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

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and on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a year-old girl, who school at a parentally-funded private preschool during SY 2011/12 and also received vision services at parents' expense during the latter half of SY 2011/12.

On May 17, 2011, Petitioners filed a Complaint against Respondent DCPS that raised the following issues: (1) Whether DCPS denied Student a FAPE by failing to timely evaluate and classify her through the Early Intervention Program; 2) Whether DCPS denied Student a FAPE by failing to timely evaluate and classify her through the Early Stages Program; 3) Whether DCPS denied Student a FAPE by failing to develop an appropriate IEP for SY 2010/11; (4) Whether DCPS denied Student a FAPE by failing to propose a placement; (5) Whether DCPS denied Student a FAPE by failing to give Parents a copy of the January 6, 2011 IEP; (6) Whether the private facility Student attended during SY 2011/12 is a proper placement for Student; and (7) Whether the additional services Parent provided were proper. As relief for the alleged denials of FAPE, Petitioner requested reimbursement for cost of the private facility from January through June of 2011, reimbursement for the functional vision, pre-braille, and orientation and mobility services Parents provided to Student, appropriate assistive technology as determined by an independent vision specialist, and ESY for children with vision impairment.

On May 27, 2011, DCPS filed its Response to the Complaint. In its Response, DCPS asserted that (1) DCPS is not the proper Respondent for claims involving the Part C program operated by OSSE for early intervention for children from birth to three years old; (2) with respect to Part B

services beginning on a child's third birthday, DCPS timely complied with its duty upon receiving proper notice of Student's transition; (3) the factual circumstances and timeline for this case was affected by Parents' request to delay developing the IEP until Parents finally agreed to development of the IEP on January 6, 2011 and Parents' refusal to provide initial consent for the provision of services; (4) the IEP is reasonably calculated to provide Student with meaningful educational benefit; (5) the placement of 1 hour per week of vision services and orientation and mobility services is appropriate and represents the LRE; (6) DCPS provided Parent and her attorney with multiple copies of the IEP; (7) the selection of site is within the LEA's discretion and DCPS has selected a site which can implement the IEP and conforms to the LRE standards; and (8) Parents failed to provide appropriate notice of a unilateral placement and/or acted unreasonably. DCPS attached to the Complaint documents in support of some of its assertions.

On June 20 and 21, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. The hearing officer merged Petitioner's claims 1 and 2 into one issue. The hearing officer issued the Prehearing Order on June 24, 2011.

On June 24, 2011, DCPS filed a Motion to Dismiss. In its Motion, DCPS asserted that because Parents refused to provide consent for the initial provision of services, pursuant to 34 C.F.R. § 300.300(b), DCPS has no obligation to provide a FAPE to Student and Parents are not entitled to assert any of the protections afforded disabled students under IDEA. On June 28, 2011, Petitioner filed its Opposition to DCPS's Motion to Dismiss, explaining therein that 34 C.F.R. § 300.300(b) does not preclude a parent who has failed to provide consent for the initial provision of services from challenging through a due process complaint the appropriateness of the services offered by the LEA. On July 5, 2011, the hearing officer issued an Order Denying DCPS's Motion to Dismiss for essentially the reasons asserted in Petitioner's Opposition to the Motion.

On July 11, 2011, DCPS filed a Motion for Reconsideration of its Motion to Dismiss. DCPS made the same arguments it asserted in its initial Motion, but attached a 2008 case from the U.S. District Court for the Northern District of Alabama to its Motion. On July 14, 2011, Petitioner filed its Opposition to the DCPS's Motion for Reconsideration, pointing out the lack of new arguments and/or facts and seeking sanctions against DCPS. The hearing officer took the Motion and Opposition under consideration at the due process hearing and denied the Motion verbally on the record during the hearing.

On July 11, 2011, Petitioner disclosed twenty-six documents (Petitioner's Exhibits 1 – 26), and DCPS disclosed eleven documents (Respondent's Exhibits 1 – 11).

The hearing officer convened the due process hearing on July 18, 2011.[1] The parties' disclosed documents were admitted into the record without objection. Once the hearing officer had addressed DCPS's Motion for Reconsideration, the hearing officer received opening statements and the parties' testimonial evidence. When the hearing officer requested post-hearing briefing by the parties on the issue of whether DCPS was required to provide services to Student in a DCPS school it had assigned her to attend, or whether DCPS could instead provide the services to Student at her neighborhood school as a non-enrolled student, counsel and the hearing officer

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

agreed that the parties would be allowed to file the requested brief, as well as a written closing statement, on or before 6:30 pm on Friday, July 22, 2011.[2] Thereafter, the hearing officer concluded the hearing but left the record open until July 22nd.

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

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS deny Student a FAPE by failing to timely evaluate and classify her through the Early Intervention Program and the Early Stages Program?

