

**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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Student Hearing Office  
August 23, 2013

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Petitioner,

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**

Student is a male, who currently is not attending any school at all. On June 11, 2013, Petitioner filed a complaint against respondent DCPS, alleging that DCPS denied Student a free appropriate public education (“FAPE”) by failing to implement Student’s IEP since April 8, 2013 and failing to locate an appropriate placement that can meet student’s educational, vocational and behavioral needs. As relief for these alleged denials of FAPE, Petitioner requested a finding of a denial of FAPE, an Order requiring DCPS to fund Student’s compensatory education plan, and an Order requiring DCPS to place and fund Student, including transportation, at an appropriate special education placement.

On June 21, DCPS filed a Response, which contained only general denials of each claim.

On June 26, 2013, Petitioner filed a Motion to Strike DCPS’s Response and Motion to Compel a Statutory Response or More Definitive Statement. On July 2, 2013, DCPS filed an Opposition to the Motion. On July 3, 2013, the hearing officer issued an Order which granted the Motion in part, to the extent of requiring DCPS to file within 6 days a Response compliant with applicable regulations.

On July 10, 2013, DCPS filed an Amended Response, asserting, *inter alia*, that Student may attend his neighborhood school, which can implement his IEP.

The parties participated in a Resolution Meeting on July 11, 2013. There was no agreement, but the parties agreed not to change the timeline. Therefore, the 45-day timeline began on July 13, 2013 and will end on August 26, 2013, which is the HOD deadline.

On July 19, Petitioner filed a Motion for a Notice to Appear. On July 22, 2013, after the chief hearing officer issued the requested Notice, the undersigned hearing officer issued an Order granting Petitioner’s Notice.

By their respective letters dated July 29, 2013, Petitioner disclosed sixteen documents (Petitioner's Exhibits 1-16) and DCPS disclosed six documents (Respondent's Exhibits 1-6).

The hearing officer convened the due process hearing on August 5, 2013, as scheduled.<sup>1</sup> All documents disclosed by the parties were admitted into the record without objection. The hearing officer received the parties' opening statements, testimonial evidence, and closing statements, then the hearing officer brought the proceeding to a close.

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)**

1. Did DCPS deny Student a FAPE by failing to implement Student's IEP since April 8, 2013?
2. Did DCPS deny Student a FAPE by failing to locate an appropriate placement that can meet Student's educational, vocational and behavioral needs?

### **FINDINGS OF FACT**<sup>2</sup>

2. Student's current IEP, dated January 28, 2013, identifies Student's primary disability as Deafness and requires Student to receive 27 hours per week of specialized instruction, 45 minutes per month of audiology services, and 120 minutes per month of behavioral support services, with all instruction and related services to be provided outside general education.<sup>3</sup>
3. During SY 2012/13, Student attended a self-contained program at a DCPS senior high school ("previous DCPS school"). In that program, a significant portion – at least 60% -- of Student's instruction was provided by way of a computer program, and there were 8 to 10 children in Student's class. During the first half of the school year, there was a special education teacher, one aide and one behavior technician in the classroom. After Winter Break, there was a special education teacher and two aides in the classroom, but the retention rate for aides was low so there were 4 or 5 aides throughout the year. The computer served as the general education teacher.<sup>4</sup>

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<sup>2</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>3</sup> Petitioner's Exhibit 3.

<sup>4</sup> Testimony of DYRS case manager; testimony of special education teacher.

