DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Hearing Officer: Kimm Massey, Esq.

Case No:

OSSE
STUDENT HEARING OFFICE
2011 FEB -7 AM 9:19

HEARING OFFICER DETERMINATION

BACKGROUND

Student is an year-old male, who has attended his current DCPS senior high school for 4 to 5 years but is still in the grade. Student's current IEP lists Specific Learning Disability ("SLD") as his primary disability and requires him to receive 26.5 hours per week of specialized instruction outside general education and 30 minutes per week of behavioral support services.

On December 3, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS denied failed to comply with an April 5, 2010 Settlement Agreement ("4/1/10 SA")[1], failed to convene an IEP meeting upon request, failed to develop an appropriate IEP, failed to implement an appropriate IEP, and failed to provide an appropriate placement. As relief for these alleged denials of FAPE, Petitioner sought, *inter alia*, immediate funding and placement for Student at a specified private school, with transportation; funding of an independent comprehensive evaluation and an FBA, and any other evaluations recommended in the specified evaluations; an IEP meeting within 5 days of placement to review and revise the IEP as appropriate; and discussion and determination of compensatory education at the ordered IEP meeting, or alternatively, funding of an independent evaluation to determine appropriate compensatory education.

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[1] The documentary evidence produced in this case proves that the Settlement Agreement was executed on April 1, 2010.

On December 13, 2010, DCPS filed its Response to the Complaint. In its Response, DCPS asserted that the instant action was barred by collateral estoppel due to a previous action and/or waiver due to the 4/1/10 SA; that DCPS had completed and previously provided to Petitioner's counsel an FBA for Student; that an IEP meeting had been held on June 14, 2010, and in any event, a failure to convene an IEP meeting upon request did not constitute a violation of IDEA; that Student had repeatedly been absent, unavailable for, or refused behavioral support services offered by DCPS; that Petitioner's Complaint failed to state a basis for an award of the requested independent psychological evaluation; and that DCPS had provided an appropriate IEP/placement for Student and the team agreed with the IEP/placement at the June 2010 meeting.

On January 19, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Upon the hearing officer's request, DCPS agreed to further set forth its collateral estoppel defense in a prehearing motion and Petitioner agreed to timely file an opposition thereto. The hearing officer issued the Prehearing Order on January 24, 2011.

On January 25, 2011, DCPS filed its Motion to Dismiss. On January 28, 2011, Petitioner filed its Opposition to the Motion to Dismiss. On February 1, 2011, the hearing officer issued an Order granting in part and denying in part DCPS's Motion to Dismiss. In this Order, the hearing officer granted the Motion to Dismiss with respect to Petitioner's claims that DCPS failed to comply with the 4/1/10 SA by failing to conduct an FBA[2] and failed to provide an appropriate placement prior to the 2010/11 school year, but the hearing officer denied the Motion to Dismiss in all other respects.

By their respective disclosure letters dated January 27, 2011, Petitioner disclosed fourteen documents (Petitioner's Exhibits 1 – 14), and DCPS disclosed DCPS-1 through DCPS-6.

The hearing officer convened the due process hearing on February 3, 2011.[3] The parties' disclosed documents were admitted into the record without objection. Upon reviewing the issues, the hearing officer noted that Petitioner's claims for failure to comply with the 4/1/10 SA by failing to revise the IEP and failure to develop an appropriate IEP involved some redundancy and that the parties' presentation of evidence should be tailored accordingly. Petitioner sought to introduce the testimony of a witness who had not been disclosed in place of a disclosed witness from the same educational institution, but DCPS objected to the undisclosed witness. The hearing officer excluded the testimony on DCPS's objection pursuant to 34 C.F.R. § 300(a)(3). Thereafter, the hearing officer received opening statements, the testimony of Petitioner's three witnesses,[4] the testimony of DCPS's sole witness, and closing statements. Finally, the hearing officer concluded the hearing.

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[2] This ruling did not affect Petitioner's claim that DCPS failed to comply with the 4/1/10 SA by failing to revise the IEP.

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

[4] Over DCPS's objection, the hearing officer allowed Petitioner to recall its initial witness immediately prior to the conclusion of its case to testify about Petitioner's proposed compensatory education plan.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 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.").

