DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

RECEIVED
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through

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Date Issued: June 25, 2010

Hearing Officer: Kimm Massey, Esq.

Case No:

Hearing Date: June 3 and 9, 2010
Rooms: 4A and 6A, respectively

HEARING OFFICER DETERMINATION

BACKGROUND

Student is a year-old female, who has been classified as having multiple disabilities.

On April 7, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS denied Student a FAPE by failing to provide an appropriate placement for the past two years, failing to determine an appropriate placement during Student's March 5, 2010 IEP meeting 9and failing to include Parent in the placement decision to be made), failing to develop appropriate IEPs for Student in November 2008 and November 2009, failing to implement Student's March 5, 2010 IEP as written, and failing to provide Student with appropriate special education services and all of her related services. As relief for these alleged denials of FAPE, Petitioner requested funding for a placement of Parent's choice, such as Building for the or a meeting within 30 days to review Student's progress, appropriate educational, related, and special education services, and compensatory education services.

On April 15, 2010, DCPS filed it Response to the Complaint, asserting therein (1) that the 2008 and 2009 IEPs were appropriate at the time they were developed, which is the standard to be applied, (2) that IEPs must be based on the student's needs, not on the disability classification, and Student's IEP were reasonably calculated to provide educational benefit, (3) that Student's personal and family problems and absenteeism, not the availability or provision of special

education and related services, have severely impacted her academic progress, (4) that Student's current and previous DCPS schools were schools of choice chosen by Parent, which implemented Student's IEPs to the extent she made herself available and were appropriate least restrictive environments for Student; and that any claim concerning the determination of Student's next placement was premature.

On May 17, 2010, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. During the conference, Petitioner clarified that its claim concerning appropriate services relates to DCPS's alleged failure to provide counseling since August 2009 and transportation since November 2009. Moreover, during the discussion of "placement" versus "location of services," it was determined that Petitioner would file a brief on its position by close of business on Friday, May 21, 2010, and DCPS would file a responsive brief by close of business on Tuesday, May 26, 2010. Finally, it was agreed that, although the 30-day resolution period previously had been shortened due to the parties' failure to agree at the resolution session, Petitioner would file a written waiver of its right to a shorter resolution period to facilitate the scheduling of a second due process hearing within the original 75-day timeline. The hearing officer issued the Prehearing Order on May 22, 2010, Petitioner submitted its written waiver on May 24, 2010, and the parties timely submitted their briefs on the issue of placement.

By their respective cover letters dated May 26, 2010, Petitioner disclosed 21 documents (Petitioner's Exhibits 1 through 21), and DCPS disclosed 34 documents (DCPS-1 through DCPS-34).

On June 3, 2010, the hearing officer convened the due process hearing for this case.[1] Both parties' disclosed documents were admitted into the record without objection. Thereafter, opening statements were received, then Petitioner presented its testimonial evidence and rested its case. DCPS was also able to present the testimony of its first witness prior to the conclusion of the first scheduled hearing.

The hearing officer reconvened the due process hearing on June 9, 2010, at which time DCPS presented the testimony of its remaining witnesses. Thereafter, pursuant to the parties' request, it was agreed that Petitioner would submit its written closing statement by close of business on Monday, June 14, and DCPS would submit its written closing statement by close of business on Tuesday, June 15, with the instant HOD to be issued by June 25. The parties submitted a joint motion for continuance on June 9, and the hearing officer issued an Interim Order on Continuance Motion on the same day, June 9. The parties subsequently submitted their written closing statements in accordance with the established schedule.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 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.").

[1] Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

ISSUES

The issues to be determined are as follows:

1. Did DCPS fail to provide an appropriate placement for Student during the 2008/09 and 2009/10 school years?

2. Did DCPS fail to make an appropriate placement decision for Student at her March 5, 2010 MDT meeting and fail to include Parent in the placement decision-making process?

