

**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
June 2, 2014

Petitioner

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**¹

Student presently attends a private full-time special education school. On March 18, 2014, Petitioner filed a Complaint against Respondent District of Columbia Public School (“DCPS”). On March 29, 2014, DCPS filed its Response to the Complaint.

Petitioner and the LEA concluded the Resolution Meeting process by participating in a resolution session meeting on March 31, 2014. No agreement was reached, but the parties agreed not to prematurely shorten the 30-day resolution period. The 45-day timeline began on April 18, 2014 and will end on June 1, 2014, which is the HOD deadline.

On April 25, 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 provide Student with an appropriate Individualized Educational Program (IEP) or placement/location of services at the November 9, 2012 meeting or the January 8, 2013 meeting and/or make a suitable placement available for Student for the 2012-2013 and 2013-2014 school years.

Respondent DCPS’ Defenses: (i) Student’s IEP was developed at the November 2012 IEP team meeting pursuant to a Hearing Officer Determination (issued on or about October 10, 2012) and that the IEP is reasonably calculated to provide Student with meaningful educational benefit. (ii) DCPS notified Student that Student’s IEP could be implemented at his neighborhood school. (iii) Petitioner’s Due Process Complaint is Petitioner’s second time attempting to collaterally attack a finding that the requested private school is not appropriate for

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

Student. (iv) DCPS will seek dismissal of this claim as barred by res judicata and/or claim preclusion.

Relief Requested: (i) A finding that the Student has been denied a FAPE. (ii) An order that DCPS shall reimburse the parent for tuition paid to the requested private school for the 2012-2013 and 2013-2014 school years. (iii) An order that DCPS shall reimburse the parent for out of pocket expenses for related services provided to Student at the private school during the 2012-2013 and 2013-2014 school years. (iv) An order that DCPS shall convene an MDT/IEP meeting at the attending school and develop an IEP consistent with the recommendations of the independent neuropsychological evaluation dated May 2012, on or before the end of June 2014, with said IEP to provide at a minimum, a small sized classroom of between eight and ten students and one teacher with experience working with students with language based learning disorders and one aide; individualized tutoring of at least two hours per week to be broken down into 30 minute sessions, with a learning disability specialist to address Student's reading disorder; support in written expression, as well as consideration of a behavior plan to address avoidant behaviors; and accommodations to include preferential seating, redirection, frequent breaks, reduced distractions, frequent praise, books on tape and several suggested computer programs that would be beneficial to Student. (v) An order that DCPS shall identify a location of service that can implement the revised IEP for the 2014-2015 school year within ten (10) days of the date of the aforementioned IEP meeting, and provide the parent with an opportunity to meet with the proposed school to confirm the school's ability to implement Student's program, prior to the end of July 2014. (vi) The Student's current educational placement should be considered the attending school for purposes of "stay put" in the event of a dispute about the proposed school's ability to implement the Student's revised IEP.

By their respective letters dated May 6, 2014, Petitioner disclosed twenty-two documents (Petitioner's Exhibits 1-22), and DCPS disclosed fourteen documents (Respondent's Exhibits 1-14).

The hearing officer convened the due process hearing on May 13, 2014, as scheduled.² All disclosed documents were admitted without objection. DCPS made an oral motion to dismiss, which the hearing officer conditionally denied. However, the hearing officer agreed to take into account in the instant decision that a December 2011 HOD ruled that Student did not require a full-time special education school, and the hearing indicated that the motion would be revisited if appropriate in connection with the writing of the instant decision.

Thereafter, the hearing officer received Petitioner's opening statement, DCPS reserved its opening to the start of its case, Petitioner presented its testimonial evidence, DCPS made a motion for directed finding, which the hearing officer denied, DCPS presented its testimonial evidence, and the hearing office received closing statements prior to concluding the hearing.

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 FAPE by failing to provide Student with an appropriate Individualized Educational Program (IEP) or placement/location of services at the November 9, 2012 meeting or the January 8, 2013 meeting and/or make a suitable placement available for Student for the 2012-2013 and 2013-2014 school years?