ISSUES

The issues to be determined are as follows:

1. Did DCPS fail to comply with the 4/1/10 SA by failing to revise Student's IEP?

2. Did DCPS deny Student a FAPE by failing to convene an IEP meeting upon request?

3. Did DCPS fail to develop an appropriate IEP?

4. Did DCPS fail to implement an appropriate IEP?

5. Did DCPS fail to provide an appropriate placement for SY 2010/11?

FINDINGS OF FACT

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 years old. He has attended his current DCPS high school for 4 to 5 years, but he is currently in the 10th grade with only 4.5 credits. Student is performing below grade level in almost all areas. His performance on a March 6, 2009 administration of the Woodcock-Johnson III Achievement Test resulted in the following grade equivalencies ("GE"): broad math – 5.1 GE; math calculation skills – 5.3 GE; math fluency – 3.9 GE; broad reading – 7.1 GE; reading fluency – 7.4 GE; spelling – 12.9 GE; passage comprehension – 3.7 GE; broad written language – 9.3 GE; written expression – 7.3 GE; writing fluency – 8.4 GE; and writing samples – 4.3 GE. Moreover, based on the results of a 10/29/08 comprehensive psychological evaluation, Student's overall cognitive performance is in the Borderline range, and he has a full scale IQ of 79 (Borderline).[5]

2. Student's current IEP, dated March 25, 2010, lists SLD as Student's primary disability and requires Student to receive 26.5 hours per week of specialized instruction outside general education and 30 minutes per week of behavioral support services.[6]

3. On Student's current IEP, the sections where baseline data should be listed for the academic areas of mathematics, reading and written expression do not contain baseline

[5] Testimony of Student; *see* Petitioner's Exhibit 1; *see* DCPS-3.
[6] DCPS-4; Petitioner's Exhibit 1.

data describing Student's abilities at the time the IEP was written but instead contain the following objective: "Mastery will be determined by 75% accuracy on assignments as required to pass the course." Moreover, the goals listed on Student's IEP in the academic areas of mathematics, reading and written expression are too advanced for Student, in light of his below grade level abilities. The goals listed on the emotional, social and behavioral development portion of Student's IEP inappropriately focus on why Student has not been attending school when the goals should address ways to get Student to attend school.[7]

4. On April 1, 2010, the instant parties entered into a Settlement Agreement, which required DCPS to convene an IEPMDT meeting to, *inter alia*, review Student's FBA, if completed, and revise the student's IEP if appropriate.[8]

5. On April 8, 2010, Student's educational advocate forwarded to DCPS an email that included an extensive listing of all the changes Petitioner's representatives felt were needed for Student's IEP. A comparison of the advocate's list with the current IEP reveals that all of Student's academic goals have been changed and one or more additional goals were added for each academic area. However, it appears that no changes were made to the portion of the IEP that represents Student's Post-Secondary Transition Plan, despite the advocate's email indicating that the transition plan does not include the results of all transition assessments, contains goals that are not specific, appropriate for Student, and measurable, does not contain appropriate baseline data, and does not identify appropriate post-secondary transition activities and services.[9]

6. On June 9, 2010, DCPS issued an IEP Progress Report for Student, which indicated that Student had made "No Progress" on his IEP goals during all 4 reporting periods of school year 2009/10.[10]

7. On June 11, 2010, DCPS convened an MDT meeting for Student. Parent participated in the first portion of the meeting, and the advocate participated in the entire meeting with the LEA representative and the remaining DCPS team members. DCPS's Meeting Notes indicate that Petitioner's advocate noted that Student's baseline data was inappropriate and his test results needed to be aligned with the goals; however, the advocate also accepted Student's goals since he was not attending classes. The DCPS Notes also include the advocate's suggestion that the team discuss placement after completion of Student's FBA.[11]

8. The advocate's notes for Student's June 11, 2010 MDT meeting indicate that a DCPS team member reviewed "some of the changes in the IEP." Moreover, after outlining information about the Student's IEP, the advocate's notes state that "[t]he goals were

[7] Testimony of advocate; DCPS-4; Petitioner's Exhibit 1.
[8] DCPS-2.
[9] Petitioner's Exhibits 9 and 1; testimony of advocate.
[10] Petitioner's Exhibit 5.
[11] DCPS-5;

changed." At the due process hearing in this matter, the advocate was unable to recall any details about the changes to the IEP reflected in her notes.[12]

9. On June 15, 2010, DCPS forwarded by email to Petitioner's counsel a copy of a combination FBA and BIP that DCPS had prepared for Student. The FBA/BIP has not been reviewed by Student's IEP team.

