

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

Student Hearing Office  
810 First Street, NE, Second Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
February 26, 2013

\_\_\_\_\_, on behalf of  
\_\_\_\_\_

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No: 2012-0790

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Room No.: 2006

Respondent.

**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**

Student is a \_\_\_\_\_ girl, who currently attends a private school ("Private School") located in the District of Columbia. On November 26, 2012, Petitioner filed a Complaint against DCPS, alleging that DCPS denied Student a free appropriate public education ("FAPE") by (1) refusing to provide Student with specialized instruction and related services at the Private School, and (2) refusing to follow proper procedures in offering Student a placement once her IEP was developed, and then later requiring Student to attend a different placement that was not formally offered following the creation of the IEP. As relief for these alleged denials of FAPE, Petitioner requested findings in Petitioner's favor, that DCPS be ordered to issue a Prior Written Notice ("PWN") to the Private School, that DCPS be ordered to reimburse the Private School for monies spent providing Student with ESY services during Summer 2012 and for monies spent providing Student with specialized instruction and related services required by Student's May 2012 IEP, that DCPS be ordered to reimburse Parent for expenses she incurred during Summer 2012 or school year ("SY") 2012/13, and that either DCPS be ordered to fund Parent's compensatory education plan or the hearing officer fashion a compensatory education plan.

On December 7, 2012, DCPS filed its Response, which asserted (1) that Parent unilaterally enrolled Student at the Private School in SY 2010/11, Student's tuition was covered by a scholarship, and Student had not at that time been found eligible for special education services; (2) although a 4/30/12 hearing officer determination ("HOD") found that DCPS had failed to comply with a settlement agreement ("SA") by not timely holding an IEP development meeting, the hearing officer did not conclude that DCPS agreed to fund Student at the Private School, the

hearing officer did not order DCPS to begin funding Student's placement, and the hearing officer did not find that DCPS had determined that the Private School was an appropriate placement for Student; (3) DCPS fully complied with the 4/30/12 HOD by developing an IEP for Student on 5/23/12; (4) Student's IEP can be implemented at her neighborhood school; (5) DCPS issued a PWN on 1/25/12 offering the neighborhood school as Student's location of services and that PWN has never been rescinded; and (6) the Private School presently does not have a full certificate of approval from OSSE, with the result that it is not allowed to accept or enroll any DCPS students.

The parties concluded the Resolution Meeting process by participating in a resolution session on December 14, 2012. No agreement was reached, but the parties agreed not to shorten the 30-day resolution period. Therefore, the 45-day timeline initially began on December 27, 2012 and ended on February 9, 2012. However, on January 18, 2013, Petitioner filed a Consent Motion for a Continuance, which the chief hearing officer granted on January 22, 2013, with the result that the 75-day timeline for this case was extended to February 25, 2013, which is now the HOD deadline.

On January 3, 2013, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer issued a Prehearing Order on January 9, 2013.

By letter dated January 11, 2013, Petitioner disclosed nineteen documents (Petitioner's Exhibits 1-19), and by letter dated January 15, 2013, DCPS disclosed twelve documents (Respondent's Exhibits 1-12).

The hearing officer convened the due process hearing on February 11, 2013.<sup>1</sup> All documents disclosed by both parties were admitted into the record without objection. Thereafter, the hearing officer received opening statements, testimonial evidence from both parties, and closing statements. The hearing officer allowed the parties until midnight on Wednesday, February 13, 2013 to submit simultaneous written closing statements of no more than 10 double-spaced pages. The hearing officer then brought the hearing to a close. Later, by email dated February 12, 2013, the hearing officer extended the deadline for closing briefs to 11:50 pm on February 15, 2013.<sup>2</sup>

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:

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<sup>1</sup> Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

<sup>2</sup> Both parties timely submitted their written closing briefs.

1. Did DCPS deny Student a FAPE by failing to provide her with specialized instruction and related services at the Private School?
2. Did DCPS deny Student a FAPE by failing to provide her with a placement at the Private School following development of the IEP?

