

**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 14, 2014

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Petitioner,

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOL

Respondent.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY<sup>1</sup>**

On November 29, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public School (“DCPS”). On December 11, 2013, DCPS filed its Response to the Complaint.

The parties concluded the Resolution Meeting process by participating in a resolution meeting on January 7, 2014. The resolution period for this case ended on December 29, 2013. Hence, the 45-day timeline for this case started on December 30, 2013 and will end on February 12, 2014, which is the HOD due date.

On January 15, 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) Failure to develop an IEP in January 2013 (Petitioner contends DCPS should have developed an IEP at Student’s January 16, 2013 triennial review meeting); (ii) Failure to develop an adequate IEP on May 6, 2013; (Petitioner contends the May 6, 2013 IEP should have included OT goals and provided Student a full-time out-of-general-education placement); (iii) Failure to provide an appropriate placement during SY 2012/13 and SY 2013/14 (Petitioner contends Student required and requires a full-time out-of-general placement); and (iv) Compensatory education from January 2013 up until the time DCPS provides an appropriate placement.

***Respondent’s Defenses:*** (i) The IEP and related services are appropriate and have allowed Student to make progress in keeping with the IDEA; (ii) The IEP team has just been presented with additional data which it must have sufficient time to evaluate; (iii) With regard to location of services, this is a decision wholly within the discretion of DCPS and it would be wholly inappropriate to go from a partial IEP to a full time private placement; and (iv) Petitioner has not shown pursuant to the Reid standard that services were missed or that compensatory education is warranted.

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

**Relief Requested:** (i) DCPS will fund Student’s placement in a school identified by the parent. If the school determines that Student requires a dedicated aide in order to attend the school, DCPS will immediately provide a trained aide for the student, to include her time on the bus; (ii) If the parent has not been able to identify a school that will accept Student, DCPS will immediately find an appropriate placement; (iii) DCPS will provide or fund (whichever is appropriate at the time) the required home/hospital instruction; (iv) DCPS will fund independent comprehensive psychological, developmental vision, and assistive technology evaluations, due to DCPS’ failure to review the independent OT evaluation and to address the issue of the significant drop in IQ scores; and (v) The parent reserves the right to seek compensatory education at a later date.

With their respective five-day disclosure letters, Petitioner disclosed twenty-nine documents (Petitioner’s Exhibits 1-29), and DCPS disclosed six documents (Respondent’s Exhibits 1-6).

The hearing officer convened the due process hearing on January 30, 2014, as scheduled.<sup>2</sup> At the outset, Petitioner agreed that DCPS had already issued a Location of Services letter to a nonpublic school, so the only issue remaining for consideration was the issue of independent evaluations, specifically the assistive technology and full visual evaluations recommended in an independent occupational therapy (“OT”) assessment.

Thereafter, Petitioner’s Exhibits 15 through 29 and Respondent’s Exhibits were admitted into the record without objection. Petitioner’s Exhibits 1-14 were admitted over DCPS’s relevance objection based on the narrowing of the issues for adjudication, but the hearing officer stressed that only relevant and probative documents would be considered in the instant decision. The hearing officer then received opening statements and the testimony of Petitioner’s sole witness. DCPS declined to present any testimonial evidence, so the hearing officer received closing statements and 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.”).

### **ISSUE(S)**

1. Is Petitioner entitled to an award consisting of the requested relief of an independent assistive technology assessment and an independent full visual assessment for Student?

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

1. Student is a \_\_\_\_\_ female, and when the instant Complaint was filed, she was attending \_\_\_\_\_ a DCPS elementary school.<sup>4</sup>

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

<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> See Complaint; Respondent’s Exhibits 1 and 5.

