

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

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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE  
2011 JAN 20 AM 10:26

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**HEARING OFFICER DETERMINATION**

**BACKGROUND**

Student is a            year-old female, who is currently attending a private school pursuant to Parent's unilateral placement. Student's current IEP lists Emotional Disturbance ("ED") as her primary disability and requires her to receive a total of 15 hours per week of specialized instruction outside general education, as well as 120 minutes per month each of speech-language pathology services and behavioral support services, and assistive technology in the form of text-to-speech or text-to-reading software.

On November 26, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS denied Student a free appropriate public education ("FAPE") by failing to provide an IEP reasonably calculated to provide educational benefit, failing to include a behavior intervention plan ("BIP") in the IEP, failing to provide an appropriate placement, failing to follow proper procedures in determining placement, and failing to issue an appropriate Prior to Action notice. As relief for these alleged denials of FAPE, Petitioner sought, *inter alia*, funding for Student at the unilateral placement retroactive to the start of school year ("SY") 2010/11, plus transportation, and an Order requiring DCPS to revise Student's IEP goals and objectives to address her learning disabilities ("LD") and other health impairments ("OHI"), and to provide for Student to receive no less than 25 hours per week of specialized instruction, 2 hours per week of

speech and language services, 1 hour per week of counseling services, 2 hours per month of family counseling, and a BIP.

On December 6, 2010, DCPS filed its Response to the Complaint, which was more in the nature of an Answer addressing each Complaint allegation. In its Response, DCPS asserted that Parent failed to advise DCPS of her intent to seek public funding for the unilateral placement, that the LEA team at Student's MDT meeting determined that the neighborhood school was an appropriate site and Student would be placed in a small class there, that the team considered and rejected other disability classifications for Student and the IEP addresses all of Student's needs, that Parent agreed with the disability classification of ED, that the neighborhood school is the LRE and can implement the IEP, that there were concerns about Student's recent OT evaluation, that a BIP is not indicated, and that the relief requested is inappropriate because Student does not require a full-time placement and the unilateral placement cannot implement the existing IEP.

On December 15, 2010, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Upon the hearing officer's inquiry, Petitioner's counsel agreed to email to the hearing officer and opposing counsel a copy of Petitioner's 10-day letter notifying DCPS of Parent's intent to unilaterally place Student and seek public funding therefor. The hearing officer issued the Prehearing Order on December 20, 2010.

By disclosure letters submitted on December 30, 2010, Petitioner disclosed twenty-six documents (Petitioner's Exhibits 1 – 26)<sup>1</sup>, and DCPS disclosed DCPS-1 through DCPS-7.

The hearing officer convened the due process hearing on January 6, 2011.<sup>2</sup> The parties' disclosed documents were admitted into the record without objection. Upon reviewing the issues, the hearing officer determined that Petitioner's first two claims alleging a failure to provide an IEP reasonably calculated to provide benefit and a failure to include a BIP in the IEP would be consolidated into the single issue of an alleged failure to provide an appropriate IEP. Moreover, upon the hearing officer's inquiry, Petitioner's counsel advised that Petitioner had never filed a 10-day letter regarding the unilateral placement; hence, Petitioner's counsel was unable to forward same to the hearing officer and opposing counsel after the prehearing conference. Petitioner asserted that the Complaint served as the required notice, with the result that notice was given on November 26, 2010. DCPS counsel disagreed, asserting that the statute clearly requires notice to be given either by letter or at the IEP meeting preceding the unilateral placement. Therefore, according to DCPS counsel, the notice requirement was not satisfied. The hearing officer stated that the dispute constituted a legal issue, which would be decided in the instant HOD. Thereafter, opening statements were received, and Petitioner presented the testimony of its witnesses, but Petitioner reserved the right to call an additional witness the following morning depending upon the witness's availability. The hearing officer adjourned the hearing for the day.

The hearing officer reconvened the hearing on January 7, 2011. Petitioner indicated that it would not present additional witness testimony and rested its case. DCPS presented the

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<sup>1</sup> Petitioner's Exhibits 24 through 26 were provided by supplemental disclosure.