4. Student initially performed well at the previous DCPS school. However, as the year progressed, Student began exhibiting behavior problems at school.<sup>5</sup>
5. Student decided that he no longer wanted to attend the previous DCPS school because he didn't want to receive the online instruction. After Student's special education teacher/case manager mentioned the \_\_\_\_\_ program at Student's neighborhood school as a possible location of services for Student, Student's mother took Student to the program and registered him, and they were told that the classes would begin on April \_\_\_\_\_
6. On April \_\_\_\_\_ Student returned to the \_\_\_\_\_ program but was told that he needed to be properly withdrawn from his previous DCPS school before he could attend the program. That same day, Student's DYRS case manager took Student to formally withdraw from the previous DCPS school, but when Student and the DYRS case manager returned to the \_\_\_\_\_ program, the staff at the \_\_\_\_\_ program said that they could not take Student because he had a full-time IEP, so Student would need to go back to his previous DCPS school, which would find another school for him. The staff at the \_\_\_\_\_ program also mentioned Student's neighborhood school. However, when Student and the DYRS case manager returned to the previous DCPS schools, they would not accept him either.<sup>7</sup>
7. In May 2013, Student and the case manager returned to the previous DCPS school, which stated that Student had already been withdrawn from that school. The principal stated that Student needed to go to his neighborhood school.<sup>8</sup>
8. In May 2013, Student, his DYRS case manager, and the DYRS educational specialist had a meeting with the LEA representative and for the previous DCPS school, the school psychologist, and the DCPS specialist for behavior support. This was not a formal IEP team meeting. Student was informed to go to either the \_\_\_\_\_ program, which could schedule a meeting to review his IEP, or to his neighborhood school. However, Student did not go to his neighborhood school at that time because his DYRS case manager was attempting to secure a different location of services for Student.<sup>9</sup>
9. Student was assigned to attend the previous DCPS school via a Prior Written Notice ("PWN"). During SY 2012/13, DCPS never issued a PWN changing Student's location of services from the previous DCPS school.<sup>10</sup>
10. Prior to attending his previous DCPS school, Student attended an out-of-state residential treatment facility.<sup>11</sup>
11. Beginning with its July 9, 2013 Response to the instant Complaint, DCPS has repeatedly indicated that Student may attend his neighborhood school where his full-time IEP can be implemented.

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<sup>5</sup> Testimony of DYRS case manager; testimony of Student; testimony of special education teacher; *see* Petitioner's Exhibit 10 at 13-15.

<sup>6</sup> Testimony of Student; testimony of DYRS case manager.

<sup>7</sup> Testimony of DYRS case manager; testimony of Student; *see* Respondent's Exhibit 2; *see* Petitioner's Exhibit 10.

<sup>8</sup> Testimony of DYRS case manager.

<sup>9</sup> Testimony of DYRS case manager; testimony of specialist for behavioral support.

<sup>10</sup> Testimony of specialist for behavioral support; *see* Petitioner's Exhibit 13.

<sup>11</sup> Testimony of Student.

12. Student's neighborhood school has a program for emotional disturbance ("ED"). During SY 2013/14, the school will have 9 ED classrooms. The program has full-time staff, its own floor in the school, and access to vocational programs. Student's full-time IEP can be implemented at this program.<sup>12</sup>
13. At the resolution session in this matter, DCPS offered as a potential location of services for Student a joint program with DCPS and a private institute. However, that program cannot implement Student's full-time IEP.<sup>13</sup>
14. Student's full-time IEP cannot be implemented by any of DCPS's programs.<sup>14</sup>
15. Petitioner is requesting compensatory education in the form of 125 hours of tutoring to help with credit recovery and academic work in school, a credit recovery program, and 40 hours of behavioral support services to include tutoring. However, the compensatory education plan is attended to address not only the alleged denials of FAPE in the instant action, but is also attended to address alleged deficiencies at the previous DCPS school.<sup>15</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:

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. West*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3<sup>rd</sup> Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3<sup>rd</sup> Cir. 2006). Now, for a consideration of Petitioner's claims, which will be addressed in reverse order.

#### **Implementation of IEP**

The "free appropriate public education" required by [IDEA] 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). Hence, IDEA defines a FAPE to mean special education and related services that are provided, *inter alia*, in conformity with an IEP. *See* 34 C.F.R. § 300.17(d).

"[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007). The deviations from the IEP's stated requirements must be "material." *Id.* Hence, a failure to implement all services outlined in an IEP does not constitute a per se violation of IDEA. *Schoenbach v. District of Columbia*, 309 F. Supp. 2d 71, 83 n.10 (D.D.C. 2004).

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<sup>12</sup> Testimony of specialist for behavioral support.

<sup>13</sup> Testimony of DCPS special project coordinator; *see* Respondent's Exhibit 1.

<sup>14</sup> Testimony of DCPS special project coordinator.

<sup>15</sup> Testimony of DYRS educational specialist; *see* Petitioner's Exhibit 11.

In the instant case, Petitioner argues that DCPS failed to implement Student's IEP since April 8, 2013, when DCPS refused to allow Student to return to his assigned location of services and failed to assign Student another school to attend. DCPS disagrees, arguing that Student was instructed to go to his neighborhood school but failed to do so, and in any event, Student did not suffer actual harm because he was failing all of his classes at the time he withdrew from his previous DCPS school on April 8, 2013.

