

DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

PETITIONER,
on behalf of STUDENT,¹

Petitioner,

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

Date Issued: October 27, 2012

Hearing Officer: Peter B. Vaden

Case No: 2012-0560

Hearing Date: October 15 and 17, 2012

Student Hearing Office, Rooms 2006/2004
Washington, D.C.

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the "Petitioner" or "MOTHER"), under the Individuals with Disabilities Education Act, as amended (the "IDEA"), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations ("D.C. Regs."). In her Due Process Complaint, Petitioner alleges that DCPS denied Student a free appropriate public education ("FAPE") by not completing her Individualized Education Program ("IEP") prior to the

¹ Personal identification information is provided in Appendix A.

beginning of the 2012-2013 school year and by failing to offer Student a suitable school placement.

Student, an AGE young woman, is a resident of the District of Columbia. Petitioner's Due Process Complaint, filed on August 17, 2012, named DCPS as respondent. The undersigned Hearing Officer was appointed on August 21, 2012. The parties met for a resolution session on August 29, 2012 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on September 17, 2012. On September 10, 2012, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

On August 30, 2012, Petitioner filed a motion to strike DCPS' response to the complaint for due process. In the Prehearing Order, the Hearing Officer denied the motion to strike and ordered DCPS to file an amended response which complied with 34 CFR § 300.508(e)(1). On September 13, 2012, DCPS filed its amended response and partial motion to dismiss. In response, Petitioner filed a motion to strike the partial motion to dismiss and to shift the burden of proof. Following a telephone hearing on September 25, 2012, the Hearing Officer issued an order denying Petitioner's motion to strike and to shift burden of proof.

The due process hearing was held before the undersigned Impartial Hearing Officer on October 15 and 17, 2012 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner appeared in person, and was represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified and called as witnesses NEUROPSYCHOLOGIST, PENNSYLVANIA SCHOOL LEARNING SKILLS TEACHER, Pennsylvania School

DIRECTOR OF COUNSELING, and FORMER SOCIAL STUDIES TEACHER. DCPS called as its only witness SPECIAL EDUCATION COORDINATOR. Petitioner's Exhibits P-1 through P-73 were admitted into evidence without objection, except for Exhibits P-21 through P-27, which were withdrawn. DCPS' Exhibits R-1 through R-7 were admitted without objection. Exhibit R-8 was withdrawn. Exhibit R-9 was admitted over Petitioner's objection. Counsel for both parties made opening and closing statements. At the request of Petitioner's Counsel, the parties were granted leave to file post-hearing briefs on or before October 22, 2012. Only Petitioner filed a post-hearing memorandum.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

- WHETHER DCPS HAS DENIED STUDENT A FAPE BY FAILING TO COMPLETE DEVELOPMENT OF AN APPROPRIATE IEP FOR THE 2012-2013 SCHOOL YEAR; and
- WHETHER DCPS HAS DENIED STUDENT A FAPE BY FAILING TO OFFER AN APPROPRIATE EDUCATIONAL PLACEMENT/LOCATION OF SERVICES FOR THE 2012-2013 SCHOOL YEAR.

Petitioner has made a unilateral residential placement of Student at Pennsylvania School in Pennsylvania for the 2012-2013 school year. For relief, Petitioner seeks an order for DCPS to reimburse Petitioner for her tuition and related expenses at Pennsylvania School and to fund Student's continued placement at Pennsylvania School for the remainder of the 2012-2013 school year.

FINDINGS OF FACT

After considering all of the evidence, as well as the arguments of counsel, this Hearing

Officer's Findings of Fact are as follows:

1. Student is an AGE resident of the District of Columbia, where she resides with Mother and a sibling. Testimony of Mother.

2. For the 2012-2013 school year, Student is enrolled at Pennsylvania School in Pennsylvania under a unilateral nonpublic placement made by Petitioner. Testimony of Mother.

3. For the preceding three school years, Student attended CITY HIGH SCHOOL, a DCPS public school. In school year 2011-2012, Student was in the GRADE at City High School. She is repeating Grade this year at Pennsylvania School. Testimony of Mother.