2. Did DCPS deny Student a FAPE by failing to develop an appropriate IEP for SY 2010/11 by failing to include a sufficient amount of services?

3. Did DCPS deny Student a FAPE by failing to propose a placement and advising Parents to bring Student to her neighborhood school for services as a non-attending student?

4. Did DCPS deny Student a FAPE by failing to give Parents a copy of the January 6, 2011 IEP?

5. Is the private facility Student attended during SY 2011/12 a proper placement for Student?

6. Were the additional services Parents provided proper?

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 girl, who attended a private preschool located outside of the District during SY 2010/11 at Parents' expense, and also received private vision services at Parents' expense during the latter half of SY 2010/11.

2. Student has a diagnosis of Leber's Congenital Amaurosis, which is a rare genetic condition that affects the retina and involves a loss of vision present at birth. Student received this diagnosis in December 2007 just before she turned 1 year old. In addition, Student's vision is marked by congenital nystagmus, described as involuntary eye

[2] Both parties filed a writing by or before the deadline.

movements. Overall, it is unclear whether Student's vision will stay the same or deteriorate over time.[3]

3. At or near the beginning of 2008, Parents got Student involved in the District of Columbia's program for children ages 0 to 3. The District sent two evaluators out to evaluate Student in the beginning of 2008 pretty quickly after Parents' initial request. The District also assigned Parents a contact person relatively quickly around the middle of 2008. In 2009, the District's observers went to observe Student at the private preschool located outside of the District where Parents placed her. The observers gave Student's preschool teachers oral instructions concerning how to better serve Student. Over the summer after Student turned 3 in early 2010, Parents called their contact person, only to learn she was no longer employed by the District, then Parents eventually discovered that they should call DCPS's Early Stages Program. Hence, in September 2010, Parents called the Early Stages Program. The Early Stages Program noted that Student should have been transitioned prior to turning 3 years old, so they conducted a phone intake and indicated that they would expedite processing to get Student back into the District's system.[4]

4. On September 3, 2010, Student visited a Doctor of Optometry for a low vision consultation. In the resulting report to Student's treating physician, the doctor noted that Student's diagnosis of congenital nystagmus likely related to Leber's congenital amaurosis. The doctor indicated that Student's visual acuities measured in the 200/80 range, although obtaining an accurate reading is difficult at Student's age. The doctor noted that Student tended to hold things very close to her eyes with near tasks, and she was very intrigued by the use of a closed circuit television that allowed her to enlarge objects which she could not otherwise see even by getting closer. The doctor stated that he counseled Student's family at length about potential rehabilitative strategies. The doctor was of the opinion that the closed circuit television would be a good place to start, since Student would require high magnification given the level of her vision loss, although the doctor did not believe the closed circuit television would be adequate for sustained learning based on Student's visual acuities and the amount of magnification she used during her consultation. Hence, the doctor also recommended the options of Braille and audio substitution for Student. Although the doctor did not sense that Student had a significant visual field loss and Student was comfortable getting around unassisted, the doctor opined that mobility training and even the use of a white cane would become important strategies as Student becomes older.[5]

5. On October 7, 2010, Mother formally provided consent for DCPS to conduct an initial evaluation of Student.[6]

6. On October 10, 2010, DCPS's Early Stages Program issued a confidential Psychological Report concerning Student. The evaluator noted that because Student was observed to

[3]Testimony of Mother; testimony of Petitioner's expert witness; *see* Petitioner's Exhibit 18.
[4]Testimony of Mother.
[5] Petitioner's Exhibit 2.
[6] Respondent's Exhibit 1.

have difficulty viewing small details during the evaluation, the evaluation results may reflect an underestimate of Student's true cognitive abilities. Student's performance on the Verbal Index of the Wechsler Preschool and Primary Scale of Intelligence – Third Edition ("WPPSI-III") resulted in a composite score of 110, which is in the High Average range. On the Vineland Adaptive Behavior Scales, Second Edition, Student scored in the Moderately High range in the area of Communication (Standard Score ("SS") = 116), in the Adequate range in the area of Daily Living Skills (SS = 101), and in the Moderately High to Adequate range in the area of Socialization (SS= = 114). Ultimately, the evaluator noted that Student's vision appeared to impact her ability to respond appropriately to cognitive measures that required her to complete verbal items by choosing an appropriate corresponding picture, and Student also appeared to exhibit a relative weakness in the area of written language, which was largely impacted by her ability to view written letters and numbers and perceive them accurately.[7]

