

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

OSSE
STUDENT HEARING OFFICE
2012 MAR -1 PM 2:02

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a year old girl, who currently attends her neighborhood DCPS elementary school.

On December 9, 2011, Petitioner filed a Complaint, alleging the following claims against Respondent DCPS: (1) Alleged failure to provide an appropriate individualized education plan ("IEP") at the November 18, 2011 meeting; (2) Alleged failure to provide Parent with access to and/or a copy of Student's educational records; (3) Alleged failure to implement the dedicated aide provision, and provide occupational therapy, speech/language and counseling services on a consistent basis; (4) Alleged failure to provide an appropriate placement; and (5) Student's entitlement to compensatory education. As relief for these alleged denials of FAPE, Petitioner requested findings in its favor; findings that the current IEP is inappropriate and should provide for a full-time out of general education setting, that the disability classification should be changed and goals added for that classification, or alternatively, an Order requiring DCPS to convene a meeting within 20 calendar days to review and revise the IEP in accordance with the HOD; and an Order requiring DCPS to provide all service trackers and IEP progress reports to Parent within 10 days of the HOD, implement the dedicated aide provision by providing a dedicated aide to be used solely for Student and provide speech and language services and counseling services in accordance with Student's IEP, fund Parent's compensatory education plan, fund a full-time placement for Student of Parent's choosing for at least SY 2011/12, and pay for transportation to the full-time placement.

On December 19, 2011, DCPS filed its Response, which denied the allegations of the Complaint and asserted that Student had previously attended a charter school that served as its own LEA, which prepared the current IEP and obtained Parent's signature indicating her agreement with the IEP. DCPS asserted that it has implemented the IEP, and that an MDT team agreed at Student's November 18, 2011 to continue implementing the IEP without making changes to the IEP. DCPS asserted that it received a one-page letter from one of Student's physicians, but DCPS maintains that the document was not an evaluation and no additional evaluations were provided to DCPS. DCPS denied preventing Petitioner from accessing Student's educational records, noting that Student had only been enrolled with DCPS for approximately a month at the time of the original request for records, and DCPS asserted that a dedicated aide was being provided even though service trackers are not available for dedicated aides. DCPS attached to its Response Student's October and November 2011 service trackers for occupational therapy, Student's November 2011 service trackers for speech-language pathology and behavioral support services, and a copy of the one-page letter from Student's physician.

The parties concluded the Resolution Meeting process by participating in a resolution session on January 25, 2012. No agreement was reached, but the parties did not elect to shorten the resolution period. Hence, the original 45-day timeline for this case began on January 9, 2012 and ended on February 22, 2012. However, as a result of Petitioner's January 31, 2012 Motion to Continue and the chief hearing officer's subsequent Order granting the motion, the timeline for this case was extended to March 1, 2012, which is the HOD deadline.

By their respective letters dated February 10, 2012, Petitioner disclosed forty-eight documents (Petitioner's Exhibits 1 – 48) and DCPS disclosed thirteen documents (Respondent's Exhibits 1 – 13).

The hearing officer convened the due process hearing on February 17, 2012, as scheduled.¹ Petitioner's Exhibits 1-48 and Respondent's Exhibits 1-12 were admitted without objection. Respondent's Exhibit 13 was conditionally excluded. Thereafter, the hearing officer received opening statements, testimonial evidence, and a closing statement from DCPS prior to concluding the hearing. Petitioner was allowed leave to file a written closing statement on or before February 22, 2012, which it subsequently provided by the deadline. The hearing officer also left the record open until midnight on February 21, 2012 to allow the parties time to file briefs regarding an LEA's responsibility for and in connection with an IEP developed by a previous LEA when it adopts that IEP. However, neither party filed a brief.

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.").

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS deny Student a FAPE by failing to provide an appropriate IEP at Student's November 18, 2011 MDT meeting by refusing to make any changes to Student's IEP despite evaluation data showing changes are warranted, in that (a) the IEP classifies Student as OHI, but she allegedly should be classified as ED and provided with goals to address that disability, (b) the IEP does not provide sufficient specialized instruction to address the severity of Student's deficits because Student allegedly requires full-time out of general education specialized instruction, (c) the IEP does not contain goals that address the concerns mentioned in the evaluations and does not contain appropriate present levels of performance, needs or baselines, or a statement of how the disability impacts Student's education, and (d) DCPS failed to review and revise the IEP despite receipt of a report from Student's psychiatrist, which indicates that Student needs a highly therapeutic environment with small class sizes and a full-time out of general education setting?
2. Did DCPS fail to provide Parent with access to and/or a copy of Student's educational records?
3. Did DCPS fail to implement the dedicated aide provision of Student's IEP and provide OT services, speech and language services and counseling services on a consistent basis?
4. Did DCPS fail to provide an appropriate placement because current evaluations state that Student requires a highly therapeutic school that can provide full-time out of general education services for ED?
5. Does DCPS owe Student compensatory education services, consisting of counseling and tutoring?

