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

RECEIVED

STUDENT,[1] through the Parent,	)	
	)	Date Issued: December 2, 2011
Petitioner,	)	
	)	Hearing Officer: Virginia A. Dietrich
v.	)	
District of Columbia Public Schools	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of old Student, filed a due process complaint notice on August 17, 2011 alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"). At the time of the alleged violations, Student was a child with a Specific Learning Disability who was receiving special education services.

Petitioner alleged that in June 2011, the Multidisciplinary Team ("MDT") met and increased Student's level of special education services to a full-time outside of general education Individualized Education Program ("IEP") and in July 2011, the District of Columbia Public Schools ("DCPS") assigned Student to a public school that could not implement Student's IEP; thereby denying Student a FAPE. Specifically, Petitioner alleged that the designated public school was unable to provide Student with 100% specialized instruction outside of general education, as was required by her IEP. Consequently, Petitioner enrolled Student in a private school that could provide 100% special education services outside of general education. Petitioner sought DCPS funding for placement at the private school, retroactive to the beginning of the 2011-2012 school year, as well as reimbursement for out-of-pocket transportation expenses she incurred in sending Student to the private school.

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

DCPS asserted that it had provided Student with a FAPE; i.e., that in July 2011, it had provided Student with a location of services that could implement Student's IEP. According to DCPS, Petitioner was not entitled to a private school placement or tuition reimbursement.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

The due process complaint was filed on 08/17/11. This Hearing Officer was assigned to the case on 08/18/11. A resolution meeting took place on 08/31/11, at which time the parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period expired on 09/16/11, the 45-day timeline to issue a final decision began on 09/17/11, and the final decision was due on 10/31/11. However, due to problems with the timely electronic transmission of disclosures to Respondent, Petitioner requested and was granted a continuance that extended the final decision due date until 12/09/11.

Petitioner presented five witnesses: Petitioner; Student; an expert in clinical psychology; Petitioner's educational advocate, and Associate Head of School at
DCPS presented one witness: Special education coordinator ("SEC") at

Petitioner's disclosures were dated 10/04/11 and contained a witness list and Exhibits P-1 through P-21. Exhibits P-1 through P-18, and P-20 through P-21 were admitted into evidence without objection. Exhibit P-19 was not admitted into evidence. Petitioner's supplemental disclosures, dated 11/18/11 and erroneously labeled as case number 2011-0379, containing Exhibit P-22, was admitted into evidence without objection.

DCPS' disclosures were dated 10/05/11 and contained a witness list and Exhibits R-1 through R-18. Exhibits R-2, and R-7 through R-18 were admitted into evidence without objection. Exhibits R-1, and R-3 through R-6 were not admitted into evidence.

The issue of whether DCPS denied Student a FAPE by making a placement decision that Student's IEP would be implemented at when the placement team did not include people who were familiar with Student; specifically, the placement team did not include the person who conducted the observation at and with the exception of one special education teacher from none of the other members of the placement

team knew Student or had reviewed the comprehensive psychological evaluation that led to the changes in Student's 06/14/11 IEP; was withdrawn by Petitioner. That issue is dismissed without prejudice.

The two issues to be decided in this Hearing Officer Determination are as follows:

Whether DCPS denied Student a FAPE by identifying as the location of services that would implement Student's 06/14/11 IEP for the 2011-2012 school year, when could only provide inclusion services while Student's IEP prescribed full-time outside of general education services.

Whether Petitioner is entitled to reimbursement for tuition and related expenses arising from Petitioner's unilateral placement of Student at for the 2011-2012 school year.

For relief, Petitioner requested a finding that Student was denied a FAPE; that Student be placed and funded at for the 2011-2012 school year, retroactive to 08/31/11; and that Petitioner be reimbursed in the amount of for the out of pocket transportation expenses she incurred while Student attended

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, age attended a public charter school in the District of Columbia during the 2010-2011 school year, during which time she had an IEP that provided for 15 hours/week of specialized instruction.[2] Despite Student's diligent attempts to grasp the material and despite regular extra instruction in Saturday school during the 2010-2011 school year, Student received failing final grades in science, history, and math.[3]

#2. Student's full scale IQ is in the Low Average range, her verbal reasoning and verbal understanding are in the Borderline range, her perceptual reasoning is in the Low Average range, her processing speed is in the Low Average range, and her Working Memory is in the Average range.[4] The impact of Student's cognitive abilities in school is that she has difficulty with retaining information, difficulty with comprehending and expressing verbal information and she will miss parts of information particularly if the information is complex.[5] When tested in May 2011, when Student was in the 9th grade, Student's Broad Reading ability was at the 2nd – 4th grade level, her Broad Math ability was at the 3rd-5th grade level, and her Broad Written Language ability was at the 2nd – 4th grade level, and these levels of achievement essentially mirrored her testing results in 2005 and 2008.[6]

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[2] P-10-1, Petitioner.
[3] P-15, Petitioner.
[4] P-10, Clinical psychology expert.
[5] Clinical psychology expert.
[6] P-10, Petitioner.