7. On November 4, 2010, DCPS's Division of Special Education, Vision Support Services, issued a functional visual assessment for Student. The purpose of the assessment was to determine Student's eligibility for vision support services as a student with visual impairments. The assessment report indicated, *inter alia*, that Student failed the Near Acuity and Distance Acuity portions of the McDowell Visual Screening, that the appearance of Student's eyes is pendulous nystagmus, that Student views small near tasks at a 1.2-4 inch proximity, and that Student is unable to detect unknown objects at ten feet but at close range can identify a wide range of two inch pictures of objects using generalized concepts. The evaluator ultimately determined that Student is eligible for vision support services as a student with visual impairments. The evaluator stated that Student requires tools and technology for the student with visual impairments to modify instruction to allow Student to use her strengths to increase the likelihood of academic success as appropriate, and to adapt instruction materials as needed to access the standards based curriculum as appropriate. The evaluator also indicated that Student must be considered for an Educational Core Curriculum consisting of 25 enumerated components, including appropriate accommodations and modifications, assistive technology, Braille reading skills, preferential seating, and extra time.[8]

8. On November 15, 2010, DCPS's Office of Special Education issued a functional orientation and mobility screening report for Student. The evaluator noted, *inter alia*, that Student generally moved around well in the familiar environment of her preschool class and was also able to navigate the hallways, waiting room, and playroom. Student could also use the bathroom independently and find offices, the kitchen and auditorium from her classroom and then find her way back. Although Student usually held classroom staff's hand for hallway travel, she walked by herself during the screening by walking closely to the side and using the wall when needed. However, for outdoor travel, Parent and Student's teacher reported that Student has problems with an uneven travel area and with slightly raised sidewalks. Student's motor skills, consisting of gait, balance, posture, and walking speed, were good. Moreover, Student was able to remember new routes with only one or two attempts, understood directions, could use

[7] Petitioner's Exhibit 3; Respondent's Exhibit 5.
[8] Petitioner's Exhibit 4; Respondent's Exhibit 4.

landmarks or clues during travel, and could judge visual distance while walking. The evaluator noted that Student is a very smart and independent visual traveler at her school, who can visually navigate without any help once she has learned the indoor environment. Ultimately, the evaluator recommended 2 to 3 sessions of O&M training to familiarize Student with a new or unfamiliar indoor environment, followed by consultation services from school staff and other service providers as needed. For outdoor travel around the school building and school playground area, the evaluator recommended 30 minutes per week of O&M training 2 to 3 months, followed by consultation service as needed.[9]

9. DCPS's expert witness certified teacher of the vision impaired conducted the assessment that resulted in Student's November 15, 2010 functional orientation and mobility screening report. This same certified teacher also observed Student at her private preschool located outside of the District in 2009 and made recommendations, and observed Student at her private school in the Fall of 2010 and collected interviews from Parent and the school's staff.[10]

10. On November 16, 2010, DCPS's Early Stages Family Care Coordinator provided Mother with copies of Student's O&M Report and psychological evaluation by an email that also noted Student's eligibility meeting would be held the following morning.[11]

11. By responsive emails dated November 16, 2010, Mother inquired whether plan was to develop an IEP for Student at the eligibility meeting if she was determined eligible. When the Family Care Coordinator confirmed that was the plan, Mother indicated that she was prepared for the eligibility meeting but not for an IEP meeting. Mother specifically stated, "I will not be able to have an IEP meeting tomorrow."[12]

12. At Student's November 17, 2011 eligibility meeting, Student's psychological, O&M, and vision assessments were reviewed, and Student was found eligible for vision services under the category of vision impairment. The IEP portion of the meeting was not held in accordance with Parent's previous request to only have the eligibility meeting.[13]

13. On November 29, DCPS's Early Stages Family Care Coordinator sent an email to Mother inquiring whether Mother was prepared to schedule Student's IEP meeting and asking mother to provide some dates that would work for her schedule. By email dated December 9, 2010, Mother suggested the afternoon of December 15, 2010. By reply emails on December 9, 2010, the Family Care Coordinator indicated they were booked on December 15th and suggested December 28 or 29 instead, but then indicated that the vision services team would be on leave for the holidays so the parties would have to look to January for the meeting. The Family Care Coordinator asked Mother to provide 3-5 potential January dates.[14]

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[9] Petitioner's Exhibit 5.
[10] Testimony of DCPS expert witness.
[11] Respondent's Exhibit 3.
[12] *Id.*
[13] Respondent's Exhibit 2.
[14] Respondent's Exhibit 3.

14. On January 6, 2011, Student's IEP team developed an IEP that requires Student to receive 1 hour per week of specialized instruction in general education and 60 minutes per month of orientation and mobility services outside general education. The IEP also provides that Student shall be supplied with a magnifying glass as a classroom accommodation, and that DCPS would be providing vision services only initially but when Student enrolls in school, additional assessments may be needed to address adaptive physical education, adaptive equipment, etc.