A review of the evidence in this case reveals that Student has not attended any DCPS school at all since April 8, 2013, when he voluntarily withdrew from his previous DCPS school as instructed by staff at a DCPS program, which subsequently refused to allow Student to attend the program because it could not implement his full-time IEP. Thereafter, when Student attempted to return to his previous DCPS school, his assigned location of services, the staff there would not allow student to attend that school either. As a result of this situation, from April 8, 2013 through the end of SY 2012/13, Student did not attend any DCPS school at all, with the result that he did not receive any of the services contained in his IEP. In May 2013, DCPS staff began instructing Student to register at his neighborhood DCPS school, which Student failed to do. However, DCPS never conducted a formal MDT meeting to assign a new location of services for Student and never issued a PWN indicating that Student's location of services was being changed from his previous DCPS school to his neighborhood school. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS denied Student a FAPE by wholly failing to implement his IEP from 2013 through the end of SY 2012/13, when it refused to allow Student to attend his assigned location of services and failed to assign a new location of services for Student.

To compensate Petitioner for this denial of FAPE, the hearing officer will issue an award of compensatory education. *See Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005) (under the theory of compensatory education, courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program). However, the hearing officer declines to award compensatory education in the forms and amounts requested by Petitioner because Petitioner's proposed compensatory education plan addresses alleged denials of FAPE that go beyond the denial of FAPE found herein. *See Reid*, 401 F.3d at 518 (compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA).

Upon consideration of the evidence and arguments of counsel, the hearing officer has determined that an appropriate award of compensatory education to address DCPS's failure to implement Student's IEP at all from April 8, 2013 through the end of SY 2012/13, a period of approximately two and one-half months, would consist of 75 hours of independent tutoring, which is to be spread out over the course of the first half of SY 2013/14, and an additional one hour per week of independent behavioral support services for the first 12 weeks of SY 2013/14, for a total of twelve hours of behavioral support services. The hearing officer concludes that this award of compensatory education will place Student in the same position he would have occupied but for DCPS's denial of FAPE by providing him with the academic and behavioral support he needs to be successful in the new school he will attend for SY 2013/14.

### **Placement/Location of Services**

Under IDEA, a public agency must provide an appropriate educational placement 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.

Each public agency must ensure that a continuum of alternative placements is available to meet the needs of disabled children for special education and related services. The continuum must include alternative placements such as instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and must make provision for supplementary services, such as resource room or itinerant instruction, to be provided in conjunction with regular class placement. 34 C.F.R. § 300.115.

In the instant case, Petitioner argues that DCPS has failed to assign Student an appropriate location of services. Petitioner points out that the joint program with DCPS and a private institute, which DCPS offered Student at the resolution session, cannot implement Student's full-time IEP. As a result, Petitioner is requesting a specified private placement for Student.

On the other hand, DCPS argues that Student has repeatedly been advised to attend his neighborhood DCPS school, which can implement his full-time IEP.

A review of the evidence in this case reveals that although Student was not formally assigned to attend his neighborhood DCPS school during SY 2012/13, beginning in 2013, several DCPS personnel advised Student and his DYRS case manager that Student should register at his neighborhood school, where his IEP can be implemented. Moreover, beginning with the July 2013 Response in this case, DCPS has repeatedly indicated that Student can attend his neighborhood school, which can implement his IEP. Indeed, the evidence in this case shows that Student's neighborhood school offers a full-time ED program that has full-time staff, its own floor in the school, and access to vocational programs, and the evidence confirms that the neighborhood school can implement Student's IEP. Under these circumstances, the hearing officer concludes that DCPS has offered Student a program that can implement his IEP during SY 2013/14. Hence, Petitioner has not met its burden of proof on this claim, and its request for the specified private placement will be denied.

### **ORDER**

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

1. DCPS shall provide funding for Student to receive the following forms and amounts of compensatory education: 75 hours of independent tutoring, which is to be spread out over the course of the first half of SY 2013/14, and an additional one hour per week of independent behavioral support services for the first 12 weeks of SY 2013/14, for a total of twelve hours of behavioral support services.
2. Student's location of services for SY 2013/14 shall be the full-time program for emotional disturbance at his neighborhood school.
3. All remaining requests for relief in Petitioner's June 11, 2013 Complaint are **DENIED**.

**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).

/s/ Kimm Massey

Kimm Massey, Esq.  
Hearing Officer