### **FINDINGS OF FACT**<sup>3</sup>

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 [REDACTED] and currently attends [REDACTED] grade at a private school ("Private School") located in the District of Columbia. Student has attended Private School for three years now.<sup>4</sup>
2. Student's tuition at Private School is being funded by an Opportunity Scholarship. This scholarship covers regular general education for Student, as well as enrollment fees, uniforms, field trips and textbooks.<sup>5</sup>
3. In the 4/30/12 HOD, the previous hearing officer determined that DCPS denied Student a FAPE and violated the 5/31/11 SA by failing to develop an IEP after finding Student eligible for special education. Accordingly, the hearing officer "ORDERED that, within twenty school days, [DCPS] shall convene a meeting of the Student's IEP team, including her teachers at the [Private School], to develop an IEP for the student that provides five hours per week of specialized instruction outside the general education setting, five hours per week of specialized instruction in the general education setting and four hours per month of direct speech-language services outside the general educational setting."<sup>6</sup> This is the sole and exclusive remedy granted in the 4/30/12 HOD, as the Order contains no additional provisions at all.
4. In the 4/30/12 HOD, the previous hearing officer also ruled that (i) Petitioner failed to prove that DCPS denied Student a FAPE by failing to comply with the 5/31/11 SA's provision requiring DCPS to convene a meeting by August 17, 2011 to review Student's independent assessments and determine her eligibility for special education services, and (ii) Petitioner failed to prove that Student is entitled to compensatory education.<sup>7</sup>

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<sup>3</sup> To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

<sup>4</sup> Testimony of Parent; Testimony of Student.

<sup>5</sup> Testimony of Parent; testimony of Principal at Private School.

<sup>6</sup> Petitioner's Exhibit 12 at 18-22; Respondent's Exhibit 6 at 18-22.

<sup>7</sup> Petitioner's Exhibit 12; Respondent's Exhibit 6.

5. Although the 4/30/12 HOD listed 5 issues to be determined and noted that Petitioner had requested an array of relief, including an Order requiring DCPS to revise Student's IEP, implement the IEP at the Private School, and monitor Student's progress at the Private School, the previous hearing officer ruled only on the three issues indicated herein in Paragraphs 3 and 4 above, and ordered only the sole item of relief indicated in Paragraph 3 above.<sup>8</sup>
6. To comply with the 4/30/12 HOD, DCPS initially scheduled an IEP meeting for Student to be held at Student's neighborhood school, noting that the neighborhood school is Student's home school and, therefore, her IEP team. However, Petitioner's counsel flat out refused to attend a meeting at the neighborhood school and stated that Parent would not attend a meeting held at the neighborhood school either. Thereafter, DCPS scheduled the IEP meeting to be held at Private School. To facilitate the development of the IEP required by the 4/30/12 HOD, DCPS granted the Private School temporary access to Student in its Special Education Data System ("SEDS"). DCPS advised that said temporary access would be removed by June 1, 2012.<sup>9</sup>
7. On May 23, 2012, DCPS convened a meeting of Student's IEP team, including her teachers and other staff members at the Private School, and developed an IEP that requires Student to receive five hours per week of specialized instruction outside general education, five hours per week of specialized instruction in general education, one hour per week of direct speech-language services outside general education, and sixty minutes per month of behavioral support consultation services.<sup>10</sup>
8. DCPS fully complied with its obligation under the 4/30/12 HOD by convening the 5/23/12 IEP meeting that included Student's teachers from the Private School and developing the 5/23/12 IEP for Student.
9. DCPS has never advised Parent that it would fund Student's special education services at Private School. However, at the 5/23/12 IEP meeting for Student, Parent, her legal representation and the Private School participants made clear their position that the IEP would be implemented at the Private School because Student was attending the Private School and would not be moved from the Private School. In fact, Student's previous special education teacher at the Private School simply "assumed" at the 5/23/12 meeting that it was "a given" that Student's ESY services for Summer 2012 would be provided at the Private School because he was asked to write the IEP goals/objectives.<sup>11</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> Respondent's Exhibit 17; testimony of DCPS Compliance Case Manager.

<sup>10</sup> Respondent's Exhibit 8; Petitioner's Exhibit 5.

<sup>11</sup> Testimony of DCPS Compliance Case Manager ; testimony of special education teacher at Private School; *see also* Petitioner's Exhibits 2 and 4; Respondent's Exhibit 11.