FINDINGS OF FACT²

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 a year-old girl, who currently attends her DCPS neighborhood elementary school.³

² 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..

³ See Complaint.

2. Parent enrolled Student at the DCPS neighborhood elementary school on September 29, 2011, but Student did not begin attending the school until the first week of October.⁴
3. Prior to enrolling at the DCPS neighborhood elementary school, Student attended a charter school for approximately one month from August 29, 2011, the first day of that school, to approximately September 15, 2011, .⁵
4. During SY 2010/11, Student attended kindergarten at a different charter school and received her first IEP in October 2010.⁶
5. Student has been in special education schools since infancy. Hence, she attended yet another charter school and various private schools prior SY 2010/11.⁷
6. Prior to enrolling Student in the neighborhood school in September 2011, Parent spoke to the SEC and another administrator at the school and explained to them her concerns about Student, which included standoffishness, not being fully engaged, poor communication skills, being easily distracted, difficulty completing tasks, and possible medical issues – in particular. Upon enrolling Student at the DCPS school, Parent stated that she wanted a smaller setting for Student because Student was ED with many behavior issues and she had been abused by the previous school. Parent also provided the DCPS school with various documents concerning Student. While the evidence provided at the hearing is conflicting with respect to exactly what documents Parent provided, the evidence proves that, at the very least, Parent provided the school with Student's June 9, 2011 IEP, as well as Student's psychoeducational, neuropsychological, and clinical evaluations.⁸
7. Student's June 9, 2011 IEP lists Other Health Impairment as Student's primary disability and requires Student to receive 7.5 hours per week of specialized instruction in general education; 7.5 hours per week of instruction outside general education; 30 minutes per week of speech-language pathology, 60 minutes per week of occupational therapy, and 30 minutes per week of behavioral support services, with all related services to be provided outside general education; and 30 minutes per month each of speech-language pathology and behavioral support services consultation services.⁹
8. Student's December 2, 2010 psychoeducational evaluation report reveals that Student's Full-Scale IQ and Verbal IQ scores were in the borderline range, her performance IQ score was in the low average range, and her processing speed score was in the average range. Moreover, Student's oral language score was in the low average range and her mathematics score was in the average range. The report reveals that Parent reported a host of problems concerning Student, including delayed milestones, picky eating,

⁴ Testimony of Parent; testimony of SEC.

⁵ Testimony of Parent.

⁶ Testimony of Parent.

⁷ Testimony of Parent.

⁸ Testimony of Parent; testimony of SEC.

⁹ Petitioner's Exhibit 6; Respondent's Exhibit 1.

difficulty going to sleep and nightmares, explosive behavior, multiple personalities, instability, and many medical issues such as apnea, anemia, allergies, lactose intolerance, history of head trauma, involvement in domestic violence, and seizures, although Parent did “not wish to sign a release of information to initiate contact between providers.” Student’s teachers reported that she was often on task but often needed redirection for activities more than 5 minutes long, was very articulate but sometimes struggled with simple tasks such as cutting and writing, was known to share and work cooperatively with classmates, but was unable to complete tasks even with 1:1 instruction. The evaluator observed Student and found that she was engaged in class and exhibited appropriate behavior, although she sometimes required redirection, and she exhibited appropriate interactions with others during recess and followed directions to return to class. Moreover, Student was engaged and cooperative during testing, although she had some difficulty remaining focused.¹⁰