3. Did DCPS fail to develop appropriate IEPs for Student In November 2008 and November 2009?

4. Did DCPS fail to implement Student's March 5, 2010 IEP?

5. Did DCPS fail to provide counseling from August 2009 forward and transportation from November 2009 forward?

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 is in the grade and taking some grade classes. She has a history of emotional difficulties. For example, at the beginning of 2008 Student was admitted to the after attempting/threatening Several months later, Student was admitted to for two days after experiencing a panic episode. Student has also for years had a troubled relationship with her mother and presently lives in a group home.[2]

2. On April 12, 2008, after Parent appeared *pro* se at an administrative due process hearing for Student, this hearing officer issued a Hearing Officer's Decision ("HOD"), which ordered DCPS to fund an independent FBA, an independent clinical evaluation, and an independent social history for Student, and to convene an MDT meeting within 15 days of receipt of the evaluation reports to, *inter alia*, discuss and determine an appropriate high school placement for Student for the 2008/09 school year ("SY").[3]

3. In August and September of 2008, Student received an independent neuropsychological evaluation, which resulted in the following "diagnostic impressions": learning disabilities in reading, written expression, and math; attention deficit hyperactivity

[2] Testimony of Student; DCPS-29; Petitioner's Exhibits 7, 13.
[3] DCPS-3.

disorder inattentive type; expressive and receptive language disorder; mood regulation disorder (with features of depression and anxiety); and sleep regulation disorder.[4]

4. At the start of the 2008/2009 school year, Student began attending a DCPS school of choice for students involved in the performing arts. Student majored in visual arts at the school. Normally, students gain admission to the school by auditioning and submitting letters of recommendation and the most recent report card. The school also conducts a family interview and a review of the student's IEP, if any. However, Student did not participate in the normal admission process. She gained admission during the summer of 2008 based on two of her drawings, even though her records had not been forwarded by her neighborhood school. Hence, when the performing arts school's special education coordinator ("SEC"), who is also a special education teacher, left school for the summer on June 18, 2008, she had never heard of Student. When the SEC returned to school in September 2008, Student was on her roster of students.[5]

5. Student initially did well academically at the performing arts school, but that changed when she began experiencing emotional issues due to problems she was having with her mother. Thereafter, it became hard for Student to maintain her academic progress because of frequent absences. Indeed, Student ultimately failed her classes at the school primarily due to absences that got progressively worse as the year went on.[6]

6. Very early on during Student's tenure at the performing arts school, the SEC suggested that Parent might want to consider whether the school was the correct one for Student. Indeed, at the very first parent/teacher conference at the start of the school year, the SEC suggested that Parent and Student's adult brother begin looking for another placement for Student and indicated that Student would not have been admitted to the school had all of her educational records been received before she was accepted.[7]

7. At the performing arts school, Student had a long school day, from 8:30 am to 5:00 pm, which included ten classes per day because of the dual arts and academic program. Student's math and English classes were her only special education classes. The math class was Algebra I and there were 3 students and a modified curriculum. However, Student also had a support math class and a supporting reading class. These were small classes designed solely for children who needed extra help. Still, overall, Student felt the work was difficult for her because she was not organized, she had many classes, and she experienced many events that got her off track mentally and physically, such as her two psychiatric hospitalizations. Then Student began going to school late and not going to school at all, which caused the work to pile up and left her feeling overwhelmed. The teachers attempted to give her extra help, but Student felt the work was too much for her. She felt she needed to be in school more to succeed but she was not attending consistently.[8]

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[4] Petitioner's Exhibit 7.
[5] Testimony of Parent; testimony of performing arts school SEC.
[6] Testimony of Parent; testimony of performing arts school's SEC.
[7] Testimony of SEC; testimony of brother.
[8] Testimony of Student; testimony of performing arts school's SEC.

