

DEC 27 2011

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,¹)
through the Parents,)
)
Petitioners,)
)
v.)
)
District of Columbia Public Schools)
and)
)
Office of the State Superintendent of)
Education)
)
Respondents.)

Date Issued: December 25, 2011

Hearing Officer: Virginia A. Dietrich

HEARING OFFICER DETERMINATION

Background

Petitioners, the mother ("Mother") and father ("Father") of _____ year old Student, filed a due process complaint notice on October 11, 2011 alleging that the District of Columbia Public Schools ("DCPS") had denied Student a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"). Petitioners alleged that DCPS had failed to provide Student with a finalized and appropriate Individualized Education Program ("IEP") and an appropriate placement for both the 2010-2011 and 2011-2012 school years. At the time of the alleged violations, Student was a child with Multiple Disabilities who required 100% specialized instruction and related services outside of general education. Student had received funding and placement at non-public schools by DCPS for several years prior to the start of the 2010-2011 school year.

Petitioners alleged that in the Fall of 2009, Student began having serious problems with her peer group at _____ a private special education school where Student had been placed and funded by DCPS. Due to her disabilities, Student had severe deficits in her communication and social skills. On a daily basis, Student was kicked, hit and

¹ Personal identification information is provided in Appendix A.

Hearing Officer Determination

spat at by her classmates; all of which resulted in heightened anxiety, inability to focus and disruptive behavior by Student at home and school. Mother consistently collaborated with to find solutions to the problems, but to no avail. The only possible solution hypothecated was to find a different girls peer group for Student, but none was available for Student at Mother then searched for a safe school for Student on the premise that was not an appropriate school placement and located The School, which was not a school that had received a Certificate of Approval ("COA") from the District of Columbia Office of the State Superintendent of Education ("OSSE"). DCPS, by regulation, could not place Student in The School because it did not have a COA from OSSE. Petitioners unilaterally placed Student at The School and Student has been attending there since the beginning of the 2010-2011 school year. Petitioners seek a Hearing Officer Determination that Petitioners be reimbursed for tuition and expenses paid during the 2010-2011 school year and placement and funding at The School for the 2011-2012 school year, retroactive to the beginning of the 2011-2012 school year.

Petitioners also alleged that OSSE had denied Student a FAPE by wrongfully failing to provide The School with a COA so that Student could be placed there through DCPS who had the responsibility as the local education agency ("LEA") to place Student in a school where she could receive a FAPE.

DCPS asserted that it had not denied Student a FAPE, that was an appropriate school placement for Student, and that DCPS had finalized an IEP in July 2011 and offered Petitioner an alternate location of services in August 2011, but Petitioners failed to follow through with the application process for that school.

OSSE asserted that there were regulations in place for schools to apply for a COA, the application process that was applied to The School was no different from the application process that was applied to other schools seeking a COA, OSSE took timely and consistent steps to screen COA applications and provide specific feedback to all applicants, and The School failed to follow through with the COA application process. OSSE asserted that it had not violated the IDEA and that it had not denied Student a FAPE.

Subject Matter Jurisdiction

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

Procedural History

The due process complaint was filed on 10/11/11. This Hearing Officer was assigned to the case on 10/12/11. Both Petitioners and DCPS agreed to waive the resolution meeting, but DCPS did not agree to end the 30-day resolution period. Therefore, with respect to the claims against DCPS, the resolution period ended on 11/10/11, the 45-day timeline to issue a decision

Hearing Officer Determination

began on 11/11/11 and the final decision was due by 12/25/11. With respect to the claim against OSSE, the 45-day timeline began with the filing of the complaint and the final decision was due on 11/25/11. By Order dated 11/11/11, OSSE's motion for a continuance was granted, extending the final decision due date to 12/25/11 so that a joint hearing could be held in the matter. By Order dated 10/28/11, OSSE's Motion to Dismiss the Petitioner's Complaint was denied. By Order dated 12/05/11, OSSE's Second Motion to Dismiss the Petitioner's Complaint was denied.

The due process hearing was a closed hearing that took place on 12/07/11, 12/08/11 and 12/09/11. Petitioners were represented by Michael Eig, Esq., DCPS was represented by Tanya Chor, Esq. and OSSE was represented by W. Iris Barber, Esq. None of the parties objected to the testimony of witnesses via telephone. Petitioners participated in the hearing in person.