   The FBA indicates that the behavior of concern with respect to Student includes the following: being out of seat, defiance, moodiness, physical aggression, social skills, truancy, late assignments, noncompliance, verbal aggression, bullying, fighting, off task, disorganization, making excuses, poor motivation, distracting others, passivity, seeks attention, does not complete assignments and comes to class unprepared. The FBA states that the behaviors occur in all settings continuously throughout the entire school day. Moreover, the FBA indicates that Student's behavior is related to his disability of SLD, that his team believes that Student engages in the behavior of concern because he is significantly behind academically, and that Student's behavior is particularly problematic in classes with a high student ratio and less structure.

   The FBA notes that an observation was conducted of Student in his math resource class in October 2009. The teacher reported that Student usually was very disruptive in class and did not complete classroom assignments. However, Student was on task and focused during the observation, and the teacher reported that Student was on task that day because he was receiving support from the special education teacher, who was co-teaching with the teacher that day.[13]

10. DCPS's Service Tracker logs for Student's behavioral support services for the period extending from March 8, 2010 through December 14, 2010, indicate that during the latter portion of school year 2009/10, Student received direct service six times, was absent once, and was unavailable for services three times when the provider was unable to locate Student. The service provider was unavailable once. However, during the first half of school year 2010/11, Student did not receive any direct services because he was absent three times and unavailable seven times because he refused services. The logs indicate the service provider was unavailable once when she attended an IEP meeting for Student. The logs further indicate that during the first half of school year 2010/11, the provider spoke with Student several times in the hallways, where he often cut classes. Indeed, the Progress Note for December 2, 2010 states that the service provider consulted with the Dean of Students regarding Student's behavior and refusal to go to class and further states that "Concerns need to be address in a MDT meeting with parent and other school staffs for implementation of a behavior plan."[14]

11. Student's current behavioral support services provider agrees that it is fair to say that the situation at Student's current school is not working out for him in terms of behavioral support services. As Student has never given the provider an opportunity to work with him, the provider has not been able to conduct an initial assessment or implement any incentive or other plans for Student. However, the provider is aware that Student's

[12] Petitioner's Exhibit 2; testimony of advocate.
[13] DCPS-3; testimony of advocate.
[14] DCPS-6.

attendance problem is an issue for him. The provider has seen Student in the hall and asked him to come with her for services, but Student has refused. Indeed, he consistently refuses services. The provider has left telephone messages for Student's mother, but the calls have gone unreturned, and the provider has spoken to Student's case manager on several occasions to try to develop a plan for him. The provider has also attempted to get Student to come for services by asking 2 of his friends to come to counseling with him. Although the friends said they would come, they never did.[15]

12. On August 19, 2010, Petitioner's counsel, on behalf of its "client," requested an MDT meeting for Student "to review and revise the student's IEP, academic progress, placement, and to discuss compensatory education." DCPS never responded to this written correspondence.[16]

13. On September 29, 2010, Student was suspended for 11 days as a result of an incident, in which Student was directing accused of making sexually explicit comments and a sexually explicit gesture to a female administrator.[17]

14. Although Student tends to go to his school building every school day, he walks the halls at school instead of going to his classes. Student walks the halls because he does not receive the help he needs in his classes, which makes him feel stupid in class. Indeed, many times when Student raises his hand in class to ask a question, the teachers think he's trying to be funny and will tell him to stop trying to be funny. In those circumstances, he will yell at the teachers for not taking him seriously, and then the teachers ignore him for the rest of the class. The situation has gotten so bad with respect to Student's 3rd period English class that he is not allowed to go to that class anymore because he argued with the teacher. When he does attempt to attend that class, the teacher will either tell him that he cannot come in or she will give him the class work and tell him to leave. During the 2009/10 school year Student would receive suspensions for not going to class, but during the current school year the school's staff allows him to walk the halls without taking any action. The school has not implemented any incentive or other types of plans to address his behavior.[18]

15. Student has four classes during the current school year: Algebra, Reading 180, Extended Literacy, and a combination class where he works on the assignments from all of his classes. Student does not attend Algebra every day, he has only been to Reading 180 one time, he cannot go to Extended Literacy because that is the class where the teacher will not allow him in, and he goes to his combination class all the time.[19]

16. Student has a male mentor, who has mentored Student for the past five years and intermittently provided tutoring and educational advocacy services to Student. In the mentor's professional opinion, Student has never done well at his current DCPS high

[15] Testimony of social worker.
[16] Petitioner's Exhibit 11; testimony of advocate.
[17] Petitioner's Exhibit 8.
[18] Testimony of Student.
[19] Testimony of Student.