FINDINGS OF FACT^{3,4}

1. Student presently attends a private full-time special education school.
2. Student was diagnosed with a seizure disorder . He takes two different medications that contribute to his disability.⁵
3. For SY 2011/12, Student was assigned to attend a DCPS elementary school other than his neighborhood DCPS school after it was determined that the neighborhood school could not address Student's needs.⁶
4. On or about September 30, 2011, Student's parents withdrew Student from the DCPS elementary school he was attending and enrolled him in the current private school.⁷
5. On December 18, 2011, a hearing officer issued an HOD, which stated, in part, as follows:

After only six weeks of schooling at a public elementary school in the District of Columbia at the beginning of the 2010-2011 school year, Petitioners withdrew Student from school and unilaterally placed him at the separate special education private school that Petitioners had sought funding for as far back as March 2011. The evidence in the record not only supported but mandated [footnote citation to a 6/4/11 HOD] Student's placement in an inclusion program with accommodations where Student would have access to his non-disabled peers; not the separate full-time special education school that Petitioners again seek DCPS funding for. Student's current IEP cannot be implemented at [the requested private school] and the record does not support a finding that Student requires a full-time separate special education school in order to receive educational

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 Testimony of Parent.

⁶ *Id.*

⁷ Respondent's Exhibit 2; testimony of Parent.

benefit. Student received educational benefit from the educational services he received for the six weeks that he attended the public school.

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The December 18, 2011 IEP also ordered DCPS to provide Petitioner with a letter of funding for an independent neuropsychological evaluation.⁹

6. In January 2012, Student received his independent neuropsychological evaluation. Cognitively, Student's verbal comprehension skills were in the Average range, his working memory skills were in the Extremely Low range, and his perceptual reasoning skills and processing speed were in the Borderline range. Neuropsychologically, Student scored in the Average range for phonological awareness, in the Below Average range for phonological memory, and his standard score could not be tabulated for rapid naming skills due to excessive errors; Student displayed very unevenly developed abilities in encoding and retrieving orally presented verbal information; Student's visual-motor integration scores ranged from the Very Low range to the Below Average range; and although ADD scales indicated that Student has significant memory problems, they did not indicate significant inattentive or hyperactive and impulsive symptoms. Academically, Student's reading, math and written language skills were within the kindergarten to below first grade level. Social-emotionally, Student did not have behavioral issues but there were ongoing concerns about his slow learning/learning problems. The evaluator recommended, *inter alia*, a full-time special education program, a small-sized classroom consisting of 8-10 students with one teacher and one aide, individual tutoring with a learning disability specialist to address Student's reading disorder and support in the area of written expression, as well as continued placement in the requested private school.¹⁰
7. The independent neuropsychological evaluator recommended continued full-time placement for Student because his varied disabilities combine to create a complicated educational situation, and he was in a full-time situation where he seemed to be really benefitting. Student had a small class size, a small student/teacher ratio, and he was learning well there.¹¹
8. On March 16, 2012, Petitioner appealed the December 18, 2011 HOD to the U.S. District Court for the District of Columbia.¹²
9. On May 18, 2012, DCPS prepared a Review of Student's independent neuropsychological evaluation. The DCPS certified school psychologist restated the major findings of the evaluation, but stated that the MDT should make the final determination regarding Student's eligibility. Although the school psychologist recommended strong academic support for Student with a low student and teacher ratio, explicit instruction

⁸ Respondent's Exhibit 3 at 12.

⁹ *Id.* at 13.

¹⁰ Petitioner's Exhibit 12.

¹¹ Testimony of clinical psychologist.

¹² Respondent's Exhibit 4.

with modeling and practicing, repeated instructions and the breaking down of tasks into smaller components, and frequent breaks, the school psychologist did not recommend a full-time special education program for Student or continued placement in the requested private school.¹³

10. On October 10, 2012, a second hearing officer issued an HOD, which addressed, in part, whether DCPS denied Student a FAPE by “failing to review and revise the Student’s June 14, 2011 individualized education program (“IEP”) as appropriate based on the findings of an independent neuropsychological evaluation.”¹⁴ In this HOD, the hearing officer ordered DCPS to convene an MDT/IEP meeting for Student by no later than November 9, 2012 to review the February 6, 2012 neurological evaluation and May 18, 2012 Review of same; review Student’s educational needs based on the updated information; review and revise, as appropriate, Student’s IEP; and determine an appropriate school or program for Student.¹⁵
11. DCPS scheduled an IEP for meeting for Student for November 9, 2012. However, on the morning of November 9th, Petitioner’s counsel advised DCPS by email that Student’s mother had an unexpected emergency and would not be able to attend, so the meeting would have to be rescheduled and parent would agree to an extension of the timeline. DCPS moved forward with the meeting anyway to comply with the October 2012 HOD.¹⁶
12. At the November 9, 2012 meeting, the IEP team increased Student’s special education services to 3 hours per day outside general education, consisting of 90 minutes per day of specialized instruction in reading, 30 minutes per day of specialized instruction in written expression, and 60 minutes per day of specialized instruction in mathematics. The team further determined that Student would receive ESY services for SY 2012/13, but all of his related services would remain the same, which means Student is to receive 30 minutes per week of physical therapy outside general education, 60 minutes per week of speech-language therapy outside general education, and 60 minutes per week of occupational therapy outside general education. The team also determined that the IEP could be implemented at Student’s neighborhood DCPS school. The team based the IEP on Student’s February 2012 neuropsychological evaluation, DCPS’s May 2012 review of same, and Student’s June 4, 2011 IEP. Although DCPS requested permission to conduct an observation of Student at the private school prior to the meeting, that request was denied. DCPS also requested updated information, such as progress reports, related service trackers and the like, from Petitioner’s counsel, but Petitioner’s counsel did not respond to the request.¹⁷
13. The November 9, 2012 IEP was developed by the DCPS teachers who worked with Student for 6 weeks in general education during SY 2011/12 before Parents unilaterally