Petitioners presented two witnesses: Mother; and Director of School at The School, who qualified as an expert in the education of multiply disabled children. DCPS presented three witnesses: DCPS speech-language pathology expert ("SLP"); an expert in the teaching of students who are deaf or hard of hearing; and DCPS student progress monitor. OSSE presented one witness: Acting Director of Monitoring and Compliance for OSSE.

Petitioners' disclosures dated 11/29/11, contained a witness list and Exhibits P-1 through P-86. Exhibits P-2 through P-29 were not admitted into evidence by consent of Petitioners. Exhibits P-30, P-33 and P-66 were admitted into evidence over objection. DCPS withdrew its objections to Exhibits P-31, P-32 and P-34. Exhibits P-1, P-31, P-32, P-34 through P-65, and P-67 through P-86 were admitted into evidence without objection.

DCPS' disclosures dated 11/30/11, contained a list of nine witnesses and Exhibits R-01 through R-25. DCPS' Exhibit R-26 was provided by E-mail dated 11/30/11. DCPS' disclosures dated 12/01/11 contained a witness list of 10 witnesses and Exhibit R-27. All of DCPS' exhibits were admitted into evidence without objection except for Exhibits R-1, R-2, R-3, R-10, R-13, R-14 and R-16, which were all admitted into evidence over objection.

OSSE's disclosures dated 11/30/11 contained a witness list and Exhibits OSSE-1 through OSSE-3. Exhibits OSSE-1 and OSSE-3 were admitted into evidence without objection and Exhibit OSSE-2 was admitted into evidence over objection.

Petitioners and DCPS agreed to submit written closing arguments according to the following schedule: Petitioners' brief due by close of business on 12/13/11, DCPS' brief due by 11:59 p.m. on 12/15/11, and Petitioners' reply brief due by close of business on 12/19/11. By E-mail dated 12/16/11, Petitioners did not object to DCPS' late filing of its brief. OSSE gave its oral closing argument at the due process hearing and had the opportunity to submit a reply to Petitioners' written closing argument, but no reply was submitted.

The seven issues to be determined in this Hearing Officer Determination are as follows:

Whether DCPS denied Student a FAPE by failing to finalize an IEP and have it in place for the 2010-2011 school year, following IEP meetings in July and August 2010.

Hearing Officer Determination

Whether Student was denied a FAPE by DCPS failing to provide Student with an appropriate IEP for the 2010-2011 school year when Student's needs could no longer be met at School.

Whether DCPS denied Student a FAPE by failing to propose any placement for the 2010-2011 school year, and if DCPS did propose a placement, it was an inappropriate placement.

Whether DCPS denied Student a FAPE by failing to finalize an IEP and have it in place for the 2011-2012 school year.

Whether Student was denied a FAPE by DCPS failing to provide Student with an appropriate IEP for the 2011-2012 school year; specifically, by failing to provide Student with an IEP that accurately reflected her educational needs.

Whether DCPS denied Student a FAPE by failing to propose any placement for the 2011-2012 school year, and if DCPS did propose a placement, it was an inappropriate placement.

Whether OSSE denied Student a FAPE by failing to issue a Certificate of Approval ("COA") for The School so that Student could be placed there for the 2010-2011 and 2011-2012 school years.

For relief, Petitioners requested a finding that Student was denied a FAPE on each of the issues presented, that DCPS and/or OSSE reimburse Petitioners for tuition paid to The School for the 2010-2011 school year, and that DCPS and/or OSSE place and fund Student at The School for the 2011-2012 school year, retroactive to the beginning of the 2011-2012 school year.

Findings of Fact

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

#1. Student, age and a resident of the District of Columbia, has multiple disabilities that include deafness with cochlear implants, a speech-language impairment, a general learning disability, and Attention Deficit Hyperactivity Disorder. For several years prior to the 2009-2010 school year, Student had been placed and funded at non-public schools by DCPS.³

#2. During the 2009-2010 school year, Student attended School a non-public special education day school, having been placed and funded there by DCPS. In late Fall of the 2009-2010 school year, Student began exhibiting anxiety which negatively affected her ability to function in the classroom. The anxiety arose from physical maltreatment from Student's classmates that consisted of kicking, hitting and spitting at Student on a daily basis. The impact of the anxiety was that Student was inattentive and disruptive in

² Petitioners withdrew the allegation that OSSE had failed to monitor DCPS' responsibility for providing Student with an appropriate placement for the 2010-2011 and 2011-2012 school years.