8. On November 19, 2008, DCPS convened an IEP meeting for Student and developed an IEP that required Student to receive various accommodations, 8 hours per week of specialized instruction outside of general education, and 45 minutes per week of behavioral support services outside of general education. The narrative in the Least Restrictive Environment portion of the IEP states, *inter alia*, that "[w]hile the majority of the team felt like [the performing arts school] may be a challenge for [Student] given the long day, the commute, the number of classes, and the mostly inclusion model that is followed, it was also felt that [Student] is happy here, thriving socially, and receiving support from her general ed and special ed teachers. . . " Parent signed the IEP, and no one objected to the level of services to be provided to Student.[9]

9. Prior to the start of Student's November 2008 meeting, Parent's then counsel indicated that they would no longer represent Parent because she wanted Student to stay at the performing arts school against counsel's advice. Said counsel wanted to require DCPS to provide another placement for Student. But parent wanted Student to stay at the performing arts school because it was providing stability for Student and extensive support for Student and the family during a period of great emotional crises for Student, even though Parent ideally would have preferred a school that could meet all of Student's academic and emotional needs. According to Parent, Student remained at the performing arts school after she was released from PIW because that's what Parent needed for Student at the time in terms of support. Parent was exploring a residential school in Connecticut for Student, but then Student ran away due to issues between her and Parent.[10]

10. On November 14 and 18, 2008, DCPS conducted classroom observations of Student in connection with a functional behavior assessment ("FBA") it subsequently prepared on December 3, 2008 to address the following behaviors: defiance, immature talking, moodiness, late assignments, depression, losing material, disorganization, and making excuses.[11]

11. On December 3, 2008, Parent and the SEC from the performing arts school confirmed in a signed writing that Student's IEP team had agreed at Student's November 12, 2008 reevaluation meeting that Student's independent neuropsychological evaluation satisfied the requirements for the independent clinical evaluation and independent social history ordered by the April 12, 2008 HOD, and that Parent had agreed to allow the December 3, 2008 FBA conducted by DCPS to substitute for the independent FBA ordered in the HOD.[12]

12. The staff at the performing arts school went the extra mile to provide support to Student and her family. They called Parent often about Student. Indeed, the SEC, who was also Student's case manager, participated in 44 phone calls and in-person meetings with

[9] Petitioner's Exhibit 5; testimony of performing arts school SEC.
[10] Testimony of SEC; testimony of brother; testimony of Parent.
[11] Petitioner's Exhibit 6. DCPS-16.
[12] DCPS-11.

Parent throughout the school year. The SEC also spoke with Student's adult brother on various occasions, worked with the administration and other teachers, and made herself available before school and at lunch to help Student with missing work. The SEC would call Student's home to indicate that Student was absent or tardy and to indicate specific missing pages of work. Student's support team at the school also included her special education teacher from English, a shepherd from the school's shepherding program for first-year students, her grade-level counselor, and a social worker who was helping Student with her IEP goals.[13]

13. At the end of the 2008/2009 school year, Student was not invited to return to the performing arts school. The visual arts department did not want Student to return, and the administration had also looked at Student's grades and absences. Student's transcript reflects that she earned 10 Fs, 2 Ds and one C at the end of the SY 08/09. Toward the end of the school year, the SEC began telling Parent that the school might not be able to service Student. The staff began working with Parent to find another placement for Student. Hence, the SEC completed an application for Student for an out-of-state residential placement, as well as an application for Student's current DCPS school. Normally, Students attend their neighborhood school, a charter school, or some other school when they are not invited back to the performing arts school.[14]

14. Parent attempted to send Student to her neighborhood school at the start of the 2009/10 school year, but Student had a panic attack.[15]

15. Student subsequently began attending her current DCPS school when Parent enrolled/registered her there at or near the beginning of the 2009/10 school year, although the SEC does not have an application for Student. The school is an extremely rigorous college preparatory program for students in grades 6 though 12. The program is portfolio-based, so it's heavy on projects and group projects. Students are expected to perform with "additional scaffolding," which includes modifications such as small groups, co-teaching, and recorded tapes. The school utilizes SLCs – small learning communities, each with its own administrator and counselor. The 9th grade students are one SLC, and there are 5 other SLCs grouped by grade level(s).[16]

16. On November 5, 2009, DCPS conducted an annual review/revision of Student's IEP and once again developed an IEP that provided for Student to receive 8 hours per week of specialized instruction in a general education setting and 45 minutes per week of behavioral support services. Petitioner's counsel and Parent were both at the meeting and neither stated that Student needed more IEP hours. The team discussed Student's attendance, and it was determined that she would receive bus service. She had been receiving tokens up to that point. [17]

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[13] Testimony of Parent; testimony of performing arts school's SEC; *see* DCPS-4.
[14] Petitioner's Exhibit 8; testimony of performing arts school's SEC.
[15] Testimony of Parent.
[16] Testimony of currents school's SEC; testimony of special education coordinator.
[17] DCPS-17; Petitioner's Exhibit 4; testimony of special education teacher.