#3. When the MDT met on 06/14/11, they agreed that Student, as a child with a Specific Learning Disability with deficits in reading, math and written expression, required a full-time IEP with all services to be provided outside of the general education setting. The MDT increased specialized instruction to 27.5 hours/week outside of general education, with behavioral support services of 1.5 hours/week outside of general education, speech-language pathology services of 30 minutes/week outside of general education, and speech-language pathology consultation services of 1 hour/month outside of general education.[7] The MDT determined that the least restrictive environment for Student was outside of general education and Student's academic program called for zero instructional hours in the general education setting.[8] Student's 06/14/11 IEP specified that she was on the diploma track for graduation.[9]

#4. On 07/27/11, Petitioner met with DCPS. DCPS indicated that Student's IEP could be implemented at and DCPS issued a Prior Written Notice placing Student at Following the meeting on 07/27/11, Petitioner visited met with the SEC, was informed about the services offered, and expressed the following concerns: whether Student's academic classes would be too large, whether Student would receive enough individualized attention, the lack of a special education teacher in some of the classes that Student would be assigned to, and whether Student would be able to obtain her high school credits from the program offered at

#5. cannot fully implement Student's 06/14/11 IEP. is able to provide Student with 27.5 hours/week of specialized instruction outside of general education; however, Student will not receive Carnegie credit hours for all of her academic classes and it would be difficult for her to get a diploma. At Student can receive diploma credits in English and reading by attending classes outside of general education; however, in order for Student to receive diploma credits for social studies, math and science, Student will have to receive specialized instruction inside the general education setting where both a general education teacher and a special education teacher would be present.[12]

#6. Due to Petitioner's concerns that Student would not get the appropriate services at Petitioner gave notice to DCPS on 08/09/11 of her intended unilateral placement of Student at for the 2011-2012 school year and the reasons why she believed Student's IEP could not be implemented at DCPS did not consent to fund Student's placement at

#7. Student began attending School on 08/31/11. School, located in the District of Columbia, is a full-time out of general education special education day program for students with learning disabilities who are on the diploma track. The program offers a small, structured class environment with 8-10 students per class.

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[7] P-9-7, P-9-17, Petitioner.
[8] P-9-19.
[9] P-9-12.
[10] P-7-1, P-8-2.
[11] Petitioner, SEC.
[12] SEC.
[13] R-16, R-17.

Day School can provide Student with specialized instruction and related services outside of general education while she earns diploma credits in all academic classes,[14] as is required by Student's 06/14/11 IEP. Student is doing well at she is receiving the individualized attention she needs, she enjoys attending school, she is making a great effort to do well, and her efforts combined with the instruction received are resulting in her earning As and Bs in all classes except for math.[15] is an appropriate school for Student at this time.

#8. Petitioner incurred in out of pocket transportation expenses for Student to attend

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:

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast,* 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer 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 provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The first issue to be determined is whether DCPS denied Student a FAPE by identifying Cardozo High School as the location of services that would implement Student's 06/14/11 IEP for the 2011-2012 school year, when could only provide inclusion services while Student's IEP prescribed full-time outside of general education services.

On 07/27/11, DCPS identified as the location of services where Student's IEP would be implemented by issuing a Prior Written Notice.[17] However, the evidence revealed that could not fully implement Student's IEP. Student's IEP called for her to receive all of her instruction outside of general education and the IEP specified that Student was projected to graduate from high school with a diploma.[18] Therefore, in order for Student's IEP to be implemented, Student would have to receive all of her

[14] Associate Head of School at
[15] Student, Associate Head of School at
[16] Petitioner.
[17] Finding #4.
[18] Finding #3.

specialized instruction in a placement where she would earn credits towards a diploma, and the placement at did not fit the bill. The placement is the setting and the location where the IEP is implemented. 34 C.F.R. 300.116.

At Student would have to attend math, science and social studies classes inside the general education setting in order to receive diploma credits; a scenario that was contrary to Student's IEP because Student's IEP specified that she would receive zero instructional hours in the general education setting.[19]

It is well established that not every failure to provide services according to a student's IEP amounts to an IDEA violation, but a material failure to implement an IEP violates the IDEA. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J,* 502 F.3d 811, 822 (9th Cir. 2007). A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. A showing of educational harm is not required. *See Department of Education, State of Hawaii v. R.F. by Pauline F.,* 57 IDELR 197 (2011).