4. At a May 21, 2012 eligibility meeting at City High School, Student was determined to be a student with a disability, who needs special education and related services, under the Primary Disability Classification, Other Health Impairment ("OHI"). Exhibit P-53.

5. Student has a long history of emotional and behavioral concerns dating to her early childhood. She was diagnosed with Post Traumatic Stress Disorder when she was 4 years old. Testimony of Mother.

6. During her second grade year at CITY ELEMENTARY SCHOOL, Student was found eligible for a Section 504 Plan, under the provisions of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, based upon deficits in auditory awareness and in fine motor skills. The 504 Plan provided Student occupational therapy and language therapy services. Exhibit P-15. Some parts of the 504 Plan were successful. Testimony of Mother.

7. In middle school, Student's performance was spotty. She experienced anxiety, started giving up on herself and became more withdrawn. Testimony of Mother.

8. Student's educational experience at City High School started out positive. Her grades were mixed and she did not fail any classes until the 2011-2012 school year. Testimony

of Mother.

9. At the beginning of the 2011-2012 school year at City High School, Student was enrolled in Advanced Placement (“AP”) English, AP Biology, AP U.S. History and Honors Pre-Calculus. During the year, over Mother’s objection, City High School moved Student to regular classes in Pre-Calculus and English. In her 2011-2012 school year, Student failed classes. She was extremely disorganized and distracted. Her anxiety symptoms increased and she began to believe she could not succeed. During this period, Student engaged increasingly in self-destructive behaviors. Testimony of Mother.

10. Former Social Studies Teacher taught Student World History in 9th Grade and AP U.S. History in 11th Grade. Testimony of Former Social Studies Teacher. Former Social Studies Teacher had a very close teacher-student relationship with Student and provided extensive additional support outside of the regular class time. Former Social Studies Teacher was a very credible witness both because of her long, close teacher-pupil relationship with Student and her obvious concern for Student’s well-being.

11. At City High School, Student showed high aptitude, but her achievement, especially in 11th grade, did not match her aptitude. In 9th grade, Student’s attendance was good. In 11th grade, Student’s attendance declined, from being present for 50-70 percent of classes during the fall term, to only attending 25 percent of classes during the third quarter to attending almost no classes the last quarter. Student was not effective in turning in assignments on time. Her biggest behavioral problems were nonattendance and anxiety. Student also had attention issues and could not always stay focused. Independent work was difficult for her. Student also had difficulty with social interaction with her peers. Testimony of Former Social Studies Teacher.

12. For the 2011-2012 school year, Student failed Pre-calculus, AP Biology and AP History. She received an A+ in Ceramics, an A in Internship and a D in English III. Testimony of Mother.

13. Before the 2011-2012 school year began, Mother requested DCPS to evaluate Student for special education eligibility. At a meeting in January 2012, City High School staff suggested to Mother that she pay for private assessments. Testimony of Mother. In a February 7, 2012 letter, Petitioner's Co-Counsel wrote the principal of City High School to again request that DCPS evaluate Student to determine her eligibility for special education. Exhibit P-30.

14. In February 2012, Mother referred Student to Neuropsychologist for a neuropsychological assessment. Following evaluations of Student on February 20 and 28, 2012, Neuropsychologist issued a Neuropsychological Evaluation Report. On cognitive testing using the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV), Student's verbal skills fell in the superior range of intelligence. Her non-verbal cognitive abilities fell in the low-average range and she demonstrated considerable weakness in processing speed. On academic achievement testing, using the Woodcock-Johnson III (Normative Update) Tests of Achievement, Student's average range Broad Reading score was markedly below expectations, based on her verbal cognitive scores. Student's performance on features of neuropsychological functioning indicated weaknesses on tasks requiring executive functioning skills, including organization and planning, speed and efficiency and complex information processing. Exhibit P-33.

15. Neuropsychologist reported that Student's performance on the psychological evaluations endorsed symptoms indicative of clinically-significant depression and anxiety. Exhibit P-33.

