

**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 19, 2014

Petitioner

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**¹

Student is a male. On November 9th, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public School (“DCPS”). On December 12, 2013, DCPS filed its Response to the Complaint and supplemented its response on December 17th, 2013.

The parties concluded the Resolution Meeting process by participating in a resolution meeting on January 10th, 2014. The resolution period for this case ended on January 5, 2014. Hence, the 45-day timeline for this case started on January 6th, 2014 and will end on February 19th 2014, which is the HOD due date.

On January 15th, 2014, the hearing officer conducted a prehearing conference and determined, that the claims to be adjudicated, defenses asserted, and relief requested were as follows:

Petitioner’s Claims: (i) Alleged failure to comply with the November 13th, 2013 Hearing Officer Determination (“HOD”) by failing to review and revise the Student’s IEP and determine an appropriate educational placement and location of services other than School B and failing to determine if the placement should be a day school placement or a residential placement due to Student’s severe in school and out of school behaviors. (ii) Alleged failure to develop an appropriate IEP on November 26th 2013. (iii) Alleged failure to allow the parent to participate in the educational placement, including location of services, decision, which allegedly was made unilaterally by DCPS following the November 26th, 2013 MDT meeting. (iv) Alleged failure to provide an appropriate special education placement for SY 2013/14.

¹ This section sets forth only the basic procedural history. Other events, including motions practice, may have taken place that are not listed here.

Respondent's Defenses: (i) Petitioner unfortunately did not fully avail herself to participate in the meeting and consultation process for IEP and location of service determination. (ii) DCPS has complied with the HOD and engaged appropriately. (iii) DCPS has not denied this student a FAPE or violated IDEA.

Relief Requested: (i) DCPS will immediately take all necessary steps to place Student in an appropriate placement. Specifically, Parent is seeking a placement at School A as a first step. Parent contends this change in placement may eliminate the need for a residential placement. (ii) DCPS will participate in the development of an IEP at Student's new placement. (iii) If no placement is identified by the time of the hearing, DCPS will fund a tutor of Parent's choice to provide educational services until such time as a placement is identified. (iv) Parent reserves the right to seek compensatory education until such time as the student is appropriately placed and the new school staff can participate in the development of a plan.

By their respective letters dated January 29th 2014 and January 28th 2014, Petitioner disclosed twenty-two documents (Petitioner's Exhibits 1-22), and DCPS disclosed fifteen documents (Respondent's Exhibits 1-15).

The hearing officer convened the due process hearing on February 5th, 2014, as scheduled.² Respondent objected to Petitioner's Exhibits 2, 3, 5, 11, 13-15, and 22 in part, primarily on relevance grounds, but the hearing officer admitted the exhibits over Respondent's objections. Petitioner objected to Respondent's Exhibit 13 on the ground that the document had not previously been disclosed, but the hearing officer admitted the exhibit over Petitioner's objection because it was disclosed five days prior to the hearing in accordance with the requirements of IDEA. Thereafter, Petitioner's Exhibits 1, 4, 6-10, 12, 16-21, and the remainder of 22, as well as Respondent's Exhibits 1 through 12, 14 and 15, were admitted into the record without objection.

As a preliminary matter, the hearing officer raised the issue, *sua sponte*, of whether the adjudication of Petitioner's fourth claim regarding an appropriate placement for SY 2013/14 was barred on *res judicata* grounds. After hearing arguments from both parties and examining the previous HOD, the hearing officer determined that the claim was indeed barred on *res judicata* grounds because it was adjudicated in the previous due process hearing for this Student.

The hearing officer then received opening statements from both parties, testimonial evidence from Petitioner, rebuttal evidence from Respondent, Respondent's testimonial evidence for its case-in-chief, and the parties' closing statements. The hearing officer subsequently brought the hearing 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.").

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

ISSUE(S)

1. Did DCPS deny Student a free and appropriate public education (“FAPE”) by failing to comply with the November 13th 2013 HOD by failing to revise Student’s IEP and determine an appropriate educational placement and location of services other than School B and failing to determine if the placement should be a day school placement or a residential placement due to Student’s severe in school and out of school behaviors?
2. Did DCPS fail to develop an appropriate IEP on November 26th, 2013?
3. Did DCPS fail to allow Parent to participate in the educational placement, including location of services, decision, which allegedly was made by DCPS following the November 26th, 2013 MDT meeting?