³ Mother.

Hearing Officer Determination

school and disruptive at home. Student did not have a behavior plan at Mother collaborated with and the school tried many different solutions to the problem, including finding an alternate female peer group for Student at but nothing worked and an alternate peer group was not available. Also, Mother found that lacked a school wide behavior plan that Mother felt was necessary to consistently address the behaviors of the other students.⁴

#3. On 11/17/09, the Multidisciplinary Team (“MDT”) met at and created an IEP that classified Student with Multiple Disabilities that included Learning Disability, Hearing Impairment, Speech-Language Impairment and Other Health Impairment. The IEP prescribed 26.5 hours/week of specialized instruction, 2 hours/week of speech services, 1.5 hours/month of occupational therapy services, with all services to be provided outside of general education.⁵

and DCPS agreed that Student’s placement for the 2009-2010 school year was appropriate due to Student’s need for small classes, integration of service and a low teacher to student ratio.⁶

#4. In January 2010, Student’s progress towards the majority of her IEP academic goals, speech language goals and behavioral goals was inconsistent when the goal was introduced to Student.⁷ In May 2010, a neuro-cognitive learning assessment revealed that in spite of compromised cognitive processing and an extremely complex learning style, Student continued to demonstrate notable gains in academic skills and abilities and Student had social skills at age appropriate levels. Student also made notable gains in adaptive skills and behavior. With respect to behavioral assessments, Student had clinically significant scores in the areas of restlessness, impulsivity, social problems, hyperactivity, and inattention.⁸ Petitioners attributed the heightened nature of the behavioral traits to the physical and emotional distress Student was experiencing as a consequence of the chronic physical and emotional maltreatment from Student’s classmates.⁹

#5. As a result of the problems that Student encountered at Petitioner began looking for a safe school for Student that had an appropriate girls peer group and a school wide behavior plan. Mother researched schools, applied to The School and Student was accepted for admission in the Spring of 2010.¹⁰ The School is a small non-public school that provides services to children with disabilities, but it is not a certified special education school and The School does not have a Certificate of Approval (“COA”) from OSSE.¹¹ Having a COA is a prerequisite for DCPS to place and fund any child at a non-public school.¹² If a school does not have a COA, then it is the LEAs responsibility to determine an appropriate placement at an IEP team meeting.¹³

⁴ Mother.

⁵ P-30-1.

⁶ P-30-24.

⁷ P-33.

⁸ P-35.

⁹ Mother.

¹⁰ Mother.

¹¹ Director of the School at The School.

¹² Acting Director of Monitoring and Compliance at OSSE.

¹³ Acting Director of Monitoring and Compliance at OSSE.

Hearing Officer Determination

#6. In July 2010, [redacted] was in support of a placement change to another school,¹⁴ but the reason for [redacted] support was not in the record. The MDT met on 07/16/10 for the purpose of reviewing evaluations and discussing a change in placement.¹⁵ The team reviewed the independent neuro-psychological evaluation, and Petitioners and Petitioners' Attorney requested to review the speech-language evaluation at the next meeting because they had just received it.¹⁶ The school psychologist recommended development of IEP goals and objectives regarding coping with anxiety, self-esteem and strategies for communicating with peers.¹⁷ Even though Student had done well socially with her female peer group during the Extended School Year in July 2010, it was agreed that social skills needed to be embedded within the curriculum for Student.¹⁸ It was noted that Student's IEP should be revised to include counseling goals, and opportunities for socialization and social skills groups throughout all academic areas.¹⁹ Despite the willingness of DCPS to create new IEP goals, Petitioners and Petitioners' Attorney wished to put a hold on the IEP goals development process and reconvene after [redacted] created new goals.²⁰

#7. At the MDT meeting on 07/16/10, there was also a discussion about the appropriateness of [redacted] and Mother asked for a change of placement to The [redacted] School and told DCPS that Student had been accepted there.²¹ DCPS could not place Student at The [redacted] School because the school did not have a Certificate of Approval and DCPS indicated this to Petitioners.²² The meeting concluded with the intent of the MDT to draft social/emotional goals and objectives and classroom adaptation goals at the next meeting on 08/06/10.²³