<sup>2</sup> Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

testimony of its witnesses and rested its case as well. After receiving closing statements, the hearing officer concluded the hearing.

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

### ISSUES

The issues to be determined are as follows:

1. Did DCPS fail to provide an appropriate IEP?
2. Did DCPS fail to provide an appropriate location of services?
3. Did DCPS fail to follow appropriate procedures in determining the location of services?
4. Did DCPS deny Student a FAPE by failing to issue a Prior to Action Notice?

### 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's current IEP is dated November 17, 2010. The IEP lists ED as Student's primary disability and requires her to receive the following special education and related services: 5 hours per week of specialized instruction outside general education in reading; 5 hours per week of specialized instruction outside general education in written expression; 5 hours per week of specialized instruction outside general education in mathematics; 120 minutes per month of speech-language pathology services; 120 minutes per month of behavioral support services; and assistive technology services in the form of text-to-speech or text-to-reading software for classroom instruction and support.  
The IEP contains annual goals in the areas of mathematics, reading, written expression, and emotional, social and behavioral development. The IEP does not contain any annual goals in the area of communication.<sup>3</sup>
2. Student's previous IEP, dated July 12, 2010, also lists Student's primary disability as ED and requires Student to receive 5 hours per week of specialized instruction outside general education in reading; 5 hours per week of specialized instruction outside general education in written expression; 5 hours per week of specialized instruction outside general education in mathematics; 120 minutes per month of speech-language pathology

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<sup>3</sup> Petitioner's Exhibit 19; DCPS-5.

services; 120 minutes per month of behavioral support services; and assistive technology services in the form of text-to-speech or text-to-reading software for classroom instruction and support.<sup>4</sup>

3. Student's prior IEP dated April 1, 2009 also lists ED as Student's primary disability and requires Student to receive 15 hours per week of specialized instruction outside general education, 30 minutes per week of speech-language pathology services, and 30 minutes per week of behavioral support services.<sup>5</sup>
4. On April 2, 2010, Student received an independent speech-language evaluation, which included the administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition ("CELF-4"). Although Student was taking Ritalin for ADHD twice daily at the time, Student did not take her Ritalin on the morning of the evaluation. Student was 14 years when the test was administered, but she received the following age equivalency scores on the CELF-4 subtests: 8.11 years on the Recalling Sentences, Formulated Sentences, Semantic Relationships, Number Repetition, and Familiar Sequences subtests; 9.0 years on the Word Definitions subtest; 9.4 years on the Word Classes-Total subtest; and 10.9 years on the Sentence Assembly subtest. Moreover, Student received the following percentile ranks on the composite score chart for the CELF-4: Core Language – 6%; Receptive Language – 10%; Expressive Language – 7%; Language Content – 10%; Language Memory – 8%; and Working Memory – 10%.

The evaluator noted that Student's composite scores were all considered to fall within the very low range, indicating a severe language disorder. The evaluator further stated as follows: "The overall clinical impression of [Student's] language was that she has acquired a basic ability to understand and use language. She falls below her same age peers and would not be able to quickly understand and fluently discuss content that was presented on the grade level. She has delays in all areas . . ." The evaluator indicated that student's language disorder could manifest in the following ways in an academic setting: "an inability to follow directions, slow responsiveness to questions, simplistic use of sentence structures, lack of details in oral and written responses, and difficulty learning new information."

The evaluator ultimately determined that Student requires the assistance of a speech language pathologist to teach fundamental language skills that apply to her curriculum. Specifically, the evaluator recommended that Student receive 60 minutes of speech-language therapy 2 times per week.<sup>6</sup>

5. Although Student's speech is clear, she says one thing but means another in that she uses different words than what she needs to use to express what she intends to say.<sup>7</sup>
6. The speech pathologist at the unilateral placement has been providing Student with 30 minutes of individual speech therapy once per week and also visits Student's classrooms once or twice per week. Hence, Student is receiving approximately 30 to 60 minutes per

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<sup>4</sup> Petitioner's Exhibit 16.

<sup>5</sup> Petitioner's Exhibit 8.

<sup>6</sup> Petitioner's Exhibit 12; DCPS-3.