9. Student’s February 17, 2011 neuropsychological evaluation report revealed that Student’s mother was present in the testing room but moved out of sight during the evaluation. Student’s motivation and focus were poor during the testing session, she often talked or sang over the examiner, she climbed under the evaluation table and refused to come out, yelled out things to her mother, and engaged in other inappropriate behaviors during the testing. Student’s performance on the neurological testing was at the Well Below Expected Level with respect to her ability to understand verbal directions and her executive functioning, at the Below Expected Level in the memory and learning domain, and at the Expected level in sensorimotor functioning. Parent reported that Student had a history of medical issues, including microcephaly, seizure disorder, multiple traumatic brain injuries, some of which were self-inflicted, breathing problems involving apnea, asthma and allergies, gastroesophageal reflux disease, and chronic anemia, but Parent did not provide the evaluator with any documentation of these medical issues. Parent also reported that she was very concerned about student’s behavior, social-emotional functioning, and limited attention span and was concerned that Student may hear voices, could not seem to remain focused, was moody with sudden changes in her personality and attitude, did not sleep well and tried to hurt her brother by throwing things at him while he was asleep, had trouble keeping still and took out her frustrations on objects or other people, had tortured a cat in the past, was being avoided by other children because of her unpredictability, tended to throw herself down onto the floor and slam into objects, and threw fits in the car. Student’s special education teacher reported that Student had not displayed the aggressive types of behaviors reported by her mother at home and seemed to get along well with her peers, although Student sometimes refused to complete any work, had a short attention span and acted impulsively.¹¹
10. Student’s April 27, 2011 Clinical Evaluation report included a review of Student’s previous reports. Based on behavior scales completed by two of Student’s teachers, the evaluator determined that Student had significant difficulty with externalizing problems (hyperactivity), internalizing problems (depression, anxiety, and somatization), and

¹⁰ Petitioner’s Exhibit 16.

¹¹ Petitioner’s Exhibit 17.

general behavioral symptoms (atypicality attention problems and withdrawal), as well as moderate difficulties adjusting to some social and academic situations.¹²

11. Based on the verbal information and documentation Parent provided in connection with enrolling Student, the SEC at Student's neighborhood DCPS school suggested temporarily placing Student in the school's self-contained classroom with autistic students and Parent agreed. The class included 6-7 other students, which was consistent with the small setting Parent desired for Student.¹³
12. On November 18, 2011, the neighborhood DCPS school held Student's 30-day review MDT meeting and was informed by Parent for the first time that Parent was not in agreement with Student's June 9, 2011 IEP. The advocate requested Service Trackers for Student. DCPS proposed placing Student in a less restrictive classroom where her IEP could be implemented because Student had not exhibited any behavioral problems at the school other than on her first day attending. Parent disagreed and, through her advocate, requested a full-time ED setting for Student, which the neighborhood school indicated it could not provide. The team disagreed with a more restrictive setting for Student, noting that the picture Parent had painted of Student did not match what Student exhibited at the neighborhood school. Parent informed the team that Student takes several medications and has seizures, provided the team with a report from Student's psychiatrist, and requested a draft IEP with 27.5 hours for Student. The team disagreed with a more restrictive setting for Student and stated that DCPS would implement Student's existing IEP because Student had transitioned well in the neighborhood school with the supports provided on her IEP. The team determined that the neighborhood school could meet Student's needs. The team also noted that Student had been attending music, art, PE, library and science with her non-disabled peers. The SEC stated that DCPS did not receive all of Student's evaluations. The SEC and the advocate both stated that the DCPS team members should review the evaluations and prepare a draft IEP.¹⁴
13. DCPS effectively adopted Student's June 9, 2011 IEP at the November 18, 2011 30-day review MDT meeting. The IEP does not contain appropriate and sufficient information regarding present levels of performance, needs, and baseline data in the IEP sections for Mathematics and Reading. The IEP does not contain any baseline data in the IEP section for Emotional, Social, and Behavioral Development.¹⁵
14. The report from Student's psychiatrist that Parent gave DCPS at the November 18, 2011 is a one page letter, dated August 15, 2011. The letter states that the psychiatrist had been treating Student in an outpatient clinic since July 28, 2011, listed "reported" medical and behavioral issues for Student, and stated that the psychiatrist had diagnosed Student with Pervasive Developmental Disorder NOS because she has some autistic like features

¹² Petitioner's Exhibit 18.

¹³ Testimony of Parent; testimony of SEC.

¹⁴ Respondent's Exhibit 2; Petitioner's Exhibit 12.