16. Neuropsychologist reported Student's diagnostic formulation as Major Depressive Disorder - Recurrent - Moderate without Psychotic Features, Panic Disorder without Agoraphobia, Post-Traumatic Stress Disorder - Chronic, Identity Problem, Reading Disorder - Fluency Deficits, and Attention-Deficit Hyperactivity Disorder - NOS. Neuropsychologist reported that Student would continue to require consistent outpatient psychiatric services and a more intensive educational plan to address the impact of her emotional, attention, and learning disorders upon academic functioning. Exhibit P-33.

17. In the report, Neuropsychologist recommended that Student should continue to receive regular outpatient psychotherapy with specific contracting of her self-destructive behavior, planning in the event that she requires a more intensive treatment setting, and evidence-based cognitive-behavioral strategies for the treatment of depression and anxiety. Exhibit P-33.

18. In his report, Neuropsychologist recommended that Student be placed in a small, highly structured, therapeutic classroom with a low student to teacher ratio throughout her day. He also recommended a "more intensive educational program" for Student including school accommodations, such as extended time on tests and quizzes, benchmarking of reading fluency, strategies to support reading comprehension and access to a word processor for written expression. Exhibit P-33.

19. On February 8, 2012, Petitioner filed a prior complaint for due process against DCPS (Case No. 2012-0120). In the prior complaint, Petitioner requested comprehensive special education eligibility evaluations of Student. DCPS agreed to proceed with the testing as soon as Mother executed a parental consent. Exhibit P-34. On March 14, 2012, Petitioner withdrew, without prejudice, her complaint in Case No. 2012-0120. Exhibit P-48.

20. In March and April 2012, DCPS conducted evaluations of Student, including an Updated Social Work Assessment (March 26, 2012), an Initial Speech-Language Evaluation (April 13, 2012) and a Psychological Evaluation (April 17, 2012). Exhibits P-45, P-46 and P-47. DCPS' SCHOOL PSYCHOLOGIST concluded that Student met the criteria for Emotional Disturbance based on Neuropsychologist's diagnoses of Generalized Anxiety Disorder and Major Depression, as well as indications from Mother, Student and Student's teachers that these conditions contributed to Student's academic struggles and had been detrimental to her academic functioning. School Psychologist reported that Student's anxiety and depression concerns were "disabling" to her "life functions" in home and at school and detrimental to her educational functioning. School Psychologist recommended, *inter alia*, that Student would benefit from behavioral support to address issues related to her anxiety and depression, social skills development and self esteem, and, in light of her executive functioning problems, Student would require a higher level of adult-provided structure, direction, nurturing and feedback than is needed by most Students. Exhibit P-47.

21. Student's Multidisciplinary Team ("MDT team") met at City High School on May 22, 2012 and determined that Student was eligible for special education and related services based upon the disabilities, OHI and ED. Testimony of Mother.

22. Student's IEP team convened on June 7 and June 14, 2012 to develop an IEP for Student. Testimony of Mother. Former Social Studies Teacher attended the June 2011 IEP meeting for Student. She told the IEP team that Student definitely needs more 1:1 support in the classroom, as might be provided in an inclusion setting by a special education co-teacher. Testimony of Former Social Studies Teacher.

23. At the June 14, 2012 IEP meeting, Student's IEP was completed, except for the determination of specific Special Education and Related Services to be provided to Student, the provisions for Classroom Accommodations and State Assessment (DC-CAS) Participation, and Student's school placement. Testimony of Special Education Coordinator. The IEP team planned to reconvene at the end of August 2012 to complete the IEP. Testimony of Special Education Coordinator, Exhibit P-61. DCPS did not issue a Prior Written Notice for Student's educational placement or for the provision of FAPE for the 2012-2013 school year. Testimony of Special Education Coordinator.

24. At the June 14, 2012 IEP meeting, Special Education Coordinator proposed that DCPS would provide counseling to Student over the summer, as a compensatory education service, to begin to address Student's emotional challenges so that she would be ready to learn when she returned to school in the fall. The services were not provided. Testimony of Special Education Coordinator.

25. Following the June 14, 2012 IEP meeting, Student's City High School case manager was supposed to meet with Mother to work on the Classroom Accommodations section of Student's IEP. That meeting did not happen. Testimony of Education Coordinator.