<sup>7</sup> Testimony of Parent.

week, which may sometimes extend to approximately 90 minutes per week. However, Student is not being provided with text-to-speech in accordance with the IEP. In the classroom, the speech pathologist tries to help Student understand the words/vocabulary being used. Student's strength is her pragmatic skills, which is her ability to give information relevant to the instruction she has received. Student's weakness is her inability to consistently give complete and/or correct answers to class work without visual and auditory cues. Since she began attending the unilateral placement, Student has made significant improvement in how she feels about herself and her ability to talk about her concerns instead of holding in everything.<sup>8</sup>

7. During Student's      and      grade years in the DCPS middle school, the DCPS speech-language pathologist provided Student with services one time per week for 30 to 60 minutes and worked on Student's oral language skills. Student primarily received 30 minutes of services per week, but 60 minutes were given when necessary to make up for missed services. The DCPS speech-language pathologist also purchased a text-to-speech program and used it with Student so that she would receive information in two modalities, which increases retention. The speech language pathologist saw progress when she worked with Student, as Student increased from 60-65% accuracy to accuracy in the 90% range after two years of services, and Student's progress really accelerated when the service provider introduced speech-to-text program. Based on the speech-language pathologist's experience working with Student, the speech-language pathologist found some portions of Student's April 2, 2010 evaluation questionable with respect to her true language ability but accepted the evaluation with reservations. Although the speech language pathologist agreed with the evaluator that Student would benefit from some type of speech-to-text software and consultation with an assistive technology or OT specialist, she disagreed that Student needs 2 hours per week of speech/language services because Student can ask questions and express her thoughts and desires in school and around the community. Two hours of services weekly would be overkill and not beneficial because it's not needed since Student is working on oral language and functional independence. Nevertheless, Student's IEP should contain baseline data and goals and objectives for speech.<sup>9</sup>
8. On July 6, 2010, Student received an independent social history evaluation. The evaluation report notes Parent's concern about Student's increased aggression in school in 7<sup>th</sup> and 8<sup>th</sup> grades, as well as her labile moods that resulted in an inconsistent ability to maintain appropriate school behavior, her refusal to do work, her below grade level performance in math, reading and writing, and her inability to perform at grade level independently.<sup>10</sup>
9. On July 14, 2010, Student received an independent clinical psychoeducational evaluation, which included, *inter alia*, the Wechsler Intelligence Scale for Children, Fourth Edition ("WISC-IV"), and the Woodcock-Johnson III Tests of Achievement ("WJ-III"), as well as various social and emotional/personality tests. On the WISC-IV, Student received a

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<sup>8</sup> Testimony of unilateral placement's speech/language pathologist.

<sup>9</sup> Testimony of DCPS speech/language pathologist; testimony of SEC.

<sup>10</sup> Petitioner's Exhibit 15.

Full Scale IQ score of 69, which is in the Extremely Low Range, and Student received scores in the Borderline range on the indices for Verbal Comprehension, Perceptual Reasoning, Working Memory, and Processing Speed. On the WJ-III, Student received scores in the Very Low Range in Broad Reading, Broad Math, and Broad Written Language, a score in the Low Range in Oral Language, and scores in the Very Low Range in Academic Skills, Academic Fluency, and Academic Applications. Overall, Student's scores on the WISC-IV resulted in grade equivalencies ranging from the 2.8 grade level to the 3.8 grade level, even though Student was in the 8<sup>th</sup> grade at the time of testing. Based on Student's history and her performance on the assessments administered, the evaluator made the following diagnoses: Dysthymic Disorder, Early Onset; Learning Disorder, NOS; Attention Deficit Hyperactivity Disorder, Predominantly Inattentive Type, by history; and Educational Problems. The evaluator recommended, *inter alia*, that Student's family consider family counseling, that Student's teachers limit instruction primarily to one-to-one and small-group setting, reserving large-group settings for maintenance activities, and that teachers, family, and other adults engage Student in social interactions.<sup>11</sup>