#8. The team reconvened on 08/06/10 to discuss the IEP. [redacted] did not provide an updated IEP and the only IEP on the table was the 11/17/09 IEP. The results of the meeting were inconclusive and although academic matters were discussed, no conclusive IEP was developed.²⁴ Petitioners and Petitioners' Attorney wanted to put a hold on the IEP development process and the location of services discussion pending the opportunity to talk with the Deputy Chancellor of Special Education about the COA process.²⁵ Petitioners again asked for placement at The [redacted] School and DCPS did not agree to the placement.²⁶ On 10/25/10, Petitioners sent correspondence to the Deputy Chancellor of Special Education indicating that [redacted] was an inappropriate placement for Student and requesting that DCPS fund and place Student at The [redacted] School.²⁷ On that same date, the Deputy Chancellor of Special Education responded by denying the request and saying that DCPS did not have the authority to place and fund Student at

¹⁴ Mother, P-43-2.

¹⁵ R-16.

¹⁶ R-16, Mother.

¹⁷ P-45-3.

¹⁸ P-45-3.

¹⁹ R-16.

²⁰ DCPS SLP.

²¹ Mother, SLP, P-45-1.

²² Mother, Acting Director of Monitoring and Compliance at OSSE, DCPS progress monitor.

²³ P-45-3.

²⁴ SLP.

²⁵ SLP.

²⁶ Mother, DCPS progress monitor.

²⁷ R-8.

Hearing Officer Determination

a school that did not have a valid COA.²⁸ A final IEP for the 2010-2011 school year was never developed.²⁹

#9. Several months passed with no action taken by DCPS until April 2011, when the DCPS speech-language pathologist conducted an observation of Student at The School.³⁰ Student had been attending The School since the beginning of the 2010-2011 school year.³¹ The DCPS speech-language pathologist prepared a Speech and Language Observation report that indicated that Student needed speech-language services.³²

#10. On 07/07/11, the MDT met to review and revise Student's IEP and discuss the location of services.³³ Petitioners' Attorney objected to going forward with IEP development and a location of services discussion.³⁴ Petitioners' Attorney presented updated information to the MDT from The School and DCPS presented Petitioners with a copy of the DCPS Speech and Language Observation report and all agreed to reconvene in light of the newly presented information.³⁵ Due to refusal to cooperate, DCPS was not able to get a copy of Student's most current IEP from Before the meeting concluded, DCPS indicated that Student would be referred to a non-public site location, that DCPS would review The School's version of the IEP, review evaluations and draft an IEP that would be sent to Petitioners by close of business on 07/12/11.³⁷ Petitioners never received the promised draft IEP.³⁸

#11. On 07/26/11, the MDT reconvened to review DCPS' Speech and Language Observation report, determine Student's eligibility for special education services, draft an IEP and determine the location of services.³⁹ DCPS provided Petitioners with goals and objectives that included speech language goals and socio-emotional goals. DCPS proposed School as a site location,⁴⁰ but Petitioners' Attorney requested that the discussion on site location not take place until after the IEP was finalized and approved by Petitioners.⁴¹ DCPS had referred Student to non-public locations and acceptance was pending on Petitioners' participation in the site location application process.⁴²

#12. On 08/05/11, DCPS issued a Prior Written Notice indicating that DCPS refused to initiate a placement change, that remained an appropriate placement until Petitioners completed the admissions process for School, and that the location of services was still

²⁸ R-7.

²⁹ Mother.

³⁰ SLP.

³¹ P-52, Director of the School at The School.

³² SLP, R-01, R-04.

³³ DCPS progress monitor, R-01.

³⁴ DCPS progress monitor, R-03.

³⁵ DCPS progress monitor, R-01.

³⁶ DCPS progress monitor.

³⁷ DCPS progress monitor, R-01.

³⁸ Mother.

³⁹ DCPS progress monitor, R-02, R-03.

⁴⁰ DCPS progress monitor.

⁴¹ R-02, R-03.

⁴² R-02.