FINDINGS OF FACT^{3,4}

1. Student _____ was identified as a student with a disability under IDEA with a disability classification of specific learning disability (“SLD”). Student was placed at School A, a DCPS school, when he was in first grade, and he remained there until he completed eighth grade at the end of SY 2012-2013.⁵
2. DCPS assigned Student to attend School B, a DCPS senior high school, for SY 2013/14. Student began attending School B at the start of SY 2013/14.⁶
3. On November 17, 2013, an independent hearing officer (“IHO”) issued an HOD, which ordered DCPS to do the following:

DCPS shall, within ten (10) business days of the issuance of this Order, if it has not already done so, convene an IEP meeting to review the student’s recent independent comprehensive psychological evaluation, review and determine the student’s disability classification, review and revise the student’s IEP and determine an appropriate educational placement and location of services other than School B. The team shall also consider and determine whether the student should simply be provided a day school placement or be referred for and provided a residential placement due to his severe in school and out of school behaviors.⁷

³ 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.

⁴ When citing an exhibit that has been submitted by both parties, the hearing officer may only cite to one party’s exhibit.

⁵ Respondent’s Exhibit 1 at 4, Finding of Fact (“FOF”) 1.

⁶ Respondent’s Exhibit 1 at 5, FOF 11; Complaint at 3.

⁷ Respondent’s Exhibit 1 at 8.

4. On November 13, 2013, DCPS prepared a written review of Student's independent comprehensive psychological evaluation.⁸
5. On November 26, 2013, DCPS convened an IEP meeting for Student. The stated purpose of the IEP meeting was to comply with the November 17, 2013 HOD. The team reviewed Student's independent comprehensive psychological evaluation, primarily by way of DCPS's written review of the evaluation. The team reviewed Student's disability classification and determined to change the classification from SLD to emotional disturbance ("ED"). With respect to Student's IEP, the team determined that Student's hours for the related service of counseling would remain the same until a placement had been determined. The special education coordinator ("SEC") stated that no goals would be changed because the placement needed to be determined first; hence, the only change made to the IEP was the change in disability classification. At no point did DCPS provide Parent and her representatives with a copy of the IEP for review and revision. Finally, the team determined that Student needed a more restrictive placement than a DCPS school, but DCPS's compliance case manager ("CCM") stated that a central office team would determine placement after it received the meeting notes. Although the CCM stated that a nonpublic would be considered, the CCM said that she was not at liberty to indicate whether the nonpublic would be a residential or day school because the central office team would make that decision. As a result, there would have to be another meeting to finalize Student's location of services. At no point during this placement discussion did the team discuss where Student needed to be placed on the level of services continuum or any actual potential locations of service, even though Petitioner's representatives repeatedly stated that a placement discussion needed to be held with Parent's participation prior to a location decision.⁹
6. On December 9, 2013, DCPS reconvened Student's IEP team to finalize Student's location of service. Parent was presented with two nonpublic day schools to choose from: School C with a dedicated aide (because School C's acceptance of Student was conditional upon the provision of a dedicated aide to Student) or School D. DCPS's representatives suggested amending Student's IEP to add a dedicated aide so that Student could attend School C, but Petitioner's counsel initially disagreed with the amendment. Although Parent ultimately chose School C and agreed to the amendment of the IEP to add a dedicated aide, DCPS determined to place Student at School D and the decision was made by someone from DCPS other than the DCPS representatives in attendance at the meeting. A representative from School D participated in the meeting by phone. Petitioner's counsel and advocate strongly disagreed with School D and continued to request a residential facility for Student.¹⁰
7. Also on December 9, 2013, DCPS issued a location of services letter assigning Student to School D.¹¹

⁸ Respondent's Exhibit 5.

⁹ Respondent's Exhibit 8; Petitioner's Exhibit 18 at 4; testimony of advocate.

¹⁰ Respondent's Exhibit 13; Petitioner's Exhibit 18 at 7; testimony of advocate; testimony of compliance case manager.

¹¹ Respondent's Exhibit 3.