10. Student's performance on her 2010 psychoeducational evaluation indicates that she would have a lot of problems in high school because she would be behind. Her depression would result in her either sitting in the back of the class and not participating, or acting out and being removed from class. Student would not be able to function in a regular education class with no supports. She would struggle in all areas academically. Student needs a low student/teacher ratio with lots of individualized attention in a therapeutic academic environment. Student's 202 psychoeducational evaluator recommends family counseling twice per month for 50 to 60 minutes each session for Student's family to assist the family in understanding Student's depression and other conditions and what she needs to succeed academically.
11. Student's previous psychoeducational evaluation, which was conducted by DCPS on April 10, 2008, also included the administration of a WJ-III and various social emotional testing. On the WJ-III, Student scored in the Borderline range in Reading and Written Language, and in the Low Average range in Math. Student's performance on the WJ-III cluster tests and subtests resulted in grade equivalencies that ranged from a low of 1.5 to a high of 4.1, with most of the grade equivalencies hovering around the second to third grade level. Based on Student's performance on all of the assessments administered, the evaluator concluded that student qualified for specialized instruction as a student with ED and specific learning disabilities ("SLD") in reading, math and written language.<sup>12</sup>
12. On August 30, Student began attending her current private school pursuant to Parent's unilateral placement. Student is doing well at the school, in that she is passing all of her classes, is doing homework and learning to communicate more, appears to be more self confident, and is opening up more. When Student first began attending the school, she identified herself as "goth," had many bouts of depression, used her "boy name" on all of her class papers, was very sad and kept to herself. Student also expressed

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<sup>11</sup> Petitioner's Exhibit 14.

<sup>12</sup> Petitioner's Exhibit 7.

helplessness/hopelessness/depression and suicidal thoughts without a suicidal plan. Student continues to use her boy name on her school work, but she no longer wears all black, she smiles and interacts with others more, and her suicidal thoughts have decreased significantly.

Student has been receiving 2½ hours per week of counseling services at the unilateral placement, including two 60-minute individual counseling sessions per week and one 30-minute session with a girl group. The staff initially monitored Student's behavior all day long on a daily basis, but now that she expresses her feelings more, the monitoring has been decreased.<sup>13</sup>

13. Prior to attending the unilateral placement, Student attended a DCPS middle school, where she exhibited terrible behavior. When Student was in grade, Parent received calls approximately every other day about Student's inappropriate behavior, such as fighting and being disrespectful. In grade, Student stopped fighting but would not do what the teachers and the principal told her to do and would not do her school work and homework. However, now that Student is attending the unilateral placement, she does her school work and homework, she interacts with others, talks to Parent and other adults more, and compromises instead of not listening and disagreeing.<sup>14</sup>
14. On September 23, 2010, DCPS prepared a functional behavior assessment ("FBA") for Student. The FBA noted Student's history of physically aggressive behaviors, inattentiveness, poor self-control, poor coping skills, depression, low self-esteem, moodiness, social withdrawal, holding grudges, emotional immaturity, self-mutilation, defiance, poor anger management, having difficulty accepting "no," and being oppositional. However, at the time of the FBA, Student was attending a private school and had not exhibited defiant, oppositional or aggressive behaviors since the start of the school year. Student was, however, exhibiting moodiness, socially withdrawn behaviors, inattentiveness, and low self-confidence. The assessor ultimately recommended, *inter alia*, the development and implementation of a BIP, implementation of the current IEP, particularly with respect to counseling services, intensive behavior support services to address personal safety and mood elevating issues, and intensive community based therapy to address familial issues.<sup>15</sup>
15. A BIP would be helpful for Student to address her emotional issues and would help to ensure her safety. A BIP could also address Student's ADHD.<sup>16</sup>
16. At Student's November 17, 2010 MDT/IEP meeting, the team reviewed Student's independent evaluations and IEP. The team determined to keep the existing goals for Student but to increase Student's counseling services from 30 minutes per week to 1 hour per week. The team agreed that Student was making behavioral and academic progress at the unilateral placement. Although the educational advocate and the unilateral placement

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<sup>13</sup> Testimony of Acting Head of School; testimony of unilateral placement's special educator.

<sup>14</sup> Testimony of Parent.