17. Initially Student's school bus did not come consistently, which affected her attendance. However, when the school bus began to show up consistently, Student's attendance did not improve.[18]

18. Student has not performed well academically at her current DCPS school. However, Student's teachers consistently note that her truancy affects her ability to succeed academically and that she has the ability to make academic progress and show gains if only she would consistently attend school. The main issue with Student is her attendance, which results in a lack of consistency in instruction, which affects her performance. Student would sometimes go to other parts of the school building or leave the school building altogether to avoid class. Student would sometimes also fall asleep in class. Student appeared to be emotionally stable at school, in that she got along with her peers and had good relations with her teachers. However, Student's case manager/special education teacher spoke with Parent approximately every other week about Student's progress.[19]

19. To address Student's "very poor" attendance, the school's staff held meetings, gave Student transportation, and talked with Student about the problem. On or about May 13, 2010, DCPS attempted to complete an FBA to address Student's excessive truancy and inability to remain awake in class. However, the FBA could not be completed because, although DCPS attempted to conduct classroom observations of Student's on four different occasions, it was unable to complete even one observation due to Student's repeated absences.[20]

20. In February 2010, Student's group home was closing, so she was moved to another group home. Although another transportation request had been submitted to DCPS in or about February, it took several weeks for Student to begin receiving transportation services at her new residence. Indeed, as of Student's March 5, 2010 IEP meeting, her transportation services had not resumed. However, by the end of the school year when transportation had resumed, Student often was not present in the morning at the group home and/or in the afternoon at school when it was time for the bus to pick her up.[21]

21. On March 5, 2010, DCPS reconvened Student's IEP meeting. The team reviewed Student's 2008 neuropsychological evaluation and revised her IEP to provide 27 hours per week of specialized instruction outside of general education, 60 minutes per month of behavioral support services outside of general education and ESY. The Meeting Notes indicate that the SEC recommended co-taught classes for Student for three periods and indicated that the change could be effected in a week. However, Petitioner's counsel requested a full-time IEP, and she and the advocate did not agree with not providing 27+ hours of IEP services outside of a general education setting. The SEC indicated that the current school could not implement an IEP for 27+ hours. Although the SEC indicated

[18] Testimony of special education teacher.
[19] Testimony of special education teacher; DCPS-24.
[20] Testimony of special education teacher; testimony of current school's SEC; Petitioner's Exhibit 12; DCPS-22.
[21] Testimony of guardian *ad litem*; testimony of current school's SEC.

that the team would not be able to provide a placement at the meeting, she also indicated that there are programs in DCPS that can provide Student with a full-time setting.[22]

22. As of the March 5, 2010 IEP meeting, Student's counselor had not been meeting regularly with Student. The counselor was supposed to send emails to Student's teachers, and the teachers were supposed to tell Student to go to counseling. However, no one was telling Student to go to counseling and Student did not know when she was supposed to go.[23]

23. Prior to the March 5, 2010 IEP meeting, Student's special education teacher would provide inclusion assistance to Student 1 to 2 times per week for approximately 30 minutes per day. Subsequent to the March 5th meeting, the special education teacher tried to provide 80 minutes of inclusion assistance to Student during her English and Geometry classes; however, Student was often absent.[24]

24. As of April 22, 2010, Student has earned 5.5 Carnegie Units and requires another 22.5 Carnegie Units to graduate. Student's March 26, 2010 Progress Report indicates that she earned Ds and/or Fs in all classes other than Art and Design Foundations, in which she earned a B. Student's current school enforces DCPS's policy which requires a failing grade to be given after 9 absences, and which provides that 7 unexcused tardies equal 1 unexcused absence.[25]