26. On June 21, 2012, Mother sent an email to Special Education Coordinator asking if she had been able to schedule a continuation of the IEP meeting and asking for guidance on beginning summer counseling for Student, as proposed by Special Education Coordinator at the June 14, 2012 IEP meeting. Exhibit P-55. Mother also left a voicemail message for Special Education Coordinator. Special Education Coordinator did not respond to the June 21, 2012 email or to Mother's voicemail message. Testimony of Mother, Testimony of Special Education Coordinator.

27. On July 11, 2012, the office of Petitioner's Counsel contacted Special Education Coordinator to schedule a meeting to complete Student's IEP. No response was received.

Exhibit P-57, Testimony of Mother.

28. In July 2012, Mother and Student visited Pennsylvania School for an admissions interview. By letter of August 9, 2012, Pennsylvania School informed Mother that its Selection Committee wanted to offer Student admission for the 2012-2013 school year. Exhibit P-59.

29. By letter of August 6, 2012, Petitioner's Co-Counsel provided written notice to the principal at City High School that Petitioner intended to enroll Student at Pennsylvania School for the 2012-2013 school year and to seek public funding for the placement. Exhibit P-57. DCPS did not respond to Petitioner's notice. Exhibit P-57, Testimony of Mother. On August 17, 2012, Petitioner filed her complaint for due process in this case.

30. On August 29, 2012, Petitioner and DCPS representatives attended a resolution session, convened to address the issues in Petitioner's August 17, 2012, due process complaint. No agreement was reached. Exhibit P-61.

31. DCPS convened an IEP meeting on September 11, 2012 to complete Student's DCPS IEP. Petitioner and Petitioner's Co-Counsel attended the meeting. Petitioner and DCPS did not agree on IEP services or a placement for Student at the meeting. Exhibit P-64.

32. At the September 11, 2012 IEP meeting, Petitioner's co-counsel stated Mother's "standing belief" that Student needed specialized instruction in inclusion classes throughout the school day. Exhibit P-64.

33. Pennsylvania School is a 160 year-old, all girls, private school in central Pennsylvania. It has an enrollment of 291 students, in grades 7 through 12, most of whom are boarding students. Pennsylvania School, which has a high percentage of international students,

draws students who are interested in dance, equestrian sports, and English as a Second Language, as well as those who would benefit from the academic support services of Pennsylvania School's Learning Skills department. All core classes are taught in a regular education setting, with 8-14 students per class. Less than 1% of the girls at Pennsylvania School have IEPs. None of the regular education teachers at Pennsylvania School is certified in special education. Testimony of Learning Skills Teacher, Exhibit P-71.

34. Pennsylvania School has not received an Office of the State Superintendent of Education ("OSSE") Certificate of Approval for nonpublic special education schools and programs, serving students with disabilities funded by the District of Columbia. Stipulation of counsel.

35. Pennsylvania School offers Learning Skills classes as a supplement to its regular education program. The Learning Skills department is staffed by three teachers who provide learning assistance to children who need some type of academic support, including students who have learning disabilities or emotional handicaps. Testimony of Learning Skills Teacher. The Learning Skills program is an elective class, designed for any student still developing organizational or study skills, or in need of individual instruction in specific subjects. Exhibit P-69.

36. Pennsylvania School has two full-time counselors on the staff. Four visiting psychologists from the area provide services to students as needed. Testimony of Director of Counseling.

37. Mother enrolled Student at Pennsylvania School for the 2012-2013 school year to repeat GRADE. In addition to the regular Pennsylvania School tuition and room and board costs, Mother paid supplemental fees to enroll Student in the elective Learning Skills and

tutoring programs and the equestrian program. Exhibit P-66, Testimony of Mother.

38. In September 2012, Pennsylvania School developed an education plan for Student. The purpose of the plan was to provide Student appropriate accommodations and modifications to address Neuropsychologist's February 2012 evaluation report and recommendations. Modifications for Student included in the plan are: Use laptop for note-taking and written assignments; Provide 50% extended test time; Provide study guides and outlines if available; Check for understanding of assigned reading material; For projects, provide examples of required assignment; and Change tasks frequently to promote and restore focus. Testimony of Learning Skills Teacher, Exhibit P-65. Student does not have an IEP at Pennsylvania School. Testimony of Learning Skills Teacher.