<sup>15</sup> Petitioner's Exhibit 18; DCPS-7.

<sup>16</sup> Testimony of unilateral placement's special educator; testimony of unilateral placement's Director of Clinical Services; testimony of psychology intern.

team members wanted to change Student's disability classification to multiply disabled, the DCPS team members and Parent determined that the classification would remain ED. Finally, the DCPS team members determined to designate Student's neighborhood school as her location of services, with Student to be placed in a classroom with a resource teacher, 2 aides and 9 students, while Parent and the advocate were of the opinion that the unilateral placement was an appropriate site and could better meet Student's needs.<sup>17</sup>

17. Although the November 17, 2010 MDT agreed that Student's counseling services should be increased to 1 hour, the current IEP does not reflect the increased services.<sup>18</sup>
18. At Student's November 2010 IEP meeting, Parent disagreed that the neighborhood school is appropriate because Parent believes Student needs the 5 children per class she currently has and one-on-one assistance from the teacher. Moreover, the teacher at the neighborhood school is approximately 60+ years old, which Parent believes would be a distraction to Student because Student's previous teachers were all 30 to 40 years old, and the students at the neighborhood school are the same students Student used to fight at her DCPS middle school. Parent also believes that Student needs more than 15 hours per week of specialized instruction because she does not understand math. Despite an invitation to do so from the special education coordinator ("SEC") at the neighborhood school, Parent has never visited the proposed neighborhood school or the teacher and classroom where Student would be placed.<sup>19</sup>
19. On December 29, 2010, DCPS issued a Prior to Action Notice indicating that Student's placement would be changed from the unilateral placement to the neighborhood school. The only description or explanation on the form was as follows: "Per SA. If parent chooses to enroll [Student] in her neighborhood school [name of school]." The form did not list any other options considered, reason(s) for rejecting said options, or other relevant factors to the decision.<sup>20</sup>
20. At the neighborhood school proposed by DCPS, Student would be in a classroom with 7 LD students, 1 intellectually deficient ("ID") student, and 1 ED student. Student would receive instruction in Art, reading, math, written expression, science and music. The resource teacher and her aide would take the students as a class to their general education classes and then give the students extra work in that subject if necessary for them to understand the concepts presented in class. The resource teacher would either stay in the general education class with the students or drop them off and leave until the conclusion of the class. The class is a semi-self-contained special education class that Student would remain with all day.<sup>21</sup>
21. The unilateral placement is a full-time day program for children, ages 12 through 21 in grades 6 through 12, who have SLD, OHI, multiple disabilities, ADHD, traumatic brain

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<sup>17</sup> See Petitioner's Exhibits 21 and 22; testimony of educational advocate 2.

<sup>18</sup> Testimony of educational advocate 2; testimony of SEC.

<sup>19</sup> Testimony of Parent; testimony of SEC.

<sup>20</sup> Petitioner's Exhibit 23.

<sup>21</sup> Testimony of SEC; testimony of DCPS school psychologist.

injury, and/or ED students who do not exhibit acting out problems. The school currently serves 37 to 40 students, all of whom are from the District of Columbia, and approximately 30 of whom are funded by DCPS. The school has been approved by OSSE as an 11-month program. The tuition is \_\_\_\_\_ per year, including breakfast and lunch, with related services provided at a rate ranging from \_\_\_\_\_ to \_\_\_\_\_ per hour. The school provides 25.5 to 26 hours of academic instruction per week, which is provided by content-area certified teachers who are not special education certified. One special education teacher, who is special education certified by only the Maryland Department of Education, consults with all of the content area teachers by meeting with teachers, helping to develop lesson plans, going into each class to observe, and similar actions. This special education teacher's primary role at the school is to be the IEP coordinator. Student attends the high school program, where the teachers for math, English, social studies, art, and history are not special education certified. The school offers class sizes of 3 to 5 students per class, except in Art, Technology and Gym, where the class size is 7 students.<sup>22</sup>

### 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. Appropriateness of IEP

"The 'free appropriate public education' required by the Act is tailored to the unique needs of the handicapped child by means of an 'individualized educational program.'" Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). The IEP is to be developed in accordance with the determinations of the student's IEP team. See 34 C.F.R. § 300.324. Moreover, "[I]mplicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Rowley*, 458 U.S. 172.