Hearing Officer Determination

pending because the location of services discussion had been twice postponed by Petitioners' Attorney.⁴³ Petitioners never saw the Prior Written Notice until Mother reviewed the disclosure documents that had been filed by DCPS on 11/30/11 and 12/01/11.⁴⁴

#13. On 08/05/11, Petitioners sent a letter to DCPS indicating their intent to continue Student's placement at The School and seek public funding for the placement.⁴⁵ DCPS subsequently responded to the letter, indicating its refusal to fund placement at The School and indicating that was an appropriate placement.⁴⁶

#14. On 08/18/11, Petitioners forwarded to DCPS all of the copies of and The School's IEPs that were in their possession.⁴⁷ After that date, there is no evidence in the record that DCPS convened or attempted to convene a meeting to develop an IEP and determine a location of services where the IEP could be implemented. On 10/11/11, Petitioners filed the instant due process complaint.⁴⁸

#15. The School is a small, non-profit, private school that services children with learning disabilities, processing delays, expressive and receptive language delays, but mostly children with multiple disabilities who have layered needs. The school is not a special education school; however, all teachers have special education training, but special education certification is not required. Student is representative of the student profile of students at the school although Student is the oldest child in the school. Student's classroom size consists of 8 students with one full time teacher and an aide who has a college degree and special education training. All staff implement behavior plans. At The School, the following related services are provided on a contractual basis: Speech-language, occupational therapy, therapeutic physical education, behavioral support and school nurse.⁴⁹

#16. At The School, Student made friends and her anxiety behaviors that consisted of nervousness, pushing, picking and hitting, have stopped. Student also made significant progress in reading, moved up a grade in math and Student's communication skills and ability to interact with others has improved.⁵⁰ Student is doing well socially, emotionally and academically at The School.⁵¹ When Student was observed by DCPS at The School in April 2011, Student was observed to be learning and engaged in the curriculum.⁵²

#17. At all relevant times, OSSE had in place policies, procedures and regulations for schools to obtain a Certificate of Approval ("COA"). Prior to 10/07/10, there were four pages of regulations that granted OSSE the authority to issue a COA, but the regulations did not give specific application requirements. On 10/08/10, 33 pages of regulations were promulgated that

⁴³ R-03.

⁴⁴ Mother.

⁴⁵ P-74-1.

⁴⁶ P-78-1.

⁴⁷ P-77-1.

⁴⁸ P-1-1.

⁴⁹ Director of the School at The School.

⁵⁰ Mother.

⁵¹ Director of the School at The School.

⁵² SLP.

Hearing Officer Determination

expanded the application process and requirements considerably and the regulations provided specific compliance criteria and the documentation necessary to demonstrate compliance.⁵³ On 10/12/10, OSSE received an application from The School that was dated 10/07/10.⁵⁴ OSSE made the decision to wait, review all pending applications and then give specific feedback to all schools rather than requesting applicants to resubmit applications that met the requirements of the new regulations. OSSE conducted a two-tier review of the 80 pending COA applications from Feb-Jun 2011 and then sent letters to applicants informing them of the specific documentation requirements necessary to continue with the COA process.⁵⁵ OSSE sent such a letter to The School on 07/12/11.⁵⁶ On 11/18/11, OSSE sent a follow-up letter to The School, one of 30 schools, indicating that the school's application was still incomplete and failure to submit the required documentation within 30 days would render the application null and void.⁵⁷ The School made an administrative decision not to pursue the Certificate of Approval application process⁵⁸ and OSSE did not receive a response to either letter concerning the COA application requirement deficiencies.⁵⁹ The School did not receive a COA from OSSE.

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:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

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

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

⁵³ Acting Director of Monitoring and Compliance at OSSE.

⁵⁴ Acting Director of Monitoring and Compliance at OSSE, R-03, R-10.

⁵⁵ Acting Director of Monitoring and Compliance at OSSE,

⁵⁶ OSSE-1.

⁵⁷ OSSE-2-1.

⁵⁸ Director of the School at The School.

⁵⁸ SLP.

⁵⁹ Acting Director of Monitoring and Compliance at OSSE,

Hearing Officer Determination

The first issue to be determined is whether DCPS denied Student a FAPE by failing to finalize an IEP and have it in place for the 2010-2011 school year, following IEP meetings in July and August 2010.

At the beginning of each school year, DCPS must have in effect, for each child with a disability within its jurisdiction, an IEP. 34 C.F.R. 300.323. The IEP must include a statement of the child's present levels of academic achievement and functional performance including a statement of measureable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the disability. 34 C.F.R. 300.320(a). The IEP must also include a statement of the special education and related services and supplementary aids and services, to be provided to the child, and a statement of the program modifications or supports that will be provided to enable the child to advance appropriately toward attaining annual goals. 34 C.F.R. 300.320(a)(4).

"The IEP is the "centerpiece" of the IDEA's system for delivering education to disabled children," *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988), and the centerpiece for the implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003).