10. DCPS issues a PWN when, *inter alia*, a student needs to be placed at another school. At the time of the 4/30/12 HOD, there existed a PWN that placed Student at her neighborhood school.<sup>12</sup>
11. The administrative record for this case includes a 1/25/12 IEP that placed Student at her neighborhood school and recites that the neighborhood school is able to implement Student's IEP and render appropriate services.<sup>13</sup> The record does not contain any subsequent PWNs removing Student from her neighborhood school and/or placing Student at another school for purposes of receiving special education services.
12. The Private School currently does not have a Certificate of Approval from OSSE to service special education students. At present, the Private School has no certified teachers at all. The Private School is a private general education school that can only provide special education services if another LEA funds those services. Hence, to the extent that any students at the Private School currently have IEPs, those IEPs are not being implemented.<sup>14</sup>
13. The Private School cannot implement Student's IEP. The Private School would have to hire someone to provide specialized instruction to Student, which means that Student would receive one-on-one pullout services and inclusion services.<sup>15</sup>
14. At present, the DCPS neighborhood school for Student cannot implement Student's IEP because it cannot consistently provide Student with five hours per week of specialized instruction in the general education setting.<sup>16</sup>
15. The administrative record for this case does not include any evidence indicating whether or not Student's neighborhood school could implement Student's IEP at the time of the 5/23/12 IEP meeting.

### **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. Failure to Provide Services at the Private School**

IDEA defines a FAPE to mean special education and related services that, *inter alia*, are provided at public expense, under public supervision and direction, and without charge; and are provided in conformity with an IEP. See 34 C.F.R. § 300.17. Hence, under IDEA, a public

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<sup>12</sup> Testimony of DCPS Compliance Case Manager.

<sup>13</sup> Respondent's Exhibit 2.

<sup>14</sup> Testimony of Principal at Private School.

<sup>15</sup> Testimony of Principal at Private School.

<sup>16</sup> Special education teacher/LEA representative for neighborhood school.

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 the instant case, Petitioner asserts that DCPS denied Student a FAPE by failing to provide her with specialized instruction and related services at the Private School. Petitioner argues that it has not raised in the Complaint the issue of whether DCPS violated the 4/30/12 HOD, so that is not a matter for the hearing officer to determine in this case. However, Petitioner then asserts that the previous hearing officer who issued the 4/30/12 HOD “found that the student was entitled to receive an IEP (and have it implemented) at [the Private School] . . . As such, the parent’s position is that just creating the IEP was not sufficient for DCPS to have fulfilled its duty as LEA. DCPS was also responsible for ensuring that the student received services per the May 2012 IEP.”<sup>17</sup> Then, Petitioner again asserts “it is clear that the [previous hearing officer] ruled yes, the student is entitled to receive the IEP and the corresponding special education and related services at [the Private School].”<sup>18</sup>

A review of the 4/30/12 HOD reveals that the previous hearing officer did not rule that Student was entitled to receive an IEP (and have it implemented) at the Private School. Nor did the previous hearing officer rule that Student is entitled to receive the IEP and the corresponding special education and related services at the Private School. Instead, the previous hearing officer ruled only that DCPS denied Student a FAPE and violated the 5/31/11 SA by failing to develop an IEP after finding Student eligible for special education, and the previous hearing officer ordered DCPS to convene a meeting of the Student’s IEP team that included her teachers at the Private School and develop an IEP providing specified special education services. The previous hearing officer did not order where the IEP meeting was to take place or where the implementation of the IEP created at the meeting was to take place, despite Petitioner’s specific request for a ruling ordering DCPS to implement the IEP at the Private School. Hence, DCPS fulfilled its obligation under the 4/30/12 HOD by convening the 5/23/12 IEP meeting and developing the IEP providing the special education services specified by the previous hearing officer.