In this case, there was a material failure to implement the IEP. If Student attended and received all of her instruction outside of general education, as was required by her IEP, it would be impossible for her to receive diploma credits in math, science and social studies; thereby making it difficult if not impossible for her to graduate with a diploma.[20]

Petitioner met her burden of proof. Pursuant to 34 C.F.R. 300.323(c)(1), as soon as possible following development of the IEP, DCPS must ensure that special education and related services are made available to the child in accordance with the child's IEP. DCPS violated this provision of the IDEA by identifying as the location of services where Student's IEP was to be implemented; a location that could not provide services in conformity with Student's IEP. Student was denied a FAPE pursuant to 34 C.F.R. 300.17, which states that a FAPE means special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate school, and are provided in conformity with an IEP. 34 C.F.R. 300.17.

The second issue to be determined is whether Petitioner is entitled to reimbursement for tuition and related expenses arising from Petitioner's unilateral placement of Student at for the 2011-2012 school year.

The IDEA does not require DCPS to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. 34. C.F.R. 300.148(a). If the parents of a child with a disability, who previously received special education and related serves under the authority of a public agency, enroll the child in a private school without the consent of or referral by the public agency, the parents may be entitled to reimbursement for the costs of the enrollment if the hearing officer

[19] Findings #3, #5.
[20] Finding #5.

finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer even if it does not meet the State standards that apply to education provided by the State Education Agency ("SEA") and Local Education Agencies. 34 C.F.R. 300.148(c). The cost of reimbursement may be reduced or denied if at least ten (1) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not given written notice to the public agency of the reason for the rejection of the public placement and the intent to enroll the student in a private school. 34 C.F.R. 300.148(d)(1).

During the 2010-2011 school year, Student attended a public charter school in the District of Columbia.[21] On 08/09/11, Petitioner gave DCPS notice of her intent to unilaterally place Student at and the reasons for her intended actions,[22] and that notice was not without merit. Petitioner had visited and ascertained that Student would not receive the services prescribed by her IEP; specifically, Student would not be able to earn sufficient credits towards a diploma in the out of general education setting that her IEP required.[23] Student began classes at a private day school, on 08/31/11, more than ten days following her notice of unilateral placement.[24] As such, Petitioner complied with the unilateral placement notice requirements of the IDEA. As of 07/27/11, when DCPS identified as the location of services, DCPS had denied Student a FAPE by not providing Student with an appropriate school that could provide services in conformity with her IEP.[25] Therefore, Petitioner was within her rights, under the IDEA, to enroll Student in a private school.

38 D.C. Code 2561.02(c) prescribes the order of priority in placing a special education student: Special education placements shall be made in the following order or priority; provided, that the placement is appropriate for the student and made in accordance with the IDEA: (1) DCPS schools, or District of Columbia public charter schools pursuant to an agreement between DCPS and the public charter school; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia. DCPS is not required to consider a private school placement when appropriate public placement options are available.

Petitioner testified that she would like Student to graduate from a public school; indicating her desire to have Student publicly educated with appropriate services, if possible. There was no evidence in the record that a public school that could implement Student's 06/14/11 IEP was currently available. There was evidence in the record that School, a private school located in the District of Columbia, could provide the services prescribed by Student's IEP, although there was no evidence in the record that School met SEA standards. At the present time, Student is performing very well at Day School after only three months of intensive instruction, and is an

[21] Finding #1.
[22] Finding #6.
[23] Findings #4, #5.
[24] Finding #7.
[25] Finding #5.

appropriate placement and school for Student at this time.[26] Given Student's full scale IQ in the Low Average range and her relative cognitive strengths,[27] coupled with the intensive instruction she will receive at during this school year, strong consideration should be given to repeating standardized academic achievement testing in early May 2012 to ascertain the gains Student has made over the course of the 2011-2012 school year and if appropriate, returning her to a public school placement that can implement her IEP, if such a public school placement is available.

ORDER

(1) DCPS shall place and fund Student at for the 2011-2012 school year, retroactive to 08/31/11, no later than 30 calendar days from the date of this Order;

(2) DCPS shall reimburse Petitioner for out of pocket transportation expenses in the amount of $60.00, no later than 30 calendar days from the date of this Order; and

(2) At least 30 days prior to the end of the 2011-2012 school year, DCPS shall convene a MDT to review and revise Student's IEP as appropriate, and discuss and determine placement and the location of services for the 2012-2013 school year.

IT IS SO ORDERED.

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: December 2, 2011

/s/ Virginia A. Dietrich
Hearing Officer

[26] Finding #7.
[27] Finding #2.