school because the school is physically too large for Student and Student does not get the individual attention he needs there. Student does not seem to be progressing at school. However, the mentor has tutored Student in the areas of reading vocabulary and consumer math, and Student is making slow progress with the mentor. The mentor knows Student to be a quiet and respectful young man who never curses and often does not even speak up when he needs to leave to go to another appointment. Hence, the mentor has been very surprised to hear that Student has cursed at or otherwise disrespected a teacher. Based on the mentor's discussions with Student, it would appear that when Student gets frustrated in class because the subject matter is too difficult and/or the teacher is not slowing down for Student and giving him the help he needs, Student will act out or do whatever it takes to avoid the class. On the other hand, when Student likes the teacher, which seems to mean that the teacher works with Student, then Student will consistently go to that class.[20]

17. Student's current DCPS school offers a full-time LD program. However, based upon the advocate's conversations with school personnel during school year 2009/10, it would appear that the school cannot offer Student a full-time, out-of-general-education program.[21]

18. By acceptance letter dated October 20, 2010, a private full-time special education school located outside of the District of Columbia indicated that Student is an appropriate candidate for its LD program for school year 2010-11.[22]

19. Student needs a highly structured program with a vocational component and an incentive-based attendance plan. Student's current DCPS school is not a highly structured setting. However, the private full-time special education school that has accepted Student for admission has a structured program and a vocational component. The mentor recently took Student to visit the private school and observed that Student will be unable to hide outside of class at the school because the building is not big enough. The private school staff explained that attendance is mandatory there and that staff will show up at Student's home to get him out of bed if he fails to attend school. The school also offers an incentive program that involves ignoring negative behavior and rewarding good behavior and attendance. When Student visited the private school, he saw that the school offers two programs – a full-time academic program, or a program with half of the focus on academics and half of the focus on a vocational course. Student visited the classes at the private school and spoke with the teachers. The class sizes were smaller than at his current DCPS school and the teachers seemed more considerate. Student is of the opinion that he would not have behavior and attendance problems at the private school because the teachers there are willing to give him the help he needs.[23]

20. On January 27, 2011, the advocate prepared a proposed Compensatory Education Plan for Student. The underlying assumption of the Plan is that "[s]ince March 25, 2010,

[20] Testimony of mentor.
[21] Testimony of advocate.
[22] Petitioner's Exhibit 12.
[23] Testimony of advocate; testimony of Student; testimony of mentor.

[Student] has had an inappropriate IEP and inappropriate placement, which has subsequently led to him absenting himself from class." Similarly, the advocate assumed that Student has not benefited from any of the specialized instruction he has received because it has been provided in an inappropriate setting. The advocate calculated that the period from March 25, 2010 through January 27, 2011 represented 31 weeks of school. Multiplying this figure by the .5 hours of behavioral services and 26.5 hours of specialized instruction per week mandated by Student's IEP, the advocate determined that Student missed 15.5 hours of behavioral support services and 795 hours of specialized instruction.[24] Taking into account the missed services, Student's scores on previous evaluations, and what Student can tolerate at this time, the advocate recommended compensatory education consisting of the following for Student: 50 hours of independent career mentoring that will provide on the job experience and an understanding of what the career may entail; 250 hours of independent tutoring in reading and mathematics that is work related to assist Student in understanding the need for mathematics and reading to acquire and maintain a vocational position; and placement in a full-time therapeutic program that provides vocational training, such as the private school that issued an acceptance letter for Student on October 20, 2010. However, at the due process hearing in this case, the advocate acknowledged that if the period of time at issue were limited to the current school year only, then the number of hours of missed services at issue would decrease by approximately one-half.[25]

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. The April 1, 2010 Settlement Agreement

The 4/1/10 SA required DCPS to convene an IEP/MDT meeting to, *inter alia*, revise Student's IEP if appropriate. There is a rebuttable presumption of harm where DCPS fails to timely implement a settlement agreement. *Blackman v. District of Columbia*, Civil Action No. 97-1629 (D.D.C. Aug. 24, 2006), Consent Decree at ¶ 74.

Petitioner has alleged that DCPS failed to comply with the 4/1/10 SA by failing to revise Student's IEP at the IEP meeting held pursuant to the 4/1/10 SA. However, the notes prepared by Student's advocate at Student's June 11, 2010 MDT meeting indicate that changes were made to Student's IEP during the meeting. Moreover, a comparison of the advocate's pre-meeting suggestions for changes to the IEP with the current IEP reveals that extensive changes were made to Student's academic goals. Under these circumstances, the hearing officer concludes that Petitioner failed to meet its burden of proof on this claim.