In the instant case, Petitioner argues that Student's IEP is inappropriate because it contains insufficient specialized instruction, it contains only the ED classification, as opposed to a multiply disabled classification for ED, LD and OHI, it does not contain a BIP, and it does not contain sufficient speech and language services. Petitioner further argues that the IEP should contain 1 hour per week of counseling services, as opposed to the 30 minutes per week of counseling it currently contains.

On the other hand, DCPS maintains that the IEP is appropriate because a BIP is no longer needed as Student is no longer exhibiting the behavioral problems she previously exhibited, Parent agreed to the ED only classification and there has been no allegation that Student has been harmed by not receiving necessary services as a result of the ED classification, and the amount of speech and language services being provided is appropriate for Student.

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<sup>22</sup> Testimony of Head of School, testimony of unilateral placement's special educator.

**a. Counseling Services and BIP**

The undisputed evidence in this case reveals that Student's November 17, 2010 MDT determined to increase the amount of Student's behavioral support services from 30 minutes per week to 1 hour per week, but the increase is not reflected in Student's current IEP. The evidence in this case further reveals that Student's September 23, 2010 FBA recommended the development and implementation of a BIP for Student. Moreover, although Student no longer is exhibiting the defiant, aggressive and oppositional behaviors she previously exhibited, Student has continued to struggle with severe emotional issues in the current school year, and a BIP would be helpful in addressing Student's emotional issues and the attentional issues that result from Student's ADHD. Based on this evidence, the hearing officer concludes that Petitioner has met its burden of demonstrating that the IEP is inappropriate for failure to include the 1 hour per week of behavioral support/counseling services that the MDT determined Student requires, as well as a BIP that will help in the management of Student's emotional and attentional issues. As a result, the hearing officer will order DCPS to revise the IEP to provide for 1 hour per week of behavioral support services and to develop a BIP for Student.

**b. Specialized Instruction**

With respect to specialized instruction, the evidence in this case reveals that every IEP developed for Student since April 1, 2009 has provided for Student to receive 15 hours per week of specialized instruction, 30 minutes per week of speech-language pathology services and 30 minutes per week of behavioral support service. However, Student has not made academic progress with this level of IEP services. Hence, Student's performance on a WJ-III administered in 2008 revealed that she was functioning at approximately a 2<sup>nd</sup> to 3<sup>rd</sup> grade level at the time of that test, and Student's performance on a WJ-III administered in 2010 revealed that she continues to function at approximately a 2<sup>nd</sup> to 3<sup>rd</sup> grade level. This evidence tends to prove that Student has not been receiving educational benefit from the amount of specialized instruction supplied under her current and previous IEPs. As a result, the hearing officer concludes that Petitioner has met its burden of proving that Student's current IEP is inappropriate for failure to provide for sufficient specialized instruction. However, the hearing officer further concludes that the evidence is inconclusive as to exactly how much specialized instruction Student requires to receive educational benefit. Therefore, the hearing officer will order DCPS to reconvene Student's MDT so that the team can determine exactly how much specialized instruction Student requires.

**c. Speech and Language Services**

The results of Student's April 2, 2010 speech and language evaluation, as well as the professional opinions of Student's current and former speech and language service providers, prove that Student has a language disorder. Student's speech and language evaluation recommends two hours per week of speech and language services for Student. However, Student's current speech and language services provider is providing Student with approximately 30 to 60 minutes of services per week, with the services sometimes extending to 90 minutes per week. Moreover, Student's previous speech-language pathologist, who worked with Student for two school years, primarily provided Student with 30 minutes per week of services and saw

Student make tremendous progress while receiving that level of services. As Student's current IEP provides Student with 30 minutes per week of speech and language services, and also requires that Student receive text-to-speech or text-to-reading software, the hearing officer finds that Petitioner has failed to demonstrate that the IEP is inappropriate for failure to provide sufficient speech and language services. Nevertheless, the undisputed evidence in this case demonstrates that the IEP contains no baseline data or IEP goals in the areas of communication. Therefore, the hearing officer will order DCPS to reconvene Student's MDT so that the team can revise Student's IEP to include baseline data and annual goals for Student in the area of communications.