25. Normally, when a child is at Student's age and as far behind as Student is academically, the child will begin to disengage from education. However, Student is not disengaged; she still wants to obtain an education. To do so, she will need a small, caring, supportive environment where attendance can be monitored and addressed. Student also needs individual counseling in school – at least two 45-50 minute sessions per week, to help her learn to deal with her emotions and issues. Crisis management on site at the school would also be very helpful in the event Student's mood instability issues resurface.[26]

26. By letter dated March 26, 2010, Student's guardian *ad litem* was advised that Student had been accepted, pending placement by DCPS, to a nonpublic full-time special education school located in the District of Columbia, which offers an accelerated high school program, as well as functional reading, math, writing, speaking and life skills, to LD and ED students ranging in age from 17 to 21 years old. Student's acceptance letter indicates that her "attendance, participation and work completion will be important to [her] success" in the program. Student wants to attend the school based on her tour of the facility and her three-day visit to the school, during which she was allowed to participate as a student. At this school, Student saw other students who were like her – older

[22] Petitioner's Exhibit 2, DCPS-20.
[23] Testimony of special education teacher.
[24] Testimony of special education teacher.
[25] Petitioner's Exhibit 8; DCPS-29; testimony of current school's SEC.
[26] Testimony of mental health consultant; testimony of Student.

students in lower grades, and those students were working on their diplomas on a fast track.[27]

27. A resolution session was held for this case on April 22, 2010. Petitioner's counsel stated at the meeting that Student requires a specialized program. However, DCPS indicated that it "was not offering any relief" at the time.[28]

28. By email dated May 18, 2010, which was subsequent to the prehearing conference and approximately two weeks prior to the first scheduled due process hearing for this matter, DCPS proposed one of its schools as a new school site for Student. Although DCPS initially presented the school as a possible vocational placement, later that same day DCPS advised Petitioner's counsel that the proposed placement does not in fact have a vocational program. Parent was invited to visit the school the following week, which was a mere week before the first due process hearing, but Parent did not accept the invitation. The school is a "diploma tracked high school," which provides full-time services ED Students primarily. The school offers a behavior program with levels and a point system, as well as social workers who assist in the classroom and also provide individual and group counseling. The school offers class ratios of 8 to 10 students with 2 teachers, usually 1 special education certified and 1 content certified and maybe also special education certified. The school offers a 10-month program with ESY and credit recovery during the summer and after school from 4 to 6:30 pm during the school year. There are students at the school who have attendance problems, and the school has tried different methods to address the problem, such as an incentive program and home visits with parents. All of the students at the school are below grade level and the teachers work with the students to raise their level of functioning, with the result that most of the children have improved. Student would not be the only student of advanced age in a much lower grade. Moreover, although there is no vocational program at the school, once the students turn 18 years old, the transition specialist arranges vocational exposure through internships with businesses, trade schools, and the like, and the students are also linked up with RSA.[29]

29. Petitioner has proposed a compensatory education plan for Student that consists of (a) three hours of 1-on-1 tutoring per week over a 12-month period, for a total of 144 hours of tutoring, and (b) a comprehensive female rites of passage program that will require Student to participate in a weekly 3-hour meeting with a therapeutic group led by mental health clinicians and to also meet 2 hours per week with a mentor, for a total 5-hour commitment each week for 6 months, as well as a 1 day (10-hour) retreat and monthly (10-hour) field trips.[30]

CONCLUSIONS OF LAW

[27] Petitioner's Exhibits 9-10; testimony of Student; testimony of guardian *ad litem*. .
[28] DCPS-22; Petitioner's Exhibit 12.
[29] DCPS-23; testimony of SEC of proposed DCPS school site.
[30] Testimony of Petitioner's psychologist; Petitioner's Exhibits 20 and 21.