[24] The hearing officer's calculations indicate that 31 weeks times 26.5 hours of service weekly equals 821.5 hours of missed specialized instruction.
[25] Petitioner's Exhibit 13; testimony of advocate.

2. Failure to Convene an IEP Meeting Upon Request

An LEA must ensure that a disabled child's IEP team reviews the child's IEP periodically, but not less than annually, to determine whether the child's annual goals are being achieved, and revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals, the results of any reevaluation conducted pursuant to the statute, information about the child that has been provided to or by the parents, the child's anticipated needs, or other matters. 34 C.F.R. § 300.324(b)(1). However, procedural violations may be found to have constituted a denial of FAPE only where they impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

In the instant case, Petitioner has alleged that DCPS denied Student a FAPE by failing to conduct an IEP meeting pursuant to Petitioner's August 19, 2010 written request. According to Petitioner, as a result of DCPS's failure to convene the requested IEP meeting, Student's FBA has never been reviewed, he has an IEP that contains unattainable goals, and the IEP team has not had an opportunity to discuss Student's lack of progress toward his annual goals and DCPS's failure to provide services to Student in accordance with his IEP. On the other hand, DCPS contends that the law does not require an LEA to convene a meeting upon request.

Upon consideration of the law, facts and parties' arguments, the hearing officer is persuaded that DCPS's failure to convene an IEP meeting upon Petitioner's August 19, 2010 request constituted a denial of FAPE because it prevented Student's IEP team from reviewing the FBA, revising or determining whether revisions were needed for the IEP goals, and discussing Student's lack of progress and lack of receipt of all services, thereby impeding Student's right to a FAPE. As a result, Petitioner has met its burden of proving this claim, and the hearing officer will order DCPS to convene an IEP meeting for Student.

3. Appropriateness of IEP

"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 IEP is to be developed in accordance with the determinations of the student's IEP team. *See* 34 C.F.R. § 300.324. Moreover, "[I]mplicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Rowley*, 458 U.S. 172.

In the instant case, Petitioner contends that Student's IEP is inappropriate because it contains unattainable goals, inappropriate baseline data, and an inappropriate transition plan, and Student has not made progress under the IEP. DCPS, however, maintains that Student has been provided with the full-time IEP he requires.

The hearing officer acknowledges that the existing IEP requires Student to receive full-time special education services in an out of general education setting. However, a review of the

evidence in this case also reveals that Student is performing significantly below grade level in almost all areas but his IEP goals are based on 9th grade standards, there is no baseline data provided for the academic areas addressed in the IEP, Student's transition plan is missing essential information and has not been tailored to address his individual needs, and Student has not made any academic progress under the current IEP. As a result, Petitioner has met its burden of proving that DCPS has provided Student with an inappropriate IEP. However, as Petitioner failed to present evidence of exactly what the IEP should contain, and the hearing officer plans to order an IEP meeting for Student to address other claims in this matter, the hearing officer will order DCPS to review and revise Student's IEP at the ordered IEP meeting to ensure that Student's goals are not too difficult for him to achieve, appropriate baseline data is listed for all academic areas and the transition plan, social/emotional goals include methods or plans to ensure Student's class attendance, the transition plan is revised to include the results of all transition assessments, goals that are specific, appropriate for Student, and measurable, and appropriate post-secondary transition activities and services, and any other revisions deemed necessary by the team are made.

4. Implementation of the IEP

As noted above, "[t]he '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.'" *Rowley*, 458 U.S. 176. Hence, an LEA satisfies its obligation to provide a FAPE by providing special education and related services that are provided, *inter alia*, at public expense, at an appropriate school, and in conformity with the IEP. *See* 34 C.F.R. § 300.17.

In the instant case, there is no dispute that Student is not receiving all of the services prescribed by his IEP due to his failure to attend his classes. However, Petitioner maintains that Student's failure to attend his classes is due to his SLD disability, while DCPS denies that Student's disability is involved and maintains that Student is an adult student who refuses to attend classes and accept behavioral support services.