8. Student began attending School D on December 19, 2013. However, Student's attendance has not been consistent because he does not want to go to the school and complains that he has to get up too early to get there (at approximately 5:50 am), and that the commute is too long (including 1.5 hours to get to school in the mornings). Student becomes violent and threatens Parent when Parent tries to make him attend School D.¹²

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. Weast*, 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 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner's claims.

Alleged Failure to Comply with 11/17/13 HOD

Pursuant to IDEA, hearing officers have authority to render decisions regarding the provision of FAPE. *See* 34 C.F.R. § 300.513(a); *Letter to Armstrong*, Office of Special Education Programs (28 IDELR 303 June 11, 1997) (states must set up due process system which gives hearing officers authority to order any relief necessary to ensure student receives a FAPE). Moreover, hearing officer decisions rendered pursuant to IDEA are final, except that any party may appeal an HOD to either the state educational agency if the hearing was conducted by some other agency, or to an appropriate State or federal district court. *See* 34 C.F.R. §§ 300.514, 300.516.

In the instant case, there is no contention that either party to the administrative due process hearing that resulted in the November 17, 2013 HOD appealed that decision. Hence, the November 17, 2013 HOD is a final decision rendered pursuant to IDEA, and the parties were obligated to comply with that decision. Petitioner contends that DCPS failed to comply with its obligations under the decision. A review of the evidence in this case supports Petitioner's contention, because the evidence reveals that DCPS failed to comply with that portion of the November 17, 2013 HOD's mandate requiring that DCPS convene an IEP meeting for Student to review and revise Student's IEP and determine an appropriate educational placement and location of services, including a consideration and determination of whether Student required a day school or a residential placement. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proving a denial of FAPE in connection with this claim, and the hearing officer will order DCPS to comply with that portion of the November 17, 2013 HOD that it has failed to comply with to date.

¹² *See* Petitioner's Exhibit 22 at 1; testimony of Parent.

Alleged Failure to Develop an Appropriate IEP on 11/26/13

The FAPE required by IDEA is tailored to the unique needs of each handicapped child by means of an IEP. *See Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, a disabled child's IEP must be reasonably calculated to enable the child to receive educational benefit. *Id.*

In the instant case, Petitioner contends that DCPS failed to develop an appropriate IEP for Student on November 26, 2013. However, Petitioner failed to offer any evidence or argument demonstrating in what regard the IEP is deficient. Hence, Petitioner has not challenged the number of hours of service under the IEP, the appropriateness of the goals in the IEP, or any other specific provisions of the IEP. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this claim.

Alleged Failure to Allow Parent to Participate in the Placement/Location Decision

IDEA requires that in determining the educational placement of a child with a disability, each public agency must ensure that, *inter alia*, the placement decision is made by a group of persons that includes the child's parents. *See* 34 C.F.R. § 300.116(a)(1). Moreover, IDEA provides that a hearing officer may find there has been a denial of FAPE where a procedural violation significantly impedes a parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child. 34 C.F.R. § 300.513(a)(2)(ii).

In the instant case, Petitioner contends that DCPS denied Student a FAPE by failing to allow Parent to participate in the placement/location of services decision for Student. The evidence fully supports Petitioner's contention, as the evidence reveals that the placement/location of services decision for Student was made by one or more individuals in DCPS's central office and Parent was not allowed to participate in the decision-making process despite repeated requests to do so. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proof on this claim as well, and in ordering DCPS to reconvene Student's IEP meeting to, *inter alia*, determine an appropriate educational placement and location of services for Student, the hearing officer will explicitly require that DCPS permit Parent to participate in the decision-making process. As Parent has reserved the right to seek compensatory education after Student has been appropriately placed, no compensatory education will be awarded herein.

ORDER

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

1. Within 7 business days of the issuance of this Order, DCPS shall reconvene Student's IEP team meeting to review and revise Student's IEP, and to discuss and determine an appropriate educational placement and location of services for Student, which shall include a consideration and determination of whether Student should simply be provided

a day school placement or be referred for and provided a residential placement due to his severe in school and out of school behaviors.

2. As Parent is a member of Student's IEP team,¹³ DCPS shall ensure that Parent is allowed an opportunity to fully participate in the decision-making process that takes place at the IEP meeting ordered in Paragraph 1 above.

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: 2/19/14

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer

¹³ See 34 C.F.R. § 300.321(a)(1).