Student had a DCPS IEP dated 11/17/09.⁶⁰ In January 2010, Student's progress towards the majority of her IEP goals was not too good and in May 2010, a neuropsychological evaluation revealed that even though Student had made gains in academic skills and abilities, Student had clinically significant scores in impulsivity, social problems, hyperactivity and inattention.⁶¹ Student's behavioral problems were corroborated by Mother who testified that Student suffered heightened anxiety due to daily physical and emotional maltreatment by her classmates.⁶² At the 07/16/10 IEP meeting, the team determined that Student's IEP should be revised to include IEP goals and objectives regarding coping with anxiety, self-esteem and strategies for communicating with peers and that social skills should be embedded within the curriculum for Student. DCPS was willing to create the necessary goals, but Petitioners put a halt to the development of the goals, indicating that the team should reconvene after developed new goals.⁶³

When the IEP team reconvened on 08/06/10, _____ did not provide an updated IEP. Although areas of academic functioning were discussed, the results of the meeting were inconclusive and an IEP that properly reflected Student's needs was not developed. DCPS did not proceed with developing the necessary goals for Student's IEP and the IEP team did not meet again until July 2011 to review and revise the IEP.⁶⁴ Therefore, the Hearing Officer determines

⁶⁰ Finding #3.

⁶¹ Finding #4.

⁶² Finding #2.

⁶³ Finding #6.

⁶⁴ Finding #8.

Hearing Officer Determination

that at the beginning of the 2010-2011 school year, DCPS did not have in place a finalized IEP that accurately reflected Student's needs and the services necessary to meet her needs. Petitioners met their burden of proof on this issue. DCPS violated the IDEA and this violation impeded Student's right to a FAPE.

The second issue to be determined is whether Student was denied a FAPE by DCPS failing to provide Student with an appropriate IEP for the 2010-2011 school year when Student's needs could no longer be met at

Petitioners met their burden of proof on this issue, for the reasons stated in preceding issue. Mother credibly testified that _____ could not adequately address Student's behavioral and adaptive skills needs, and DCPS failed to finalize Student's IEP to include goals and objectives regarding coping with anxiety, self-esteem and strategies for communicating with peers. Petitioners met their burden of proof. The lack of an appropriate IEP denied Student a FAPE.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to propose any placement for the 2010-2011 school year, and if DCPS did propose a placement, it was an inappropriate placement.

The placement is based on the IEP and the placement is where the IEP is implemented. 34 C.F.R. 300.116. "The touchstone of 'educational placement' is not the location to which the student is assigned but rather the environment in which educational services are provided." *AW v. Fairfax County School Board*, 41 IDELR 119 (2004). There was no evidence in the record that Student required a change of placement from _____ but that is not surprising. DCPS never finalized Student's IEP for the 2010-2011 school year and without a finalized IEP, it was impossible to determine whether or not _____ was a school placement that could implement Student's IEP. DCPS failed to provide Student with an appropriate placement because DCPS failed to provide Student with an appropriate and finalized IEP. There was evidence in the record that Student's behavioral needs and adaptive skills needs required a revision to the IEP with respect to related service goals and with respect to Student's social/emotional and adaptive skills deficits that impacted all curriculum areas. Student's identified needs suggested a major re-write of the IEP. There was also evidence in the record that Student struggled mightily with peer group interaction, she was not physically safe at _____ and despite Mothers' collaboration with _____ no solution to the problem could be found at

Under the IDEA, DCPS is required to provide Student with a FAPE; i.e., special education and related services that meet the unique needs of the child, at public expense, that meet the standards of the State Education Agency, that include an appropriate school, and are provided in conformity with an IEP. 34 C.F.R. 300.1; 300.2; 300.17; 300.39.

By a preponderance of the evidence, Petitioners met their burden of proof that _____ was not an appropriate placement and that DCPS failed to provide Student with an appropriate placement for the 2010-2011 school year. Without a finalized and appropriate IEP, an

⁶⁵ Finding #2.

Hearing Officer Determination

appropriate placement could not be determined. Student was denied a FAPE because she was deprived of an educational benefit and the right to a FAPE.

The fourth issue to be determined is whether DCPS denied Student a FAPE by failing to finalize an IEP and have it in place for the 2011-2012 school year.