    The IEP contains 7 annual goals in the area of vision, which require Student to master the following skills: (i) use hand trailing technique for hallway travel at her school upon verbal direction; (ii) travel various routes independently within her school setting upon verbal direction; (iii) travel independently around the outside school environment upon verbal direction; (iv) use other senses, such as tactual and auditory, as well as her remaining vision, for her safe and independent travel upon verbal direction; (v) explore the American Printing House of the Blind ("APH"), early Childhood Dual Vision, On the Way to Literacy, Level One Pre Braille series to tactually track straight and curved lines in two settings; (vi) use the same resources to tactually scan straight and curved lines in two settings; and (vii) use the same resources to tactually scan and track basic geometric shapes.

    The "Needs" section of the IEP indicates, *inter alia*, that the addition of cane skills can be considered for Student once she has mastered initial goals. The "Present Level of Educational Performance" section of the IEP notes that at her current school, Student uses a human guide for hallway, indoor routes, and outside travel; upon verbal direction she, hesitates initially for hallway travel but then moves to the left side wall slowly and brushing it until she has enough confidence to walk through; and she is able to use her residual vision to support her in the instructional setting.

    Mother did not sign the IEP. Instead, she wrote, "I need more time to think about this" above the line for her signature. At the bottom of the first page of the IEP, DCPS noted the following: "[Mother] stated she needs more time before she signs the IEP. She is aware that [Student] cannot receive services until this document is signed."[15]

15. Student's annual IEP goals for vision, which were numbered 5, 6 and 7 on the IEP, were derived from APH's very specific guidelines concerning Braille instruction and would have included dual-vision books on the way to literacy. The pre-reading curriculum includes the use of hands and tracking as part of an "early readiness system," which allows students to explore tactile and auditory areas to get ready for reading. After 30 days of services, DCPS would have assessed Student's level of services and determined whether or not that level needed to be adjusted.[16]

16. Mother felt that Student's O&M goals required her to be dependent on others, and Mother felt that Student's vision goals should have been extended because Student is so bright. Overall, Mother was of the opinion that Student required much more than what DCPS was offering on the IEP. However, DCPS stated that once Student was in the school system, they would observe her and provide her with what she needed. Hence,

[15] Petitioner's Exhibit 6; Respondent's Exhibit 6.
[16] Testimony of DCPS's expert witness.

Mother was taken aback when DCPS advised her that there was no seat for Student in all of DCPS. Mother was told that she would have to bring Student to the neighborhood DCPS school 1 hour per week and 60 minutes per month for services. Although Student would be coming from the private preschool outside of the District where Parents had placed her at their own expense, DCPS offered no transportation for Student.[17]

17. Indeed, DCPS's expert certified teacher of the vision impaired acknowledged that Parent was told there was no space available for Student in DCPS's preschool programs and Parents would have to bring Student to the "neighborhood school of Parents' choice" to receive services as a non-attending Student.[18]

18. Although Parent requested an assistive technology evaluation, DCPS declined to provide one until it could observe Student in her specific setting because the assistive technology to be provided depended upon Student's particular needs in the particular setting. The assistive technology DCPS offers ranges from iPads to electronic Braillers and CCTVs.

    It is true that DCPS told Parent at Student's January 2011 IEP meeting that there was no space for Student at her neighborhood DCPS school, so Student was going to receive pullout services and Parents would have to take Student to the neighborhood DCPS school for 1 hour per week for vision services and for 1 hour per month for orientation and mobility services.

    DCPS offers a readiness program for 3 and 4 year-olds when required, but the program is for students who are functioning below level. As Student was not delayed in any cognitive or linguistic areas, she would not have been given preferential enrollment in the readiness/Head Start/therapeutic preschool program.[19]

19. On January 24, 2011, DCPS's Early Stages Family Care Coordinator generated a letter to Parents indicating that Parents had made a referral to Early Stages for Student on September 15, 2010, developmental assessments were conducted on October 7, 2010, and the IEP was developed on January 6, 2011 but Mother indicated she needed time to think about the IEP before signing it and left with a copy of the draft IEP to review with Father, and DCPS indicated that Student could not receive services until the document was signed. The Coordinator indicated that she had attempted to make contact with Parents on January 6th via email to Mother, on January 11th by phone, on January 20th by phone, and on January 24th by phone, leaving messages for all three phone calls. The Coordinator indicated that she would not make further attempts to reach Parents by phone but hoped they would get in touch with her upon receipt of the letter.[20]

20. While DCPS was attempting to contact Parents re Student's draft IEP, Parents were obtaining additional private services for Student from a teacher of the visually impaired because Mother had realized that Student required more than she was receiving from the private preschool she was attending. However, Parents never told DCPS that outside services were being provided to Student. Moreover, even as of the date of the due