¹⁵ Respondent's Exhibit 1; Petitioner's Exhibit 6; testimony of advocate.

but does not meet the full criteria for autism. The psychiatrist recommended a change in school placement and suggested a particular private school as an example.¹⁶

15. By emails dated November 21 and November 30, 2011, the advocate again requested Service Trackers for Student. The advocate never received a response to these emails.¹⁷
16. On December 9, 2011, Petitioner filed the instant Complaint.
17. DCPS attached to its December 19, 2011 Response to the Complaint copies of Student's Service Trackers for behavioral support, occupational therapy, and speech-language services.
18. Student's December 1, 2011 Service Tracker for behavioral support services indicates that Student received services on 4 occasions during November 2011, with three of the sessions lasting 45 minutes and the fourth session lasting 60 minutes. Student missed services on November 23, 2011 because of the provider's unavailability.
Student's January 19, 2012 Service Tracker for behavioral support services indicates that Student received services three times between December 7, 2011 and January 4, 2012, with two of the sessions lasting 30 minutes and one session lasting 45 minutes. Services were not provided on December 28, 2011 because school was closed.¹⁸
19. Student's November 3, 2011, December 1, 2011 and January 1, 2012, and January 31, 2012 Service Trackers for occupational therapy services indicates that Student consistently received services beginning October 11, 2011 and extending through January 26, 2012, unless Student was absent or unavailable (5 times), the provider was unavailable (3 times), or school was closed. The services were primarily provided two times per week, and most of the sessions lasted 30 minutes, although Student received three 60-minute sessions and one 45-minute session.¹⁹
20. Student's December 1, 2011, December 31, 2011, and February 1, 2012 Service Trackers for speech-language pathology indicate that Student received services beginning November 7, 2011 and ending January 27, 2012. Student's initial service was 60 minutes long, and for the remainder of November 2011 she received two sessions per week, except for one day when she was absent, with most of the sessions lasting 30 minutes and one session lasting 45 minutes. During December and January, Student received one 30-minute session per week, except for one occasion when she was absent.²⁰
21. Student's DCPS speech-language services provider went into Student's class on October 27, 2011 to collaborate with the teacher concerning Student.²¹

¹⁶ Respondent's Exhibit 3; Petitioner's Exhibit 19.

¹⁷ Petitioner's Exhibit 39; testimony of advocate.

¹⁸ Respondent's Exhibit 5; Petitioner's Exhibit 32.

¹⁹ Respondent's Exhibit 6.

²⁰ Respondent's Exhibit 7; Petitioner's Exhibit 32.

²¹ Testimony of speech-language pathologist.

22. DCPS began providing Student with the services of a dedicated aide the week after Student began attending her DCPS neighborhood school. However, the aide does not always serve in a capacity solely dedicated to Student and sometimes serves as an assistant/aide to the teacher or works with other students besides Student.²²
23. Student has not been suspended or sent home for behavior problems since she began attending the DCPS neighborhood school.²³
24. The full-time private school Parent selected for Student to attend has accepted Student on only a “tentative” basis because the school must be provided with Student’s medical reports from her doctors prior to making a final decision. As a result, until the school has received the necessary reports and finalized its acceptance decision, the school would not accept Student into its program even if the instant HOD awarded Student a placement at the school.²⁴
25. Petitioner has not obtained an unconditional acceptance for Student at any school.
26. The June 9, 2011 Meeting Notes prepared by the school Student was attending when her June 9, 2011 IEP was developed indicate that Parent stated her concerns that Student had difficulty transitioning, exhibited aggressive behaviors at points during the year, had recurring behavior issues since infancy and was taking medication during the year, showed anxiety at home, and could display a fearful behavior towards school and staff. Student’s speech services provider, occupational therapist, teacher, and special education teacher all indicated that they did not see severe or frequent behavior concerns with Student. The team discussed a possible ED classification for Student, with Parent and the advocate opining that Student met the criteria, but the school personnel opining that Student did not meet the criteria. Ultimately, the team determined that Student did not meet the criteria for ED.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. Alleged Failure to Provide Appropriate IEP

The “free appropriate public education” required by IDEA is tailored to the unique needs of the handicapped child by means of an “individualized educational program.” *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, a disabled child’s IEP must be reasonably calculated to enable the child to receive educational benefit. *Id.* In determining whether an IEP is reasonably calculated to

²² Testimony of SEC; testimony of Parent; *see* Petitioner’s Exhibit 34.

²³ Testimony of Parent.

²⁴ Testimony of Executive Director of private school; Petitioner’s Exhibit 36.

²⁵ Petitioner’s Exhibit 11.

provide educational benefit, the measure and adequacy of the IEP is to be determined, not in hindsight, but “as of the time it is offered to the student.” *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009).

If a child with a disability who had an IEP that was in effect in a previous public agency in the same state transfers to a new public agency in the same state, and enrolls in a new school within the same school year, the new public agency, in consultation with the parents, must provide FAPE to the child, including services comparable to those described in the child’s IEP from the previous public agency, until the new public agency either (1) adopts the child’s IEP from the previous public agency; or (2) develops, adopts, and implements a new IEP that meets the applicable requirements of IDEA. 34 C.F.R. § 300.323(e).