DCPS failed to have a final IEP in place at the beginning of the 2009-2010 school year and did not meet again to review and revise Student's IEP until 07/07/11. On 07/07/11, Student's IEP needed to be updated to include speech and language and behavioral support goals; however, the DCPS Speech and Language Observation report that was completed on 04/27/11 and recommended speech-language services, was not provided to Petitioners until the meeting on 07/07/11. As a result, Petitioners requested time to review the report. DCPS agreed to send a draft IEP to Petitioners by close of business on 07/12/11, but Petitioners never received it.⁶⁶ When the MDT reconvened on 07/26/11, DCPS provided Petitioners with goals and objectives that had been completed by DCPS. There was conflicting testimony in the record about whether or not the IEP was formerly drafted or finalized. Although the DCPS progress monitor and Mother were both believable as witnesses, the information from DCPS' witness about what occurred at the 07/26/11 meeting was second hand, and although the DCPS progress monitor testified that the IEP had been finalized and she had seen a copy of it, a draft or finalized copy of the IEP was not offered into evidence by either party. Mother testified credibly that the IEP was not finalized and that she never received any copy of an IEP.

The Hearing Officer concludes that Petitioners met their burden of proof that DCPS failed to produce an IEP, either draft or final, and have it in place for the 2011-2012 school year. DCPS violated the IDEA and Student was denied the right to a FAPE.

The fifth issue to be determined is whether Student was denied a FAPE by DCPS failing to provide Student with an appropriate IEP for the 2011-2012 school year; specifically, by failing to provide Student with an IEP that accurately reflected her educational needs.

In this case, failure to produce a final IEP is synonymous with producing an IEP that doesn't accurately reflect Student's educational needs. Behavioral support and speech-language goals were presented to Petitioners at the meeting on 07/26/11, but there was no paper copy of an IEP in the record to refute credible testimony that the IEP was not finalized on that date or at any time thereafter.⁶⁷ Petitioners met their burden of proof by a preponderance of the evidence that an appropriate IEP was not in place at the beginning of the 2011-2012 school year. Student was denied a FAPE in that she was deprived of the right to a FAPE.

The sixth issue to be determined is whether DCPS denied Student a FAPE by failing to propose any placement for the 2011-2012 school year, and if DCPS did propose a placement, it was an inappropriate placement.

To reiterate, the placement is based on the IEP and the placement is where the IEP is implemented. 34 C.F.R. 300.116. DCPS did not have an IEP in place at the beginning of the

⁶⁶ Finding #10.

⁶⁷ Findings #11, #14.

Hearing Officer Determination

2011-2012 school year. Without an IEP, the placement could not be determined. Petitioners were unwilling to talk about site locations until the IEP was finalized and approved by Petitioners. Whether or not the IEP was approved by Petitioners is irrelevant; DCPS should have completed development of an IEP and provided it to Petitioners. Neither a site location or placement could be determined without a viable IEP; therefore, the fact that DCPS selected Chelsea School as the site location has no bearing on the conclusion that DCPS failed to provide Student with an appropriate placement for the 2011-2012 school year. Petitioners met their burden of proof. Student was denied a FAPE because she was deprived of an educational benefit and the right to a FAPE.

The seventh issue to be determined is whether OSSE denied Student a FAPE by failing to issue a Certificate of Approval ("COA") for The _____ School so that Student could be placed there for the 2010-2011 and 2011-2012 school years.

Petitioners clarified at the beginning of the due process hearing that they were proceeding against OSSE only on the basis that OSSE had violated 34 C.F.R. 300.101(c) which states that each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade. Petitioners withdrew the allegation that OSSE had failed to monitor DCPS' responsibility for providing Student with an appropriate placement for the 2010-2011 and 2011-2012 school years. Thus, Petitioners argument was that OSSE's failure to grant a COA to The Diener School resulted in the denial of a FAPE.

In the District of Columbia, OSSE is the State Education Agency ("SEA"). D.C. Code 38-2601. The Hearing Officer determines that OSSE had policies and procedures in place for schools to obtain a COA and the reason that The _____ School was not granted a COA was because The _____ School chose not to pursue the COA application process set forth in the regulations. The _____ School's application for a COA, dated 10/07/10, was received by OSSE on 10/12/10. OSSE began a systematic review of the 80 applications it received and in July 2011, sent a letter to The _____ School indicating that additional documentation was required in order for DCPS to proceed with the application process. This type of letter was sent to many other applicants. The _____ School did not respond to this letter or to the follow-up letter sent to The _____ School in November 2011. In fact, The _____ School had made an administrative decision not to pursue the COA application process with OSSE.⁶⁸ Petitioners failed to meet their burden of proof that OSSE denied Student a FAPE by failing to issue a Certificate of Approval to The _____ School.

