index (score = 75) and the Working Memory Index (score = 77); a score in the Below Average range on the Perceptual Reasoning Index (score = 84); and a score in the Average range on the Processing Speed Index (score = 97).

    Student's performance on the Wechsler Individual Achievement Test-Third Edition resulted in scores in the Below Average range in Mathematics (score = 71) and Math Fluency (score = 72); and scores in the Low range in Oral Language (score = 66), Basic Reading (score = 60), and Written Expression (score = 58).

    Based on the social-emotional testing administered, the evaluator concluded that Student has socio-emotional difficulties such as internalizing and externalizing behaviors, and functional communication and adaptive difficulties. The evaluator noted that Student has a poor self-concept that reinforces feelings of anxiety, self-doubt, and nervousness. Moreover, Student's inability to properly navigate interpersonal relationships creates feelings of dissatisfaction with herself and excessive defensiveness towards others, which causes her to vacillate between being inhibited/shy and acting out. The evaluator noted Student's longstanding feelings of sadness and depression, which result in large part from her abandonment by her parents. Finally, the evaluator noted that Student's pervasive learning difficulties have resulted in coping strategies such as devising means not to complete tasks she finds difficult, and her inattention affects her learning and is both a compensatory strategy as well as secondary to her depression.

    The evaluator ultimately diagnosed Student with, *inter alia*, Dysthymic Disorder and Learning Disorder Not Otherwise Specified. Among other things, the evaluator recommended specialized instruction on a full-time basis, small classrooms with a low student-to-teacher ratio, and continued receipt of psychological counseling for Student.[23]

22. Student's June 15, 2011 comprehensive psychological evaluation indicates that, in reviewing Student's previous evaluations, the evaluator reviewed psychological and neuropsychological evaluations conducted on September 10, 2009 by an employee of DCPS's Office of Special Education.[24]

23. As Petitioner did not provide DCPS with a copy of Student's June 15, 2011 comprehensive psychological evaluation report until June 20, 2011, which was after the 5-day disclosure date, DCPS has not yet had an opportunity to convene an MDT to review the evaluation report.

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[22]DCPS-9; Petitioner's Exhibit 23.
[23]Petitioner's Exhibit 24.
[24]Petitioner's Exhibit 24.

24. Tuition at the full-time special education school that Petitioner is requesting in this action as a private placement for Student is annually, not including related services.[25]

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. Triennial Psychological Evaluation

IDEA requires an LEA to reevaluate a disabled child at least once every three years. 34 C.F.R. § 300.303(b)(2). In this case, Petitioner argues that failed to timely conduct Student's triennial psychological evaluation. However, the evidence in this case demonstrates that DCPS conducted a psychological evaluation of Student on September 10, 2009, less than two years prior to Student's June 15, 2011 psychological. As a result, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this claim.

2. Alleged Failure to Implement New Full-time IEP

The free appropriate public education ("FAPE") required by IDEA is tailored to the unique needs of each child with a disability by means of an IEP. *See Board of Education of the Hendrick Hudson Central School District, Westchester County, et al., v. Rowley et al.,* 458 U.S. 176, 182 (1982). In the instant case, Petitioner alleges that DCPS denied Student a FAPE by failing to implement Student's March 18, 2011 after it was developed. The hearing officer notes that no direct evidence regarding implementation or lack of implementation of the IEP at the Charter School subsequent to March 18th was presented at the hearing. In any event, however, Petitioner acknowledges that the Charter School could not and was not expected to implement the revised IEP. Instead, it was anticipated that DCPS would assign a new location of services for implementation of the IEP.

Petitioner complains that DCPS did not assign a new location of services until after the Complaint was filed. However, the Complaint was filed on April 19, 2011, exactly 32 days after Student's March 18, 2011 MDT meeting. Moreover, the evidence in this case demonstrates that on May 5, 2011, DCPS issued a letter identifying the DCPS high school that would provide services to Student during ESY beginning July 5, 2011; and on May 16, 2011, DCPS issued a Prior Written Notice to a DCPS high school that DCPS asserted could implement Student's new IEP. The hearing officer also notes that SY 2010/11 was nearing its end even as the new IEP was developed in March, and the hearing officer questions the appropriateness of attempting to move Student to a new school for the last few months of the school year instead of allowing her to finish out the year at the Charter School, where she was earning passing grades in most of her classes. Taking all of the circumstances and evidence into consideration, the hearing officer concludes that DCPS made arrangements to begin implementing the IEP within a reasonable time after its development. Hence, Petitioner has failed to meet its burden of proving that DCPS denied Student a FAPE by failing to timely begin implementation of the March 18, 2011 IEP.

[25]Testimony of Associate Head of School at private school.

3. Alleged Failure to Reconvene the MDT to Address Placement and to Provide a Suitable Placement

Under IDEIA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120.

In this case, Petitioner alleged in the Complaint that DCPS had failed to reconvene the MDT to address placement, and failed to provide a suitable placement to meet Student's needs. However, the Complaint was filed a mere 32 days after Student's March 18, 2011 MDT meeting, and shortly thereafter, beginning on May 12, 2001, the DCPS Charter School began sending Grandparent Letters of Invitation to a meeting to discuss location of services. Thereafter, on May 16, 2011, DCPS issued a Prior Written Notice to a DCPS high school that DCPS asserted could implement Student's new IEP.

Hence, at the due process hearing, Petitioner shifted its argument to assert that the DCPS high school Student was assigned to attend could not implement Student's IEP because it could not provide Student with a full-time out of general education setting. On the other hand, DCPS argued that the assigned school can implement the IEP, which provides only that Student's specialized instruction and related services are to be provided outside of general education and does not provide that Student cannot have any interaction at all with her non-disabled peers.

Upon review of the evidence provided regarding the assigned DCPS school, the hearing officer concludes that the assigned DCPS high school can implement Student's IEP through its full-time LD program as described at the hearing. Hence, Petitioner has failed to meet its burden of proof on this claim, with the result that it would be inappropriate to award Petitioner the requested private placement.

ORDER

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

1. All claims and requests for relief in Petitioner's April 19, 2011 Complaint are **DENIED AND DISMISSED WITH PREJUDICE**.

NOTICE OF RIGHT TO APPEAL

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

Date: 7/1/2011

/s/ *Kimm Massey*
Kimm Massey, Esq.
Hearing Officer