In the instant case, Petitioner argues that DCPS denied Student a FAPE by failing to provide an appropriate IEP at Student’s November 18, 2011 MDT, because DCPS refused to make any changes to Student’s IEP despite evaluation data showing changes are warranted. Specifically, Petitioner contends that DCPS should have changed Student’s classification from OHI to ED and provided Student with goals to address the ED disability; revised Student’s IEP to provide full-time out of general education specialized instruction; added IEP goals to address the concerns mentioned in Student’s evaluations and added appropriate present levels of performance, needs statements, baseline data, and statements of how Student’s disability impacts her education; and revised the IEP to address a report from Student’s psychiatrist indicating that Student needs a highly therapeutic environment with small class sizes and a full-time out of general education setting.

DCPS disagrees with Petitioner’s position, arguing that it fulfilled its obligation to provide Student a FAPE by implementing Student’s June 9, 2011 IEP until the November 18, 2011 30-day review meeting for Student and adopting the June 2011 IEP at the November meeting. DCPS further argues that the IEP was appropriate when it was adopted and that Student is making progress under the IEP and does not exhibit ED behavior.

A review of the evidence demonstrates that Student began attending her DCPS neighborhood school in October 2011. Student came to DCPS from an LEA charter school that she had attended for the first month of SY 2011/12 with a current IEP that had been developed at another LEA charter school Student attended during SY 2010/11. DCPS, in consultation with Parent, determined to temporarily place Student in a self-contained autism class with a small student-teacher ratio when she first began attending the neighborhood school, even though her IEP did not require a full-time out of general education setting. Thereafter, at Student’s 30-day review meeting in November 2011, the MDT determined to place Student in a less restrictive classroom where her IEP could be implemented because Student was not exhibiting ED behaviors and she had transitioned well into the neighborhood school with the supports provided on her IEP. Parent disagreed with DCPS’s decision and requested a full-time IEP and a therapeutic ED setting, but DCPS declined Parent’s request.

Based on this evidence, the hearing officer concludes that DCPS complied with its obligations under IDEA by initially providing Student with a full-time out of general education classroom to address Parent’s concerns about Student, even though Student’s IEP called for a less restrictive

setting, and then determining to move Student to a less restrictive environment where her IEP could be implemented after observing her academic and behavioral performance at the DCPS school. *See* 34 C.F.R. § 300.323(e). The hearing officer is not persuaded by Petitioner's contention that § 300.323(e) does not apply in this case because Student's IEP was developed in SY 2010/11 but she came to DCPS in SY 2011/12, because this argument overlooks the fact that Student came to DCPS from another LEA charter that she attended at the start of SY 2011/12 with the same IEP that DCPS ultimately adopted.

In arriving at this decision, the hearing officer has taken into account DCPS's obligation to consider Student's strengths, Parent's concerns, Student's evaluation results, and Student's academic, developmental and functional needs in developing (or adopting) an IEP for Student. *See* 34 C.F.R. § 300.324(a)(1). In this regard, the evidence demonstrates that DCPS considered Student's strengths and her academic, developmental and functional needs as revealed during her tenure at DCPS.

DCPS indicated at Student's 30-day review meeting that it had not had an opportunity to review Student's evaluations, but the evidence proves that DCPS had been provided with three of Student's evaluations at the time of enrollment. The first evaluation, Student's December 2010 psychoeducational evaluation, indicated that Student's cognitive and academic abilities ranged from borderline to average, and although Parent reported a host of medical and behavioral problems for Student, Parent declined to sign a release to allow contact between Student's providers. Moreover, although the evaluator noted that Student had some difficulty remaining focused and required redirection, the evaluator also observed that Student was engaged in class and exhibited appropriate behavior and interactions with others, and Student was engaged and cooperative during testing. The second evaluation, Student's February 17, 2011 neuropsychological evaluation report, revealed that Parent was present during testing and Student exhibited a range of inappropriate behaviors. This evaluation also revealed that Student performed poorly in the areas of executive functioning, memory and learning. Once again, the report indicated that Parent reported a vast array of medical and behavioral problems for Student. However, Student's teacher reported that Student had not displayed the aggressive types of behaviors reported by Parent and seemed to get along well with peers, although Student sometimes refused to complete her work and had a short attention span. The final evaluation, Student's April 27, 2011 clinical evaluation, reported that Student had significant difficulties in the areas of internalizing problems, externalizing problems, and general behavior.