¹³ Petitioner’s Exhibit 12.

¹⁴ Respondent’s Exhibit 5 at 1.

¹⁵ *Id.* at 14.

¹⁶ See Respondent’s Exhibits 7-9.

¹⁷ See Respondent’s Exhibits 10-12; testimony of DCPS principal.

enrolled Student in the requested private school. This team is not from the neighborhood DCPS school. The IEP would allow Student to receive the maximum pullout services for reading, writing and math based on current data, and it would allow Student to spend most of his day with a small student/teacher ratio working on his level. However, for art, music, recess, lunch and similar areas, Student would be in the general population. In the school where the DCPS team that developed the IEP teaches, art, music and physical education are combined into one class for five hours per week that is taught by an early childhood education teacher who specializes in working with pre-kindergarten and kindergarten children. So at that school, Student would spend 15 hours outside general education for reading, writing and math instruction, five hours in the combined art, music, and physical education class, and 2.5 hours in related services, for a total of 22.5 hours per week. Student would spend the rest of the school week, including lunch time and library time, in the general education population. However, the team did not select that school as Student's location of services; it selected the neighborhood DCPS school for Student.¹⁸

14. By letter dated December 11, 2012, Petitioner's counsel advised DCPS "of parents' intent to maintain the unilateral placement of their child in a private school . . . at [the requested private school] based upon District of Columbia Public School's (sic) failure to provide [Student] with an appropriate IEP and/or placement . . ." ¹⁹
15. DCPS reconvened Student's IEP meeting on January 8, 2013 to allow Parents an opportunity to participate. Parents and their counsel stated that they were not in agreement with the November 9, 2012 IEP or the location of services determination. Parents requested that DCPS fund Student at the requested private school, but DCPS declined and stated that the revised IEP could be implemented at the neighborhood school. DCPS asked parent to enroll Student at the neighborhood school.²⁰
16. By email dated October 25, 2013, Petitioner's counsel advised DCPS that parents had elected to keep Student at the requested private school for SY 2013/14 "as a result of DCPS's failure to develop an appropriate IEP and/or make an appropriate placement available to the student." Counsel stated that parent continued to request that DCPS develop an appropriate IEP and make an appropriate placement available, and would be willing to participate in a meeting should DCPS wish to convene one.²¹
17. At the requested private school, Student is receiving full-time special education services, as well as related services. He has attended the school since SY 2011/12. In SY 2012/13, Student was in a mixed class of grades 1 and 2 with a small student/teacher ratio, and he made slow progress in reading and math due to his memory problems. In SY 2013/14, Student is in a mixed class of 2nd and 3rd graders with a small

¹⁸ Testimony of DCPS school counselor; testimony of DCPS principal.

¹⁹ Petitioner's Exhibit 4.

²⁰ Respondent's Exhibit 13.

²¹ Petitioner's Exhibit 1.

student/teacher ratio, and he continues to make progress. Tuition at the private school is approximately \$39,000 for SY 2013/14; the tuition was \$38,100 for SY 2012/13.²²

18. Parent has received tuition assistance from the private school for SY 2012/13 and SY 2013/14. Hence, Parent's out-of-pocket costs have been \$1150 per month plus \$150 per week of OT services for SY 2012/13, and \$800 per month plus OT expenses for SY 2013/14.

19. Student's neighborhood DCPS school did not offer a full-time out of general education setting for SY 2013/14, and the only witness offered on the issue could not remember whether the school offered such a setting for SY 2012/13. However, for SY 2012/13, the neighborhood school offered one primary and one intermediate resource room with one special education teacher in each room and 20 special education students. The students went to the rooms in shifts, so there were never more than 10 students in the room at the same time because none of the students were 100% outside of general education.²³

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 claim.