39. In Student's Learning Skills class, Learning Skills Teacher teaches Student and another young woman for 45 minutes per day, five days per week. The primary goal of this class is to develop and maintain effective study habits and strategies to be successful academically. The grade earned for the Learning Skills class is based on effort and skills that should be used by students in regular education classes, including promptness, having materials in class, being organized and neat, proper classroom conduct, being productive during the class period and completing assignments. Testimony of Learning Skills Teacher, Exhibits P-67, P-68.

40. Pennsylvania School also provides a two-hour study hall period for all students, five evenings per week. During this period, Student receives additional tutoring support, as needed, from a trained student support teacher. Testimony of Learning Skills Teacher, Exhibits P-67, P-69.

41. At Pennsylvania School, Student meets with Director of Counseling once a week and meets with an outside psychologist once a week. Testimony of Director of Counseling.

42. Student is doing well at Pennsylvania School. She is enthusiastic about her school work, on time for classes, participating in classes, turning her school work in and showing improvement in executive functioning skills. For the first marking period, Student earned all A's and B's. Testimony of Learning Skills Teacher.

43. Petitioner's costs for Student's enrollment at Pennsylvania School for the 2012-2013 school year total \$58,100.00 to date, including Tuition, Room & Board (\$46,800.00), Riding Program (\$2,500.00), Learning Skills Class (\$3,800.00), Activities Escrow (\$3,000.00) and Student Support Evening Tutor (\$2,000.00). Exhibit P-66, Testimony of Mother.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Burden of Proof

The burden of proof in a due process hearing is the responsibility of the party seeking relief – the Petitioner in this case. *See* D.C. Regs. tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Legal Standard for Private Placement Reimbursement

Petitioner asserts that she is entitled to reimbursement for her unilateral placement of Student at Pennsylvania School because DCPS failed to complete Student's initial IEP prior to the start of the 2012-2013 school year. The Petitioner relies upon the U.S. Supreme Court's decisions in *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 369-370,

105 S.Ct. 1996 (1985) and *Florence County Sch. Dist. 4 v. Carter*, 510 U.S. 7, 15, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993), for the rule that when a school system fails to propose an appropriate program for a child with a disability, the school system must reimburse a parent for making an appropriate private school placement. DCPS denies that its failure to complete an IEP for Student before the start of the school year resulted in a denial of FAPE.

Under the IDEA, the District of Columbia must establish policies and procedures to ensure that a free appropriate public education (“FAPE”) is available to all District children with disabilities. 34 C.F.R. § 300.1(a). Once a child has been evaluated and found to have a qualifying disability, DCPS is required to create an individualized education program (“IEP”) for the child. 34 C.F.R. § 300.342(a); *Roark ex rel. Roark v. District of Columbia*, 460 F.Supp. 2d 32, 34-35 (D.D.C. 2006). When DCPS fails to produce a new IEP by the first day of school, the parent does not have to wait for DCPS but may select a placement and seek reimbursement. *See, e.g., Eley v. District of Columbia*, 2012 WL 3656471, 9, Civil Action No. 11-309 (D.D.C. Aug. 24, 2012). However, parents who unilaterally decide to place their disabled child in a private school, without obtaining the consent of local school officials, “do so at their own risk.” *Carter, supra*, 510 U.S. at 15 (quoting *Burlington, supra*, 471 U.S. at 359).

Parents may only receive tuition reimbursement if a hearing officer concludes that (1) “the public school placement violated the IDEA” and (2) “the private school placement was proper under the Act.” *Carter, supra* at 15. The first factor is a threshold question: if the public school placement would have been appropriate, the hearing officer’s analysis ends, and a disabled child’s parents are not entitled to reimbursement. *See, e.g., Razzaghi v. District of Columbia*, 2005 WL 3276318, 4, Civil Action No. 03-01619 (D.D.C. Sept. 28, 2005). Moreover, even when a hearing officer finds that parents of a disabled child are eligible for