[17] Testimony of Mother.
[18] Testimony of DCPS's expert witness.
[19] Testimony of DCPS's expert witness.
[20] Respondent's Exhibit 7.

process hearing in this case, Parents never provided written consent for DCPS to provide services to Student.[21]

21. On April 11, 2011, DCPS Early Stages Program issued another confidential Psychological Report concerning Student to provide additional information regarding Student's cognitive functioning. The evaluator was of the opinion that the evaluation results provide a valid estimate of Student's current cognitive functioning within the verbal domain, but the scores on measures of nonverbal abilities may underestimate Student's full potential because of her compromised ability to effectively respond to visual stimuli. Student's Verbal Index composite score on the WPPSI-III was 147, which is at the 99 percentile rank and in the Very Superior range. The evaluator did not provide Index scores for Performance and Full Scale IQ because of discrepancy between subtests and Student's difficulty completing all nonverbal tasks. However, Student performed well on the Battelle Developmental Inventory – Second Edition, on items administered in the areas of Attention and Memory and Reasoning and Academic Skills. Ultimately, the evaluator recommended continued implementation of the strategies listed in the October 2010 psychological report for Student, as well as emphasis on continued facilitation of social exchanges as a means to teach Student other skills in light of her strong social skills.[22]

22. On May 5, 2011, DCPS convened a second eligibility for Student. DCPS noted that the additional psychological testing showed that Student's cognitive skills had not been impacted, which indicated a lack of impact on her education. Hence, DCPS continued to recommend a non-attending status for Student. On the other hand, Parents and their counsel continued to believe that the IEP DCPS previously developed for Student was inappropriate.[23]

23. On May 13, 2011, Petitioner's counsel sent a letter to the Early Stages Evaluation Coordinator stating Petitioner's position that the IEP team was doing "nothing" for Student, in violation of her legal rights and needs. Counsel stated that DCPS was offering "equitable services 'for a non-attending student'" instead of an individualized education program due only to a lack of space, which violated IDEA. Counsel also disagreed with the IEP team's determination that Student's cognitive skills had not been negatively impacted and there was a lack of impact on her education. Finally, counsel stated that Student required pre-Braille instruction on a daily basis; listening, aural, and reading skills instruction on a regularly scheduled basis, and daily technology skills.[24]

24. Petitioner's expert witness teacher of the visually impaired developed IEP recommendations for Student after reviewing DCPS's proposed IEP for Student. The teacher's recommendations included the following seven accommodations: preferential seating, visual preview of objects and manipulatives, CCTV, use of a Braille writer, large print as needed, hand-held magnifier, and consistent placement of commonly used

[21] Testimony of Mother.
[22] Petitioner's Exhibit 18; Respondent's Exhibit 9.
[23] Petitioner's Exhibit 21.
[24] Respondent's Exhibit 10; Petitioner's Exhibit 22.

materials. The recommendations included three orientation and mobility goals that covered the following areas: assuming the correct human guide position, with modeling fading to independence; holding her cane in a vertical or diagonal position when traveling in human guide position, with physical prompts fading to one verbal reminder; and taking responsibility for her cane, with physical assistance fading to one verbal prompt. The recommendations also included vision goals that would require Student to demonstrate efficient pre-Braille reading readiness skills, demonstrate efficient pre-Braille writing skills, and become familiar with low vision aids such as a magnifier or a CCTV. However, the teacher never submitted her recommendations directly to DCPS, and the recommendations do not include a precise number of hours of services.[25]

25. Petitioner's expert witness teacher of the visually impaired has worked with Student on a weekly basis for approximately one hour per week since January 2011, during which time the teacher provides Student with a combination of vision and orientation and mobility services. The teacher determined to provide Student with 1 hour of services per week after reviewing Student's evaluations, which suggested at least 1 hour per week of services and taking into account that Parents would be paying for the services themselves.

    This teacher has introduced Student to pre-Braille activities and the use of a long cane for mobility purposes. The teacher is concerned that DCPS's IEP focuses on trailing along a wall or hand-holding with an adult instead of using a cane, because the methods recommended by DCPS would be too difficult with children changing classes at once, doesn't take curves, stairs and other attributes of the environment into account, and will not instill confidence when Student is on the playground. The teacher believes that Student has benefitted from the teacher's services, in that she's a more confident traveler and has taken to Braille. Moreover, the teacher has noticed that Student is tentative, cautious and nervous without a cane, and the cane helps with Student's independence and confidence. The teacher is also of the opinion that Student is doing very well with the early Braille instruction she's receiving, and the teacher recommends continuing with this instruction and moving into the introduction of actual Braille letters. The teacher opines that Student can do very well in general education with appropriate accommodations and modifications.