The "free appropriate public education" required by the Act 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). The requirement to provide a FAPE is satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* Hence, the IEP, and therefore the personalized instruction, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.*

In determining whether a Student's IEP is appropriate, the hearing officer must determine (1) whether the LEA has complied with the procedures set forth in IDEA, and (2) whether the IEP developed through IDEA's procedures was reasonably calculated to provide Student with educational benefits. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982) ("*Rowley*"). In turn, in determining whether an IEP is reasonably calculated to provide educational benefit, the measure and adequacy of the IEP is to be determined "as of the time it is offered to the student." *Thompson*

²² Testimony of associate head of private school.

²³ Testimony of DCPS special education teacher/SEC.

R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009).

IDEIA also requires that a public agency 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 contends that the IEP developed for Student on November 9, 2012, which DCPS refused to revise on January 8, 2013, was not appropriate for Student because it deviated from the recommendations of the independent neuropsychological evaluator and that evaluation was the most recent data available to the team. Petitioner also contends that the location of services designated by DCPS, the neighborhood DCPS school, was not appropriate because it did not provide a full-time out of general education program.

DCPS disagrees with Petitioner's assertions, noting that several hearing officers have determined that Student does not require a full-time special education school, and that the current IEP cannot be implemented at the requested private school. DCPS asserts that Student will benefit from an inclusion program with accommodations that allows Student access to his nondisabled peers, and DCPS points to the previous HOD finding that Student received educational benefit at the DCPS school he attended for 6 weeks during SY 2011/12. DCPS asserts that Student has made progress since he left DCPS in September 2011, so it stands to reason that if he did not require a full-time special education school back then, he does not need one now. DCPS also points out that the fact that Student is making progress at the private school does not mean that he needs to be there to receive educational benefit.

Upon a review of the evidence in this case, the hearing officer has determined that the November 2012 (and January 2013) IEP was reasonably calculated to provide Student with educational benefit, because under that IEP Student would receive the maximum pullout services for reading, writing and math, and he would spend most of his day with a small student/teacher ratio working on his level. However, for art, music, recess, lunch and similar areas, such as library time, Student would be in the general population, where he could benefit from interaction with his nondisabled peers.²⁴

On the other hand, the hearing officer notes that the IEP team which developed the IEPs under consideration was based in a school other than the neighborhood DCPS school. Although that school could offer Student a program to meet his needs, in light of its combined art, music and physical education program taught by a teacher with expertise in working with pre-kindergarten and kindergarten children, DCPS did not assign Student to attend that school. Instead, DCPS assigned Student to attend the neighborhood school, and although there was testimony that the neighborhood school could implement Student's IEP, that testimony was lacking in detail

²⁴ The hearing officer acknowledges that this determination differs from the recommendation of the independent neuropsychological evaluator; however, under IDEA it is the IEP team, and not an independent evaluator, which is charged with developing a disabled student's IEP. *See* 34 C.F.R. § 300.320-324.

sufficient enough to establish that Student could receive educational benefit at the neighborhood school, especially when one considers that the IEPs under consideration failed to include the recommended supports for Student, such as explicit instruction with modeling and practicing, repeated instructions and the breaking down of tasks into smaller components, and frequent breaks. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of establishing that DCPS failed to provide Student with an appropriate location of services from November 9, 2012 through the present.

Accordingly, the hearing officer will order DCPS to reconvene Student's IEP meeting to either (1) assign Student to attend the DCPS school where the IEP team who developed the November 9, 2012 teaches, or (2) revise the IEP to include recommended supports and determine an appropriate location of services to implement that IEP. The hearing officer will also order DCPS to reimburse Parent for ½ the cost of his actual expenses for Student's tuition and OT services at the requested private school from November 9, 2012 through the date on which DCPS complies with the mandates of this HOD.

ORDER

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

1. Within 15 calendar days of the issuance of this Order, DCPS shall reconvene Student's IEP meeting to either (1) assign Student to attend the DCPS school where the IEP team that developed the November 9, 2012 teaches, or (2) revise the IEP to include the supports recommended by DCPS's review of the independent neuropsychological evaluation and determine an appropriate location of services to implement that IEP.
2. DCPS shall reimburse Parent for ½ the cost of his actual expenses for Student's tuition and OT services at the requested private school from November 9, 2012 through the date on which DCPS complies with the mandates of Paragraph 1 of this Order.

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: 6/1/14

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