tuition reimbursement under the *Burlington/Carter* decisions, amendments made to the IDEA in 1997 allow a hearing officer to reduce or deny reimbursement under certain circumstances. *See* 20 U.S.C. § 1412(a)(10)(C)(iii). A hearing officer may reduce or deny tuition reimbursement if, *inter alia*, a disabled child's parents, prior to or during the most recent IEP meeting before removing their child from school, failed to "inform the IEP team that they were rejecting the placement proposed by the public agency to provide a [FAPE] to the child including stating their concerns and their intent to enroll their child in a private school at public expense. . . ." 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa). A hearing officer may also reduce or deny tuition reimbursement "upon a judicial finding of unreasonableness with respect to actions taken by the parents." *Id.* § 1412(a)(10)(C)(iii)(III). *See, e.g., A.I. ex rel. Iapalucci v. District of Columbia*, 402 F.Supp.2d 152, 161 -162 (D.D.C. 2005).

ANALYSIS

A. DID DCPS HAS DENY STUDENT A FAPE BY FAILING TO COMPLETE DEVELOPMENT OF AN APPROPRIATE IEP FOR THE 2012-2013 SCHOOL YEAR?

DID DCPS DENY STUDENT A FAPE BY FAILING TO OFFER AN APPROPRIATE EDUCATIONAL PLACEMENT/ LOCATION OF SERVICES FOR THE 2012-2013 SCHOOL YEAR.?

The threshold question in this case, under the *Burlington/Carter* analysis, is did DCPS deny Student a FAPE by not developing an IEP for her before the beginning of the 2012-2013 school year. At the beginning of each school year, each local education agency shall have in effect for each child with a disability in the agency's jurisdiction an IEP as defined in 20 U.S.C. § 1414(1)(A) and 34 CFR § 300.323(a). *Eley, supra*, 2012 WL 3656471 at 5. The IEP must "[map] out specific educational goals and requirements in light of the child's disabilities and

[match] the child with a school capable of fulfilling those needs.” *Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir. 1991). In the present case, there can be no dispute that DCPS violated these requirements. At a May 21, 2012 eligibility meeting at City High School, Student was, for the first time, determined to be eligible for special education and related services. Student’s IEP team met on June 7 and June 14, 2012 to develop her initial IEP, but did not complete development of significant parts of the IEP, including the hours of special education and related services she would receive and school placement. Petitioner and her attorneys communicated with DCPS several times over the summer to request that the IEP team reconvene but DCPS did not respond. Even after Petitioner provided written notice to DCPS, pursuant to 34 CFR § 300.148(d), that she intended to enroll Student in Pennsylvania School at public expense, DCPS still did not respond. Finally, more than two weeks after the 2012-2013 school year started, and after Petitioner had filed her due process complaint in the present case, DCPS belatedly reconvened Student’s IEP team. Obviously, at the beginning of the present school year, DCPS did not have an IEP in effect for Student and it had not identified a placement that was capable of fulfilling her IEP needs.

At the due process hearing, counsel for DCPS argued that the school system’s failure to complete Student’s IEP before the start of the school year was a procedural violation which did not result in denial of FAPE. *See* 34 C.F.R. § 300.513(a)(2) (“In matters alleging a procedural violation, a court may find that a child did not receive a [FAPE] only if the procedural inadequacies — i. impeded the child’s right to a [FAPE]; ii. significantly impeded the parent’s opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent’s child; or iii. caused a deprivation of educational benefits;”) *Lesesne ex rel. B.F. v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir.2006) (Only those procedural violations of

the IDEA which result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable.) DCPS' argument is unconvincing. The school system's failure to complete an initial IEP for Student before the start of the school year undoubtedly impeded Student's right to a FAPE. "[A] written, complete IEP is important to serve a parent's interest in receiving full appraisal of the educational plan for her child, allowing a parent both to monitor her child's progress and determine if any change to the program is necessary." *Alfonso v. District of Columbia*, 422 F.Supp.2d 1, 6 (D.D.C.2006). *See, also, Justin G. ex rel. Gene R. v. Board of Educ. of Montgomery County*, 148 F.Supp.2d 576, 584 (D.Md. 2001) (Failure to develop an IEP for the school year goes to the heart of the district's ability to provide a FAPE and resulted in a denial thereof.) DCPS' failure to complete Student's IEP in this case was particularly egregious, in light of DCPS School Psychologist's April 20, 2012 report that Student's anxiety and depression concerns were "disabling" to her "life functions" in home and at school and detrimental to her educational functioning. I find, therefore, that DCPS' failure to develop an IEP for Student before the start of the 2012-2013 school year resulted in loss of educational opportunity to Student and was a clear denial of FAPE.