#### **d. Disability Classification**

With respect to Student's disability classification, the evidence in this case reveals that Student has been diagnosed with ED, LD and OHI. However, the evidence also reveals Student's November 17, 2010 MDT considered and rejected a multiply disabled classification for Student, and based upon the opinions of the LEA/DCPS team members and Parent, determined that Student would be classified as ED only. Moreover, the IEP must be designed to meet the student's unique needs, which are not governed by the disability classification, and there is no evidence in this case that the Student's IEP fails to meet Student's unique needs because of the ED classification. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of demonstrating that the IEP is inappropriate for failure to include additional disability classifications. Nevertheless, as the hearing officer plans to order the MDT to review and revise Student's IEP for other reasons, the hearing officer will also order the MDT to consider whether Student requires additional goals to address her LD and attentional issues.

#### **2. Location of Services**

Under IDEIA, a public agency must provide an appropriate educational placement/location of services for each child with a disability, so that the child's needs for special education and related services can be met. See 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate secondary school and are provided in conformity with the Student's IEP. See 34 C.F.R. § 300.17.

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private secondary school without the consent of or referral by the public agency, a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the hearing officer 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. 34 C.F.R. § 300.148(c). However, the hearing officer may limit or deny reimbursement if (i) at the last IEP meeting prior to the removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency and state their intent to enroll their child in a private school at public expense, or (ii) at least 10 business day prior to the removal of the child from public school, the parents did not give written notice to the public agency of the information intent to enroll the child in a private school at public expense. See 34 C.F.R. § 300.148(d)(1).

“Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is ‘reasonably calculated to enable the child to receive educational benefits.’” *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). “Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment.” *Id.*, 556 F.Supp.2d at 37 (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley*, *supra*, 456 U.S. 176, 202)).

In the instant case, Petitioner asserts that the neighborhood school DCPS proposed for Student was inappropriate because Student needs a full-time special education placement and the program at the neighborhood school is too large and cannot give Student the necessary support. On the other hand, DCPS asserts that a FAPE was offered to Student because the neighborhood school is the least restrictive environment.

A review of the evidence in this case reveals that Student's IEP requires Student to receive 15 hours per week of specialized instruction outside general education. However, DCPS's proposal to place Student in her neighborhood school would have resulted in Student receiving content area instruction in general education classes, either with or without the resource room teacher's presence in the general education class, supplemented by extra work in each subject in the resource room if necessary to enable student and her classmates to understand the concepts presented in the general education class. As a FAPE, by definition, requires that a disabled student's special education and related services be provided in conformity with the IEP, the hearing officer concludes that Petitioner has met its burden of proving that DCPS failed to offer Student a FAPE.

As relief for this denial of FAPE, Petitioner has requested funding and placement at the unilateral placement retroactive to the start of SY 2010/11. However, Petitioner conceded at the due process hearing in this case that the unilateral placement is unable to implement Student's IEP. Moreover, as a prerequisite to awarding reimbursement and future funding for the unilateral placement, this hearing officer must first determine that the unilateral placement is appropriate or proper. In making such a determination, the hearing officer must consider, *inter alia*, the student's specialized educational needs and the link between those needs and the services offered by the school. The evidence in this case reveals that Student requires, at a minimum, at least 15 hours per week of specialized instruction outside general education. However, the evidence also reveals that the unilateral placement is unable to implement Student's IEP because all of the Student's instruction at the unilateral placement is being provided by general education teachers, and the one special education teacher involved in Student's education merely provides consulting services to the general education teachers. Hence, Student is not being provided with specialized instruction outside general education, and the hearing officer concludes that the unilateral placement is not proper or appropriate because there is an insufficient link between Student's

specialized educational needs and the services offered by the school. As a result, the hearing officer will deny Petitioner's request for reimbursement and future funding for the unilateral placement. *See Florence County School District Four v. Shannon Carter*, 510 U.S. 7 (1993) (parents who unilaterally change their child's placement do so at their own financial risk and are only entitled to reimbursement upon judicial findings that both the public placement violated IDEA and that the private school placement was proper under the Act).