Upon reviewing the evidence in this case, the hearing officer finds that the FBA prepared by DCPS indicates that Student's behaviors of concern, which include his attendance problem, are related to his disability of SLD in that Student engages in the behaviors because he is significantly behind academically. Student also testified that he walks the halls instead of attending his classes because he does not get the help he needs and feels stupid in class. Similarly, Student's long-term mentor is of the opinion that Student acts out in or avoids his classes when the subject matter is too difficult and/or the teacher does not provide Student with the help he needs. Moreover, according to Student, his DCPS teacher has been refusing to allow him to attend one of his classes because of his previous disruptive behavior in that class. Based on this evidence, the hearing officer concludes that Student's attendance problem, which has interfered with the implementation of his IEP, is directly related to his disability of SLD. The hearing officer also notes that despite Student's ongoing behavior and attendance problems, DCPS has done nothing to implement an incentive or other type of plan to address Student's behavior and attendance. Under these circumstances, the hearing officer further concludes that Petitioner has met its burden of proof on this claim.

5. Location of Services

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.

"Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia,* 859 F. Supp. 1, 5 (D.D.C. 1994) (quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). "Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment." *Id.*, 556 F.Supp.2d at 37 (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley*, *supra*, 456 U.S. 176, 202)).

In this case, Petitioner has asserted that Student requires a full-time, therapeutic, out of general education setting with a strong vocational component that Student's current DCPS school cannot provide, while DCPS maintains that the current school is appropriate.

Even a cursory review of the evidence in this case leaves no doubt that Student is not faring well this school year at his current DCPS school, and DCPS has not attempted to implement any measures to get Student on track at the school. Instead, one of Student's teachers has barred him from attending class, and other staff members allow Student to walk the halls at will without consequence. Moreover, the building at the current school is physically too large for Student to manage, and the school does not offer the highly structured setting Student requires. Indeed, the evidence suggests that the current school cannot offer the full-time out of general education setting required by Student's IEP. Based on this evidence, the hearing officer is persuaded that the current school is an inappropriate location of services for Student because the school does not offer the small, highly structured environment Student requires, and Student's special education and related needs are not being met at the school. Hence, Petitioner has met its burden of proof on this claim.

With respect to Petitioner's request for a private placement, however, Petitioner's evidence falls woefully short of providing the detailed information necessary for the hearing officer to determine whether the specific private school requested is proper under the Act. Moreover, to the extent that Petitioner provided evidence about the requested private school, it was provided by Student and others who were not in a position to provide trustworthy information about the school. Under these circumstances, the hearing officer will deny Petitioner's request for a private placement but will order DCPS to discuss and determine an appropriate full-time

therapeutic out of general education location of services for Student at the IEP meeting that DCPS will be ordered to convene herein.

6. Compensatory Education

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. *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Reid*, 401 F.3d at 524.

In the instant case, Petitioner has proven that DCPS has committed several violations of IDEIA, and therefore, Petitioner is entitled to an award of compensatory education. However, Petitioner's compensatory education plan is based on a severely excessive calculation of missed services because the plan's creator failed to limit the missed services to the current school year. Nevertheless, the hearing officer is persuaded by the abundant evidence of Student's below level functioning and missed services throughout the current school year that Student requires at least some portion of the mentoring and tutoring services recommended in Petitioner's proposed compensatory education plan to receive the educational benefits that likely would have accrued from special education services DCPS should provided him in the first place. Therefore, the hearing officer will order DCPS to discuss and determine an appropriate award of compensatory education for Student at the IEP meeting that will be ordered herein, and DCPS will be required to use the figures of 25 hours of career mentoring and 125 hours of independent tutoring, which represent one-half of what has been proposed by Petitioner, as a starting point.

ORDER

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

1. Within 7 days of Monday, February 7, 2011, DCPS and Petitioner shall participate in an IEP/MDT meeting for Student to (i) review and revise Student's IEP to ensure that Student's goals are not too difficult for him to achieve, appropriate baseline data is listed for all academic areas and the transition plan, social/emotional goals include methods or plans to ensure Student's class attendance, the transition plan is revised to include the results of all transition assessments, goals that are specific, appropriate for Student, and measurable, and appropriate post-secondary transition activities and services, and any other revisions deemed necessary by the team are made; (ii) discuss and determine an appropriate full-time therapeutic out of general education location of services for Student; and (iii) discuss and determine an appropriate award of compensatory education for Student, using the figures of 25 hours of career mentoring and 125 hours of independent tutoring as a starting point.

2. All other requests for relief made in connection with Petitioner's December 3, 2010 Complaint are hereby **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 USC §1415(i).

Date: 2/5/2011 /s/ *Kimm Massey*

Kimm Massey, Esq.
Hearing Officer