Moreover, the undersigned hearing officer is not persuaded that DCPS had an independent obligation under IDEA to provide Student with specialized instruction and related services at the Private School. The administrative record in this case reveals that pursuant to a January 25, 2012 PWN, DCPS assigned Student to attend her DCPS neighborhood school for the purpose of receiving special education services. There is no subsequent PWN designating a different school as Student’s location of services, the previous hearing officer did not change Student’s location of services in the 4/30/12 HOD, and DCPS never agreed that it would fund Student’s special education services in a location other than her neighborhood school. Instead, the record reveals merely that Parent rejected DCPS’s offer of the neighborhood school in favor of keeping Student at the Private School, where her general tuition is being funded by a scholarship. That decision on Parent’s part did not create an obligation on DCPS’s part to provide Student with special education and related services at the Private School.

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<sup>17</sup> Petitioner’s Post Trial Brief at 3.

<sup>18</sup> *Id.* at 6.

For the reasons specified above, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS denied Student a FAPE by failing to provide her with specialized instruction and related services at the Private School. *See Schaffer v. Weast*, 546 U.S. 49 (2005) (the burden of proof in an administrative hearing is placed upon the party seeking relief).

## **2. Failure to Provide a Placement at the Private School**

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.

In the instant case, Petitioner asserts that DCPS denied Student a FAPE by failing to provide her with a placement at the Private School following development of the IEP on 5/23/12. Curiously, Petitioner makes much of the fact that in the previous case concerning Student, "Petitioner was not making any request for reimbursement, because, as the evidence at the hearing showed, the student was receiving the scholarship to cover regular classes, etc. Instead, repeatedly and consistently, the Petitioner made the request simply that DCPS to be (sic) responsible for providing the special education services and related services."<sup>19</sup> Then, Petitioner proceeds to argue DCPS was required to make a formal offer of placement through a PWN following the development of the IEP at the May 2012 meeting "if they intended on having the student attend a school other than Academy for Ideal education."<sup>20</sup>

DCPS disagrees with Petitioner, arguing that the previous hearing officer did not order DCPS to fund Student's placement at the Private School, DCPS never communicated to Parent, her representatives, or any of the staff members at the Private School that it would fund the placement, and in any event, the Private School is not an appropriate location of services for Student.

A review of the evidence in this case confirms that the previous hearing officer did not order DCPS to fund Student's placement at the Private School, or to discuss placement at the IEP meeting to be convened for Student pursuant to the 4/30/12 IEP, or even to be responsible for the provision of special education and related services at the private school despite Petitioner's specific request for an Order to that effect. Hence, there is no evidentiary support for Petitioner's contention that DCPS was required to provide Student with a placement at the Private School following the development of the 5/23/12 IEP.

The evidence in this case further reveals that the most recent PWN included in the administrative record for Student is dated January 25, 2012, and this PWN requires Student to attend her neighborhood school for the purpose of receiving special education services. The previous hearing officer did not invalidate this PWN in the 4/30/12 HOD, and there is no evidence that

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<sup>19</sup> Petitioner's Post Trial Brief at 5.

<sup>20</sup> *Id.* at 8.

DCPS ever issued another PWN removing Student from her neighborhood school and/or placing Student at another school for purposes of receiving special education services. As a result, the PWN remained in effect at the time of Student's 5/23/12 IEP meeting, with the result that DCPS was, in effect, continuing to offer Student a placement at the neighborhood school, even though Parent and her legal representation made it clear that Parent had no intention of removing Student from the Private School and sending her to the neighborhood school. The administrative record does not include any evidence at all touching on the issue of whether or not the neighborhood school could implement Student's IEP at the time of the 5/23/12 IEP meeting. Hence, Petitioner has failed to prove that the neighborhood school could not implement the 5/23/12 IEP at the time the IEP was developed, and the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS denied Student a FAPE by failing to provide her with a placement at the Private School following development of the IEP on 5/23/12. *See Schaffer v. Weast, supra* (party seeking relief at administrative hearing bears burden of proof).

Nevertheless, the hearing officer notes that the evidence in this case establishes that neither the neighborhood school DCPS has chosen nor the Private School Parent has chosen is presently able to implement Student's IEP. Therefore, the hearing officer strongly recommends that DCPS reconvene Student's IEP team to assign an appropriate location of services to implement Student's IEP.

### **ORDER**

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

1. All claims in Petitioner's November 26, 2012 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: 2/25/2013

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