As an alternative ground for denying reimbursement for the unilateral placement, the hearing officer notes that Petitioner has conceded that Parent failed to comply with the notice requirements of 34 C.F.R. § 300.148, but Petitioner has requested that this hearing officer construe the Complaint as Notice provided to DCPS as of November 26, 2010. DCPS, on the other hand, argues that the Complaint cannot fulfill the requirement of giving notice either at the IEP meeting prior to the student's removal from the public school or 10 business days prior to such removal of the student. Upon consideration of the parties' arguments and the facts of this case, the hearing officer concludes that the Complaint in this case does not fulfill the notice requirements of 34 C.F.R. § 300.148, because the notice requirement contemplates the giving of notice prior to the removal of the disabled student from the public school, whereas in this case the Complaint was filed approximately three months after Student began attending the unilateral placement, which deprived DCPS of an opportunity to attempt to resolve Parent's concerns prior to the unilateral placement. Hence, the hearing officer relies upon Petitioner's failure to comply with the notice requirement of 34 C.F.R. § 300.148 as an alternative ground for denying Petitioner's request for reimbursement for the tuition expenses Parent has incurred as a result of the unilateral placement.

### **3. and 4. Procedures Used When Determining Location of Services and Prior to Action Notice**

Under IDEA, the LEA must ensure that a disabled child's parents are a part of the group that makes the placement decision for the child. *See* 34 C.F.R. § 300.116.

In the instant case, Petitioner has alleged that DCPS failed to advise Parent that the neighborhood school would be on the table, failed to consider other options besides the neighborhood school, and failed to explain why the neighborhood school was appropriate. However, under the facts of this case, where Parent did not advise DCPS of the unilateral placement until Student's November 17, 2010 meeting, Petitioner will not be heard to complain that DCPS failed to advise Parent of its proposed placement prior to the meeting. Moreover, the evidence in this case demonstrates that DCPS considered but rejected the unilateral placement Parent desired and also explained to Parent that why the small class selected for Student at the neighborhood school rendered the neighborhood school an appropriate location of services for Student in DCPS's opinion. As a result, the hearing officer concludes that Petitioner failed to meet its burden of proving this claim. In light of this evidence, the hearing officer also rejects Petitioner's claim that DCPS failed to provide a proper Prior to Action Notice concerning the proposed neighborhood school. *See* 34 C.F.R. § 300.513(b) (finding of denial of FAPE may be based on procedural violation only where right to FAPE impeded, parent's opportunity to participate in decision-making is significantly impeded, or there was deprivation of educational benefit).

**ORDER**

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

1. Within 7 days of the issuance of this Order, DCPS shall develop a BIP to address Student's emotional and attentional issues.
2. Within 10 days of the issuance of this Order, DCPS and Petitioner shall participate in an MDT meeting for Student, at which (a) Student's IEP shall be revised to include 1 hour of behavioral support services, the BIP created pursuant to Paragraph 1 above, and baseline data and annual goals in the area of communications; (b) the MDT shall determine exactly how much specialized instruction Student requires to receive educational benefit and revise the IEP to provide same; (c) the MDT shall consider whether Student requires additional goals to address her LD and attentional issues, and if so, develop same; and (d) the MDT shall discuss and determine an appropriate location of services for Student.
3. Petitioner's request for reimbursement and future funding for Parent's unilateral placement is hereby denied. However, in the event the MDT meeting ordered in Paragraph 2 above is not held within the timeframe set forth, or the meeting is held but no determination of an appropriate location of services is made, and such failure to hold the meeting or determine a location of services is due to action(s) on the part of DCPS and/or its representatives and is not attributable to actions by Petitioner and/or her representatives, then DCPS shall reimburse Petitioner for the tuition expense Parent incurs beginning on the date of the issuance of this Order and extending until the ordered meeting is held and an appropriate location of services for Student is determined.

**NOTICE OF RIGHT TO APPEAL**

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

Date: 1/20/2011

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