2. Student's most recent IEP was developed on May 6, 2013. The IEP identifies Student's primary disability as Intellectual Disability (also known as Mental Retardation). The IEP provides for Student to receive 10 hours per week of specialized instruction in reading, 3 hours per month of speech/language pathology services, and 240 minutes per month of behavioral support services, with all specialized instruction and related services to be delivered in a general education setting.<sup>5</sup>
3. Student has academic weaknesses.<sup>6</sup>
4. During the current school year in her DCPS elementary school, Student was non-compliant and constantly moving, she was a flight risk, and she was disengaged in lessons and walked around during instructional time in the classroom.<sup>7</sup>
5. During the previous school year in her DCPS elementary school, Student consistently demonstrated the following negative behaviors: not listening to adults or peers, not attending to tasks (walking around), and violence (cursing at adults and hitting peers). As a result of these negative behaviors, Student damaged most of her relationships with her peers, she was losing all instructional time by not sitting for tasks, and it was difficult for her to participate in small group work.<sup>8</sup>
6. During the previous school year, as of January 16, 2013, Student had not had a recent vision screening and failed the screening in 2010.<sup>9</sup>
7. On October 1, 2013, Student received an independent occupational therapy ("OT") evaluation due to concerns with Student's fine and visual motor skills, sensory processing, handwriting, ability to remember letters on a consistent basis, and ability to follow directions.<sup>10</sup>
8. Student's performance on the independent OT evaluation revealed the following weaknesses: fine motor control and coordination; low muscle tone; concerns in all areas of sensory processing; visual motor integration, with both visual perception and motor coordination as areas of weakness, and with visual memory so poor that Student cannot generate text independently; and self-injurious and aggressive behaviors. Moreover, Student's ocular motor control could not be formally screened during the evaluation because Student was unable to follow the instructions requiring her to follow a stimulus with her eyes.<sup>11</sup>
9. Student requires an assistive technology evaluation to identify specific types of technology that can increase her independence with writing tasks while being sensitive to her global cognitive deficits, including visual memory. An assistive technology evaluation will help determine how Student tolerates various forms of assistive technology and what kinds of assistive technology will help her to be available for learning. Appropriate assistive technology will increase Student's positive behaviors

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<sup>5</sup> Petitioner's Exhibit 12.

<sup>6</sup> Respondent's Exhibits 1 and 5.

<sup>7</sup> *Id.*

<sup>8</sup> Petitioner's Exhibit 10.

<sup>9</sup> Petitioner's Exhibit 7.

<sup>10</sup> Petitioner's Exhibit 14 at 1.

<sup>11</sup> Petitioner's Exhibit 14 at 12; testimony of occupational therapist.

and motivation, help to prevent negative behaviors and frustration, and enable Student to stay with academic tasks longer so that learning can occur.<sup>12</sup>

10. Student also requires a full visual evaluation from a specialist trained in assessing how vision affects learning. The evaluation should assess visual acuity, eye movements, visual motor integration and coordination, and visual perception. The evaluation should not be performed by an ophthalmologist, because ophthalmologists focus on diseases of the eye, as opposed to the functional vision skills that Student needs to have assessed.<sup>13</sup>
11. Student's independent OT evaluation recommended that Student receive an assistive technology evaluation and a full visual evaluation.<sup>14</sup> However, Student's IEP team has not reviewed the independent OT evaluation, and there is no evidence of record that Petitioner or her representative(s) provided the OT evaluation to anyone at Student's DCPS elementary school for review by the IEP team.
12. The Complaint in the instant action was filed on November 29, 2013, approximately six weeks after the issuance of Student's independent OT evaluation report.

### **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 (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 grouped together to the extent that they are interrelated.

Under IDEA, each public agency must ensure that a child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.304(c)(4). Each public agency must also ensure that the evaluation of each disabled child is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(7).

In the instant case, Petitioner asserts that DCPS denied Student a FAPE by failing to conduct the assistive technology and full visual evaluations recommended in Student's October 2013 independent OT evaluation. However, there is no evidence in the administrative record demonstrating that Petitioner ever provided the independent OT evaluation to DCPS for review by Student's IEP team. Moreover, even assuming, *arguendo*, that Petitioner provided the independent OT evaluation to DCPS in October 2013 after its completion, Petitioner filed the instant Complaint the following month, in November 2013. *Compare Herbin v. District of Columbia*, 362 F. Supp 254 (D.D.C. 2005) (where the court found that a 4-month delay in

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<sup>12</sup> Petitioner's Exhibit 14 at 13; testimony of occupational therapist.

<sup>13</sup> Petitioner's Exhibit 14 at 14; testimony of occupational therapist.

<sup>14</sup> Petitioner's Exhibit 14 at 13-14.

conducting requested reevaluations was not unreasonable). Under these circumstances, the hearing officer concludes that Petitioner has failed to prove its entitlement to an award from the undersigned hearing officer consisting of the requested relief of an independent assistive technology assessment and an independent full visual assessment for Student.

**ORDER**

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

1. Petitioner's request for independent evaluations is **DENIED** for the reasons set forth 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: 2/12/14

/s/ Kimm Massey

Kimm Massey, Esq.  
Hearing Officer