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. **Did DCPS fail to provide an appropriate placement for Student during the 2008/09 and 2009/10 school years?**

In this case, the parties submitted pre-hearing memoranda of law setting forth their respective positions on the issue of whether the term "placement" refers solely to a student's school site or instead to the educational program established by a student's IEP. Petitioner contends that "placement" refers to the school site, while acknowledging that courts in two jurisdictions have held that "placement" refers to the type and amount of services a student is entitled to receive. On the other hand, DCPS presents an argument about the analytical steps the hearing officer should take in deciding the issue of placement, arguing that the hearing officer must first render a decision about the appropriateness of Student's current IEP. DCPS then proceeds to analyze whether and under what circumstances the hearing officer may award a "private placement," repeatedly using that term to refer to a nonpublic school, and ultimately argues that the hearing officer must consider various statutory and regulatory provisions that address both "the placement decision-making process and the substance of a student's placement."[31] Hence, both parties seemingly acknowledge that, depending upon the jurisdiction and/or the circumstances, the term placement may refer to the type and amount of services a student is entitled to receive pursuant to the IEP and/or the actual school site where the services are to be rendered. As Petitioner has challenged both the appropriateness of Student's previous and current IEPs, as well as the appropriateness of Student's two most recent school sites under claims challenging Student's "placement," the hearing officer will analyze the appropriateness of Student's school sites in the context of Petitioner's placement claims, and the appropriateness of the type and amount of services prescribed for Student in the context of Petitioner's claim of inappropriate IEPs.

IDEIA provides that 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. Moreover, the placement decision must be made by a group that includes the parents. 34 C.F.R. § 300.116(a)(1).

The evidence in this case demonstrates that Student attended "schools of choice" during the two school years at issue in this case. As a result, in both instances, Parent selected a school for Student other than the neighborhood school, obtained an acceptance or admission for Student for the chosen school, and then registered Student at that school at the start of the school year.

For the 2008/09 school year, Parent chose a DCPS school of performing arts for Student to attend. Student did not participate in the normal admission process for the school, which would have included a review of Student's IEP. Instead, Student gained admission during the summer of 2008 based on two of her drawings. When DCPS convened an IEP meeting for Student at the school in November 2008, Parent parted ways with her then counsel, which insisted that Student required a different placement, because Parent wanted Student to stay at the performing arts school because it was providing stability for Student and extensive support for Student and the

[31] DCPS Pre-Hearing Memorandum of Law at p.7.

family during a period of great emotional crises for Student, which included several psychiatric hospitalizations. Parent was a member of the IEP team. So although the majority of the team felt the school probably was a challenge for Student, the team respected Parent's wishes and kept Student at the school. Thereafter, the school staff conducted an FBA for Student and continued to provide extensive support to Student and her family. Despite the staff's best efforts, Student ultimately failed her classes at the school due to excessive absences, which became progressively worse as the year went on.

Toward the end of the 2008/09 school year, the SEC at the performing arts school began advising Parent that Student would probably need another placement and began working with Parent to find another placement for Student. Parent ultimately sent Student to her neighborhood school at the start of the 2009/10 school year. Student had a panic attack, which convinced Parent that the neighborhood school could not meet Student's needs. Instead of seeking a more appropriate placement through the special education staff at the neighborhood school, Parent registered Student at her current DCPS school, another school of choice. Student's current school is a rigorous college preparatory program where students are expected to succeed with the help of additional scaffolding. Although Student's teachers were of the opinion that Student had the ability to succeed academically at the school, once again Student's truancy negatively impacted her academic progress. The school provided Student with transportation in an attempt to address her attendance problem. The staff also spoke with Student about her excessive absences. Ultimately, these attempted interventions did not work. On March 5, 2010, Student's IEP team revised Student's IEP to provide for full-time out-of-general-education services, which the current school was unable to provide.

Based on the facts outlined above, the hearing officer is not persuaded that DCPS failed to provide an appropriate placement for Student during the 2008/09 and 2009/10 school years. To the contrary, the facts demonstrate that Parent stepped outside of the normal placement process and selected schools of choice she wanted Student to attend for those school years, and DCPS utilized the tools at its disposal to try to make those placements work for Student. When it finally became clear that Student would not prove successful at her current school due to her ongoing truancy problem, her IEP team developed an IEP that called for a more restrictive setting for her. Under these circumstances, the hearing officer finds that Petitioner has failed to meet its burden of proof on this claim.