B. WAS THE PARENT'S UNILATERAL PLACEMENT OF STUDENT AT PENNSYLVANIA SCHOOL PROPER UNDER IDEA?

Because I have found that DCPS' failure to have an IEP in effect at the beginning of the 2012-2013 school year denied Student a FAPE, Petitioner's right to reimbursement in this case turns on the second prong of the *Burlington/Carter* test - whether Mother's residential placement of Student at Pennsylvania School was proper under the IDEA. *See Carter, supra*, 510 U.S. at 15. As explained below, I find it was not.

The issue here is whether Mother's decision to make a residential placement, as opposed

to placing Student at a non-residential school in the Washington, D.C. area, was proper under the *Burlington/Carter* criteria for reimbursement. The IDEA creates a statutory preference and expressly mandates that handicapped or disabled children be educated in the least restrictive environment to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5); 34 CFR § 300.114. Notwithstanding, the IDEA does provide for residential placement if such a placement is necessary to meet the child's individual educational needs. *See, e.g.*, 34 CFR § 300.104. If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child. *Id.*

Federal courts deciding parental reimbursement cases under the IDEA have generally held that the test for whether a child's placement in a residential program is educational, and therefore reimbursable under the IDEA, focuses on whether the child's residential placement is "necessary for educational purposes." *State ex rel. Support of Robert H.*, 257 Wis.2d 57, 69, 653 N.W.2d 503, 508 - 509 (Wis.2002) (quoting *Butler v. Evans*, 225 F.3d 887, 893 (7th Cir.2000), (citing *Tennessee Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1471 (6th Cir.1996) (a residential placement is appropriate and free only if it "is necessary for educational purposes as opposed to medical, social, or emotional problems that are separable from the learning process"); *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir.1990) (analysis focuses on whether a residential placement "may be considered necessary for educational purposes"); *Burke County Bd. of Educ.*, 895 F.2d at 980 (the IDEA covers residential placement only if such placement is "essential for the child to make any educational progress at all") (emphasis in original) (citing *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir.1983), and *Matthews v. Davis*, 742 F.2d 825, 829 (4th Cir.1984));

McKenzie v. Smith, 771 F.2d 1527, 1534 (D.C.Cir.1985) (determination of whether the IDEA requires residential placement turns on whether full-time residential placement is necessary for educational purposes); *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 693 (3rd Cir.1981) (only a residential placement that is “a necessary predicate for learning” is covered by the IDEA).

In *McKenzie v. Smith, supra*, the Court of Appeals for the District of Columbia adopted a test, first enunciated by the Third Circuit Court of Appeals in *Kruelle, supra*, for determining whether a parent is entitled to reimbursement for making a private residential placement. In *Kruelle*, an intellectually disabled child, who was unable to speak and not toilet trained, was found to need extensive, around-the-clock, care as part of his FAPE. “[T]he concept of education is necessarily broad with respect to persons such as Paul. Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point.” *Kruelle*, 642. F.2d. at 693 (internal quotations and citations omitted). The *Kruelle* test focuses on whether a child’s medical, social, or emotional problems are “inextricably intertwined” with the learning process. “To determine whether a residential placement is appropriate, a court must analyze ‘whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process.’” *McKenzie v. Smith*, 771 F. 2d 1527, 1534 (D.C.Cir. 1985) (quoting *Kruelle, supra*, 642 F.2d at 693.)² Under this test, if a

² In her post-hearing Memorandum of Law, Petitioner posits a less onerous standard for whether the Petitioner’s private placement was proper under the IDEA: “The test of whether a parental placement is proper under the Act is whether the education provided by the private school is reasonably calculated to enable the child to received educational benefits.” Petitioner’s Memorandum, p. 5 (internal quotations omitted.) Petitioner’s memorandum omits discussion of the rule for reimbursement for unilateral residential placements, adopted by the D.C. Circuit in *McKenzie v. Smith*, 771 F. 2d 1527 (D.C.Cir. 1985), which is the controlling legal authority in this jurisdiction.

hearing officer cannot segregate a child's medical, social, or emotional problems from the learning process, the school district must be ordered to reimburse the parents for the private residential placement.