Relief

Pursuant to 34 C.F.R. 300.148(c), 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 school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or 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

⁶⁸ Finding #17.

Hearing Officer Determination

appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

The cost of reimbursement may be reduced or denied if at the most recent IEP Team meeting that the parents attended prior to 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 to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or at least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of their rejection of the placement proposed by the public school, their reasons for it and their intent to enroll their child in a private school at public expense. 34 C.F.R. 300.148(d).

At both the MDT meetings on 07/16/10 and 08/06/10, there was ample discussion by Mother about the inappropriateness of [redacted] and Petitioners' desire to have DCPS place and fund Student at The [redacted] School. DCPS was unable to do so because the school lacked a COA from OSSE.⁶⁹ This notice fulfills the reimbursement notice requirements for the 2010-2011 school year. 34 C.F.R. 300.148(d).

On 08/05/11, Petitioner complied with the reimbursement notice requirements, as applicable to the 2011-2012 school year, by sending a letter to DCPS. Subsequently, DCPS acknowledged receipt of this letter and indicated its refusal to fund Student at The Diener School at public expense.⁷⁰

Petitioner is entitled to reimbursement for private special-education services when DCPS fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education services through the public school. *Forest Grove School District v. T.A.*, 52 IDELR 151 (2009).

The IDEA directs the court to "grant such relief as [it] determines is appropriate." "Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act. ... this is principally to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as non-handicapped children, but the Act also provides for placement in private schools at public expense where this is not possible. In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school." *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985).

⁶⁹ Findings #7, #8.

⁷⁰ Finding #13.

Hearing Officer Determination

In the present case, Student was already in a non-public school where Student had been placed and funded by DCPS prior to Petitioners unilaterally placing Student at a non-public school that does not meet State standards because the school does not have a Certificate of Approval from OSSE.⁷¹ The evidence revealed that at the start of both the 2010-2011 and 2011-2012 school years, DCPS had denied Student a FAPE by failing to provide Student with a finalized and appropriate IEP and by failing to provide Student with an appropriate placement. Petitioners gave proper notice to DCPS prior to both school years before unilaterally placing Student at The School.

Pursuant to *Florence County Sch. Dist. Four v. Carter*, 510 U.S.7 (1993) and 34 C.F.R. 300.148(c), Student may be placed at a school that is appropriate even if the school is not approved by the State Education Agency. The Hearing Officer determines that The School was an appropriate and proper school for Student for the 2010-2011 school year and that The School is an appropriate and proper school for Student for the 2011-2012 school year. Student has been making academic and social skills progress at The School and Student's heightened anxiety that resulted in inattentiveness and behavioral problems in school, have subsided.⁷²

As Student is the oldest child at The School and the school is not a special education school,⁷³ it is conceivable that The School will no longer be an appropriate school for Student for the upcoming 2012-2013 school year. Plans should be made to develop and finalize an appropriate IEP and determine an appropriate location of services well in advance of the upcoming 2012-2013 school year.

ORDER

(1) Within 60 calendar days, DCPS shall reimburse Petitioners for tuition and related expenses for Student's enrollment at The School during the 2009-2010 school year, subject to Petitioners' production of proper documentation and receipts for tuition and expenses incurred;

(2) Within 30 calendar days, DCPS shall place and fund Student at The School for the 2011-2012 school year, retroactive to the beginning of the 2011-2012 school year; and

(3) Within 15 business days of this Order, DCPS shall initiate the scheduling of a meeting(s) to develop an IEP for Student so that DCPS can provide Student with the appropriate related services, including speech-language and behavioral support services, required by Student while she attends The School; and so that Student's IEP is in place, placement has been discussed and determined, and a location of services has been identified well in advance of the upcoming 2012-2012 school year.

IT IS SO ORDERED.

⁷¹ Findings #8, #17.

⁷² Finding #16.

⁷³ Finding #15.

Hearing Officer Determination

NOTICE OF RIGHT TO APPEAL

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

Date: December 25, 2011

/s/ Virginia A. Dietrich
Hearing Officer