    Student will enter kindergarten in SY 2012/13, and she will be dual media because she will use both print and Braille. Hence, the teacher believes that Student needs pre-Braille instruction, as well as caning skills, to get ready for kindergarten.[26]

26. Petitioner submitted for inclusion in the administrative record a document entitled, *Literacy for Students Who are Blind: A Framework for Delivery of Instruction.* The document summarized the results of a study to gain professional consensus on the appropriate levels of instructional services for students in Braille literacy programs. The study respondents were 40 professionals in visual impairment. However, the document stressed that the study findings were intended to provide only *general* guidelines, as *the level of services must be tailored to address the individual needs of each student.* (Emphasis in original). For a student at the preschool to kindergarten level, the document recommended daily contact with the student (89% of respondents agreed) and a session

[25] Petitioner's Exhibit 24.
[26] Testimony of Petitioner's expert witness.

of ½ to 1 hour per day (89% of respondents agreed), with services to be delivered throughout at least one school year (100% of respondents agreed).

Petitioner's expert witness teacher of the visually impaired believes the recommended level of services from the study should be tailored to Student's needs by providing her with services twice per week, with the idea that the services will be increased if Student can handle it. The teacher recommends providing the services to Student during the actual school day because it would be too difficult for a year-old to attend school all day and then go to another place for additional services. The teacher also recommends assessing Student every 6 months to determine where she is and how much she has learned. The teacher further opines that Student should be in a classroom setting because she is dual media and will need more time than other single media kids. Ultimately, the teacher recommends 1 hour of combination push-in/pullout vision services two times per week, preferably in the school setting, direct orientation and mobility services for at least 1 hour per week that consists of cane travelling, and classroom accommodations/modifications, which can be set up by a vision teacher but then administered by a general education teacher.[27]

CONCLUSIONS OF LAW

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

1. Alleged Failure to Timely Evaluate and Classify Through the Early Intervention Program and the Early Stages Program

A FAPE must be available to all children residing in the District of Columbia between the ages of 3 and 21, inclusive. The obligation to make FAPE available to each eligible child residing in the district begins no later than the child's third birthday, and an IEP or IFSP must be in effect for the child by that date. 34 C.F.R. § 300.101(a)-(b). The District must have in effect policies and procedures to ensure that children participating in early intervention programs under Part C of IDEA experience a smooth and effective transition to preschool programs, that an IEP or IFSP has been developed and is being implement for the child by the child's third birthday, and that each LEA affected will participate in transition planning conferences arranged by the designated lead agency. 34 C.F.R. § 300.124.

In the instant case, Petitioner charges DCPS with failing to timely evaluate and classify Student through the Early Intervention Program and the Early Stages Program. However, it is OSSE, not DCPS which administers the District of Columbia Early Intervention Program ("DCEIP"). *See* District of Columbia Early Childhood Transition Guidelines, prepared by OSSE's Division of Special Education, which outlines the respective duties of the DCEIP and DCPS in transitioning a child from Part C early intervention services to Part B services. Indeed, DCPS has maintained throughout this proceeding that it bears no responsibility for OSSE's early intervention program, and Petitioner acknowledged such early on. *See* Prehearing Order at 2.

[27] Petitioner's Exhibit 25; testimony of Petitioner's expert witness teacher of the visually impaired.

With respect to DCPS's Early Stages Program, it is undisputed that DCPS had an obligation to help facilitate Student's smooth transition from Part C services to Part B services by participating in Student's transition conference(s). However, it is DCEIP, not the Early Stages Program, which is responsible for coordinating the transition process itself. Hence, DCEIP is required to send the Early Stages Program notice of students potentially eligible for Part C services, and to also send DCPS lists of scheduled transition conferences. *See* District of Columbia Early Childhood Transition Guidelines. In this case, the evidence proves that for some reason DCEIP failed to timely transition Student to Early stages prior to her third birthday. However, once Parents referred Student to DCPS's Early Stages Program in September 2010, Early Stages conducted a phone intake and indicated that they would expedite processing for Student. Thereafter, Early Stages promptly conducted evaluations of Student, determined by November 2010 that Student was eligible for vision and mobility services, and was prepared to develop Student's initial IEP at the eligibility meeting. At the request of Mother, however, DCPS delayed the development of Student's IEP until a later date.

Based on the legal standards and factual circumstances outlined above, the hearing officer concludes that Petitioner has failed to meet its burden of proof on these combined claims.