In the present case, Petitioner has not met her burden of proof to establish that Student's medical, social and emotional problems are not segregable from the learning process or that Student's residential placement at Pennsylvania School is necessary for educational purposes. Petitioner has adduced no evidence that Student requires placement at Pennsylvania School, or at any residential facility, for her medical, social or emotional problems. To the contrary, Petitioner's expert, Neuropsychologist, recommended in his February 2012 neuropsychological evaluation report that Student receive consistent psychiatric services and regular psychotherapy on an "outpatient" basis. In the report, Neuropsychologist also recommended "planning in the event that [Student] requires a more intensive treatment setting," however there was no evidence that the need for a more intensive setting ever arose. Moreover, Pennsylvania School is not a residential treatment center or a therapeutic boarding school. Very few of its students have IEPs. Even the Learning Skills program at Pennsylvania School is an elective class, designed for any student still developing organizational or study skills, or in need of individual instruction in specific subjects.

Neither does the evidence establish that Student's residential placement at Pennsylvania School is necessary for educational purposes. Former Social Studies Teacher, who, of all the witnesses except for Mother, knew Student best and was most familiar with her educational issues and needs, opined that Student needed 1:1 support in her classes, which could be provided by a special education co-teacher in an inclusion classroom setting. Mother also acknowledged in her testimony that an inclusion setting in all core classes might be appropriate for Student, but

contended that such an inclusion setting was not available in all classes at City High School. At the September 11, 2012 IEP meeting, Petitioner's co-counsel stated Mother's "standing belief" that Student needed specialized instruction in inclusion classes throughout the school day. In his neuropsychological evaluation report, Neuropsychologist recommended that Student be placed in a small, highly structured, therapeutic classroom with a low student-to-teacher ratio throughout her day. He also recommended a "more intensive educational program" for Student including school accommodations, such as extended time on tests and quizzes, benchmarking of reading fluency, strategies to support reading comprehension and access to a word processor for written expression. It is clear from his report, however, that Neuropsychologist envisioned that Student would receive these services and accommodations at a nonresidential school.³ In his hearing testimony, Neuropsychologist, whom I found to be a credible witness, opined that the residential setting at Pennsylvania School was quite helpful for Student, but admitted that he did not know whether there were day programs in the Washington, D.C. area that would also be appropriate for Student.

The evidence at the hearing was overwhelming that Student is receiving education benefit from attending Pennsylvania School. By all accounts, Student is doing well there. Unlike her last year's experience at City High School, at Pennsylvania School, Student is attending her classes, completing her work and earning good grades. However, the standard for reimbursement for a unilateral residential placement is not whether the Student receives educational benefit, but whether the full-time residential placement may be considered necessary for educational purposes. *See McKenzie v. Smith, supra. See, also, Angevine v. Smith* 959 F.2d

³ For example, one of Neuropsychologist's recommendations was that Student's day be broken down into a sequence of "sub-routines" such as brushing teeth, washing up, getting dressed, and packing a backpack for school. [She] may then be able to learn alternative sub-routines, such as different ways to go to school that can be practiced and swapped in and out of larger routines. Exhibit P-33, p. 16.

292, 295 (D.C.Cir. 1992) (IDEA does not guarantee children with disabilities an education that maximizes their educational potential.) Accepting Petitioner's undisputed evidence that Student is benefitting from the program at Pennsylvania School, I find that Petitioner has, nonetheless, not met her burden to demonstrate that Student's full-time residential placement at Pennsylvania School is necessary for educational purposes. Therefore, I must deny Petitioner's request that DCPS be ordered to reimburse her for the costs of Student's enrollment at Pennsylvania School or to fund Student's continued enrollment at that school for the remainder of the 2012-2013 school year.

ORDER

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

All relief requested by the Petitioner herein is denied.

Date: October 27, 2012

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

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).