2. **Did DCPS fail to make an appropriate placement decision for Student at her March 5, 2010 MDT meeting and fail to include Parent in the placement decision-making process?**

As noted above, IDEIA provides that 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. Moreover, the placement decision must be made by a group that includes the parents. 34 C.F.R. § 300.116(a)(1). Where a Complaint alleges a procedural violation, a hearing officer should only find a denial of FAPE if the procedural inadequacy impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

The evidence in this case reveals that although Student's IEP team developed on March 5, 2010 an IEP that required Student to attend a more restrictive placement, and the team acknowledged at the meeting that Student's current school could not implement the IEP, a new placement was not provided for Student at the March 5th meeting. Instead, it was not until May 18, 2010, more than two months later and subsequent to both the resolution session and the prehearing conference for this case, that DCPS finally proposed a new placement for the implementation of Student's IEP. Even then, DCPS initially presented the school as a vocational placement, only to come back later that evening and indicate that the school did not offer a vocational program. As the proposed placement was not offered until approximately two weeks prior to the due process hearing in this case and DCPS declined to offer any relief at the resolution session, the placement decision was effectively made by DCPS without any input or participation in the decision-making process by Parent. Moreover, as a result of DCPS's failure to suggest a proposed placement for Student until more than two months after the March 5th IEP meeting, even though Student's current school cannot implement the current IEP, Student's IEP was not implemented from March 5, 2010 through the end of the 2009/10 school year. Under these circumstances, the hearing officer is persuaded that DCPS's failure to make a placement decision at Student's March 5th IEP meeting impeded Student's right to a FAPE, significantly impeded Parent's opportunity to participate in the decision-making process, and caused a deprivation of educational benefit. As a result, the hearing officer concludes that Petitioner has met its burden of proof on this claim.

3. **Did DCPS fail to develop appropriate IEPs for Student In November 2008 and November 2009?**

IDEIA places responsibility for development of a disabled child's IEP on the IEP team. *See* 34 C.F.R. §§ 300.320 – 300.324. Moreover, a disabled child's IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Board of Education v. Rowley*, 458 U.S. 176.

In this case, Petitioner contends that DCPS failed to develop appropriate IEPs for Student in November 2008 and November 2009 because Student failed to make progress and indeed regressed academically while her IEP service hours remained the same. However, the evidence in this case demonstrates that at Student's November 2008 and November 2009 IEP meetings, Student's full IEP team, including Parent, agreed on the contents of the IEP and on one objected to the level of services to be provided. Indeed, Petitioner's counsel in this matter also attended Student's November 5, 2009 IEP meeting and neither counsel nor Parent, nor any other team member, suggested that Student required more IEP hours. The evidence further demonstrates that Student's teachers at both meetings were of the opinion that Student was capable of performing academically. During 2008/09 school year, Student's attendance problem became progressively worse, with the result that the November 2008 IEP team attempted to address the problem by providing Student with transportation services. With hindsight, it is clear that the provision of transportation services was insufficient to counter Student's severe attendance problems. Moreover, the hearing office wonders whether the insufficiency of the added transportation services should have been apparent to the team at the time the IEP was developed. However, given that all team members were in agreement with the IEP and no one, including

Petitioner's counsel, Parent and the school staff who worked with Student on a daily basis, suggested that Student required something more than was being provided, the hearing officer declines to second guess the IEP team. As a result, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this claim.

4. **Did DCPS fail to implement Student's March 5, 2010 IEP?**

Student's March 5, 2010 calls for Student to receive 27 hours per week of specialized instruction outside of general education and 60 minutes per month of behavioral support services outside of general education. The SEC at Student's current school acknowledged at the IEP meeting that the school could not implement the IEP, but Student was not assigned to attend another school at the meeting and a new school was not even suggested by DCPS until mid May. As a result, Student's IEP was not implement during the period extending from March 5, 2010 through the end of the 1009/10 school year, and the hearing officer concludes that Petitioner has met its burden of proof on this claim.