2. <u>Alleged Failure to Develop an Appropriate IEP for SY 2010/11</u>

A FAPE consists of special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the State Education Agency; include an appropriate preschool, elementary or secondary school education; and are provided in conformity with an IEP. 34 C.F.R. § 300.17. Indeed, the free appropriate public education required by IDEA is tailored to the unique needs of each child with a disability by means of an IEP. *See Board of Education of the Hendrick Hudson Central School District, Westchester County, et al., v. Rowley et al.,* 458 U.S. 176, 182 (1982). Hence, the requirement to provide a FAPE is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.*

In this case, Petitioner alleges that Student's initial IEP is inappropriate for failure to include a sufficient amount of services. More specifically, Petitioner asserts that Student requires more than the 1 hour per week of specialized instruction and 60 minutes per month of orientation and mobility services included in Student's draft IEP, more advanced goals for the vision and orientation and mobility services to be provided, and the numerous supports, accommodations and classroom aids recommended by its expert witness and/or enumerated in the functional vision assessment prepared by DCPS's expert witness.

On the other hand, DCPS asserts that the initial IEP is appropriate and reasonably calculated to provide Student with a FAPE. DCPS further points out that there is no significant difference between the vision and the orientation and mobility services proposed in the IEP and the vision and orientation and mobility services Parents are presently paying for Student to receive. Indeed, the IEP would provide Student with 5 hours of services per month, while Parents are paying for Student to receive only 4 hours of services per month. DCPS further argues that it would have provided school and home access to pre-Braille readers and other technology to assist Student,

while the current service provider only provides access to the technology during her one hour per week with Student.

After reviewing the evidence and considering the arguments of counsel, the hearing officer has concluded that the amount of vision and orientation and mobility services included in the IEP, as well as the annual goals and objectives included in the IEP, are appropriate and reasonably calculated to provide Student with a FAPE, at least in the first instance. In reaching this conclusion, the hearing officer has taken into account that the private service provider Parents have obtained for Student is providing slightly less than the amount of services called for in the IEP, and Student has benefitted from those services and made progress. Although the private service provider has addressed different goals during the provision of her services, the hearing officer notes that DCPS relied upon standards recommended by the American Printing House of the Blind and the recommendations of its own certified teacher of the vision impaired in developing the IEP goals, and in any event DCPS intends to review Student's progress 30 days after implementation of the IEP begins to determine whether the services being provided are sufficient or need to be adjusted. *See Rowley*, 458 U.S. at 207 (Primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, is left by IDEA to state and local educational agencies in cooperation with the parents of the child).

On the other hand, the hearing officer is persuaded by Petitioner's argument that the IEP is deficient for failure to include appropriate accommodations, classroom aids, and assistive technology for Student. Indeed, DCPS's expert witness acknowledged DCPS's obligation to provide Student with assistive technology to the extent appropriate, but DCPS has chosen to hold off on conducting the evaluation until it can observe Student in her specific setting, even though DCPS advised Mother at Student's January 2011 IEP meeting that DCPS has no specific setting to offer Student due to a lack of space. Moreover, DCPS's functional vision assessment of Student indicates that, as a student with visual impairments, Student "must" be considered for, *inter alia*, appropriate accommodations and modifications and assistive technology. Nevertheless, the only accommodation or modification listed in Student's IEP is a magnifying glass, and the IEP lists no assistive technology at all to be provided. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of demonstrating that the IEP is deficient for failure to include appropriate accommodations, modifications, classroom aids, and assistive technology, and the hearing officer will order DCPS to conduct an assistive technology evaluation of Student and reconvene Student's IEP meeting to review the evaluation and revise Student's IEP to include the accommodations, modifications, classroom aids, and assistive technology Student requires to access the general curriculum.

3. <u>Alleged Failure to Propose a Placement/Location of Services for Student</u>

As noted above, a FAPE consists of special education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the State Education Agency; *include an appropriate preschool*, elementary or secondary school education; and are provided in conformity with an IEP. 34 C.F.R. § 300.17 (emphasis added). Moreover, each public agency must ensure that a continuum of alternative placements is

available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115(a).

In the instant case, Petitioner argues that DCPS failed to propose an appropriate placement for Student when it indicated that there was no space available for Student in its preschool programs so Parents would have to bring Student to her neighborhood school for services as a non-attending Student. DCPS does not dispute this fact. Instead, DCPS maintains that Student is not entitled to a full day of programming based on her current level of functioning. Assuming, *arguendo*, that DCPS's position regarding Student's lack of entitlement to a full day of preschool services is correct, that does not excuse DCPS of its obligation to ensure that a continuum of alternative placements is available for the disabled children residing in the District, which continuum would include partial-day preschool programs for children who require that level of services. Based on the evidence in this case, which indicates that DCPS has failed to provide Student with a preschool program where she can receive the special education and related services required under her IEP, the hearing officer concludes that Petitioner has met its burden of proof on this claim. Accordingly, the hearing officer will order DCPS to convene a meeting to discuss and determine an appropriate preschool program for Student. If DCPS cannot offer an appropriate preschool program to Student, then it shall fund her attendance at an appropriate private preschool program.

4. Alleged Failure to Provide Parents a Copy of the Initial IEP

Petitioner has alleged that DCPS failed to timely provide Parents a copy of Student's initial IEP. However, the evidence in this case indicates that Petitioner's expert witness reviewed a copy of Student's initial IEP prior to developing her own recommendations for Student. Hence, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this claim.

5. Is the Private Preschool Student Attended During SY 2011/12 a Proper Placement?

A private school placement is "proper" under IDEA if the education provided by the private school is reasonably calculated to enable the disabled child to receive educational benefits. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982).

Petitioner has raised the issue of whether the private preschool Student attended during SY 2011/12 is a "proper" placement for Student. However, the hearing officer's review of the evidence in this case reveals that, as DCPS pointed out in its written closing statement, Petitioner failed to present any evidence regarding Student's current private preschool program. Moreover, to the extent that any evidence was presented concerning this issue, it was testimony from Mother that at some point during SY 2011/12, Mother realized that Student required more than she was receiving from the private school program. Under these circumstances, the hearing officer concludes that Petitioner failed to meet its burden of demonstrating that Student's private preschool program is proper. Hence, the hearing officer will deny Petitioner's request for reimbursement of the tuition Parents have paid for Student to attend the program during SY 2011/12. *See Florence County School District Four v. Shannon Carter*, 510 U.S. 7 (1993)

(parents are entitled to reimbursement for unilateral placement only where the public placement violated IDEA **AND** the private school placement was proper under the Act) (emphasis added).

6. Were the Additional Services Provided by Parents Proper?

A private school placement is "proper" under IDEA if the education provided by the private school is reasonably calculated to enable the disabled child to receive educational benefits. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982).

Petitioner has raised the issue of whether the additional services Parents provided for Student, which consisted of vision and orientation and mobility services from mid-January 2011 moving forward, constituted were "proper" for Student. On the other hand, DCPS argues that Petitioners have waived Student's entitlement to a FAPE by failing to consent to the initial provision of services under Student's initial IEP, especially since the additional services Student received are the same type and amount of services offered in the IEP.

Upon review of the evidence concerning the additional services provided to Student by Petitioner's expert witness in this case, the hearing officer concludes that the evidence is clear that the services were reasonably calculated to enable Student to receive educational benefit. The hearing officer also notes that although the hearing officer concluded above that Student's initial IEP was appropriate with respect to the amount of vision and orientation and mobility services included therein and the annual goals and objectives, the hearing officer further concluded that the IEP was inappropriate for failure to include appropriate accommodations, modifications, classroom aids, and assistive technology, and that DCPS failed to provide Student with a preschool program where she can receive the special education and related services required under her IEP. Hence, Petitioner has met its burden of demonstrating that the public placement -- that is, both the IEP and the lack of a proposed preschool program, violated IDEA.

The hearing officer acknowledges that Petitioner has met its burden of demonstrating both that the public placement violated IDEA and that the private placement was proper under the Act. *See Florence County School District Four v. Shannon Carter*, 510 U.S. 7 (1993) (parents are entitled to reimbursement for unilateral placement only where the public placement violated IDEA and the private school placement was proper under the Act). However, the undisputed evidence in this case proves that Petitioner failed to consent to the initial provision of the very type of services for which it seeks reimbursement, with the result that DCPS cannot be held liable for denying Student a FAPE by failing to provide the services for which it was requesting consent. *See* 34 C.F.R. § 300.300(b)(4)(i). Therefore, the hearing officer concludes that an award of tuition reimbursement for the additional services Parents provided to replace the services for which DCPS sought but was denied consent to provide would be inappropriate. Accordingly, the hearing officer will deny Petitioner's request for reimbursement of the cost of the additional private services provided to Student.

ORDER

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

1. Within 15 calendar days of the issuance of this Order, DCPS shall convene an MDT/IEP meeting to discuss and determine an appropriate preschool program for Student. If DCPS determines that it cannot offer Student a space in an appropriate preschool program at a DCPS school, then DCPS shall fund Student's attendance at an appropriate private preschool program.

2. Within 15 calendar days of the date of this Order, DCPS shall conduct an assistive technology evaluation of Student and provide a copy of same to Parents. Within 10 days of the date of the provision of the evaluation report to Parents, DCPS shall reconvene Student's IEP/MDT meeting to review the evaluation and revise Student's IEP to include the accommodations, modifications, classroom aids, and assistive technology Student requires to access the general curriculum. In the event DCPS is unable to comply with the timelines in this Paragraph due to the actions of Parents and/or their representative(s), then the timelines herein shall be extended by one day for each day of delay caused by Parents and/or their representative(s)

3. All remaining claims and requests for relief in Petitioner's May 17, 2011 Complaint are **DENIED AND DISMISSED WITH PREJUDICE**.

NOTICE OF RIGHT TO APPEAL

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

Date: 7/31/2011

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