5. **Did DCPS fail to provide counseling from August 2009 forward and transportation from November 2009 forward?**

Petitioner alleges that DCPS failed to provide Student with her related services during the 2009/10 school year, while DCPS argues that the services were made available to Student but she failed to take advantage of the services as a result of her excessive absenteeism.

The evidence in this case demonstrates that after Student transportation was added to Student's IEP in November 2009, the bus did not initially come to pick up Student on a consistent basis. However, when the bus later began to show up consistently, Student still did not always get on the bus. Moreover, although DCPS failed to change Student's pick-up location after receiving notice of Student's impending move to a new group home from February 2010 through and after March 5, 2010, the evidence further demonstrates that once the transportation services had been moved to the proper location, Student nevertheless failed to get on the bus in the mornings and/or afternoon.

With respect to counseling services, the evidence in this case demonstrates that as of March 5, 2010 Student's counselor was not regularly providing Student with counseling services, primarily due to the failure of the counselor and/or Student's teachers to tell Student that she was supposed to go to counseling. Once Student was advised of the times and location for her counseling session at the March 5th meeting, it appears that she still did not receive the prescribed counseling due to her excessive absences.

Based on the evidence outlined above, the hearing officer concludes that DCPS should be charged with failing to provide Student with her counseling services from November 2009 through March 5, 2009, and with intermittently failing to provide Student with her transportation services between November 2009 and approximately March 5, 2010.

6. **Relief to be Awarded**

Petitioner is requesting a private placement at either of two private schools, as well as 284 hours of compensatory education. DCPS insists that its proposed placement can implement Student's current IEP, and therefore, Petitioner is not entitled to a private placement. DCPS further argues that Petitioner is not entitled to an award of compensatory education due to its failure to prove its claims in this action and compensatory education will not further the remedial purposes of IDEIA.

This hearing officer has determined that Petitioner met its burden of proving that DCPS denied Student a FAPE by failing to make a placement decision at Student's March 5, 2010 IEP meeting, that DCPS failed to implement Student's March 5, 2010 IEP, and that DCPS failed to consistently provide Student with her related services from November 2009 through approximately March 5, 2009. With respect to DCPS's failure to make a placement decision, the hearing officer specifically found that DCPS did not even attempt to propose a placement for Student until well after the resolution session and approximately two weeks before the first due process hearing in this case, which effectively excluded Parent from participating in the placement decision-making process. As a result, the hearing officer concludes that it would be inappropriate to allow DCPS to rely upon its proposed placement to defeat Petitioner's request for placement in an appropriate private placement that can implement Student's IEP. As one of Petitioner's requested private placement offers an accelerated high school program, as well as functional reading, math, writing, speaking and life skills, to LD and ED students ranging in age from 17 to 21 years old, which the hearing officer concludes is an appropriate placement for Student and can implement Student's IEP, the hearing officer will order DCPS to fund Student's placement and transportation at that school for the 2010/11 school year.

With respect to compensatory education, the hearing officer finds that Petitioner's proposed compensatory education plan would be absolutely overwhelming to Student, and is excessive and not reasonably calculated to provide the educational benefits that likely would have accrued from special education services Student should have received in the first place. *See Reid v. District of Columbia*, 401 F.3d 516 (D.C. 2005); *Schaffer et al v. Weast et al*, 546 U.S. 49, 126 S.Ct. 528 (2005). As Petitioner has failed to provide the hearing officer with the information required for the hearing officer to fashion an appropriate compensatory education plan for Student, the hearing officer will deny Petitioner's request for compensatory education.

ORDER

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

1. DCPS shall provide Student with funding and transportation for the 2010/11 school year for the nonpublic school that accepted Student for admission by letter dated March 26, 2010.

2. All remaining requests for relief requested in Petitioner's April 7, 2010 Complaint are **DENIED**.

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: 6/25/2010

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