The hearing officer concludes that DCPS reasonably balanced Student's academic and behavioral performance at her DCPS school with the negative and positive information contained in her evaluations, as well as Parent's concerns, in determining to adopt the June 2011 IEP. In reaching this decision, the hearing officer notes that most of the negative medical and behavioral information in Student's evaluations was based on verbal reports by Parent that were not supported by medical or other documentation, and Parent's extensive concerns about Student were not supported by the observations of her psychoeducational evaluator, her teacher at the time of the neuropsychological evaluation, or the observations of her DCPS teacher and related service providers.²⁶

²⁶ Indeed, although DCPS did not have access to Student's June 9, 2011 Meeting Notes at the time of the November 2011 30-day review meeting, those Meeting Notes reveal that Student's teachers and related service providers at her

All factors considered, the hearing officer concludes that based on the information available to DCPS at the time it adopted Student's June 2011 IEP in November 2011, the IEP was reasonably calculated to enable Student to receive educational benefit, and therefore, DCPS did not deny Student a FAPE by adopting the IEP and rejecting Parent's requests for an ED classification and ED goals, a full-time out of general education IEP, and goals addressing concerns mentioned in Student's existing evaluations. The hearing officer further concludes that DCPS did not deny Student a FAPE by failing to revise Student's IEP despite Parent's provision of a letter from Student's treating psychiatrist indicating that Student needed a highly therapeutic environment with small class sizes and a full-time out of general education setting, because the letter was only one factor among many to be considered at the meeting, and the letter was dated August 15, 2011 and indicated that the psychiatrist had only been treating Student in his outpatient clinic since July 28, 2011, which affected the weight to be assigned to the letter given the psychiatrist's limited experience with Student.

On the other hand, the evidence supports Petitioner's contention that DCPS denied Student a FAPE by failing to provide an IEP that contains appropriate present levels of performance, need statements and baseline data. Specifically, the evidence proves the IEP does not contain appropriate and sufficient information regarding present levels of performance, needs, and baseline data in the IEP sections for Mathematics and Reading, and the IEP does not contain any baseline data in the IEP section for Emotional, Social, and Behavioral Development. Hence, the hearing officer will order DCPS to convene an MDT meeting to revise the IEP to address these deficiencies.

2. Alleged Failure to Provide Records

The parents of a child with a disability must be afforded an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. 34 C.F.R. § 300.501(a)(1)-(2); 5 D.C.M.R. § 3021.1. The public agency must comply with a parental request to inspect and review his or her child's education records that are collected, maintained or used by the agency without unnecessary delay and before any administrative due process hearing held pursuant to IDEA's implementing regulations. *See* 34 C.F.R. § 300.613(a).

In the instant case, the evidence proves that Parent requested Service Trackers for Student at Student's November 18, 2011 30-day review meeting, but DCPS did not provide that documentation to Parent until DCPS filed its December 19, 2011 Response in the instant matter. The hearing officer notes that although that there was a delay of one-month in connection with DCPS's provision of the requested documents to Petitioner, the documents were nevertheless provided prior to the due process hearing in this case, as required by 34 C.F.R. § 300.613(a). Moreover, although Parent requested Service Trackers for Student's dedicated aide, as well as the Service Trackers for behavioral support, speech-language and occupational therapy services that DCPS provided, DCPS explained to Parent that it does not keep Service Trackers for

previous LEA charter school during SY 2010/11 did not see the severe or frequent behavior concerns that Parent reported for Student, and that LEA also declined to comply with Parent's request for an ED classification for Student.

dedicated aide services and, therefore, could not provide that documentation. Under these circumstances, the hearing officer concludes that Petitioner failed to meet its burden of proving a violation of IDEA with respect to this claim.

3. Alleged Failure to Implement IEP

As noted above, 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.” *Rowley*, 458 U.S. 176 (1982). Hence, IDEA defines a FAPE to mean special education and related services that are provided, *inter alia*, in conformity with an IEP. See 34 C.F.R. § 300.17(d).

In the instant case, Petitioner has alleged that DCPS denied Student a FAPE by failing to implement the dedicated aide, occupational therapy services, speech and language services, and counseling services provisions of Student’s IEP. A review of the evidence in this case proves that Student’s IEP requires her to receive 30 minutes per week of speech-language pathology, 60 minutes per week of occupational therapy, and 30 minutes per week of behavioral support services, as well as a dedicated aide. The evidence proves that Student began attending her DCPS neighborhood school during the first week of October, and DCPS began providing Student with a dedicated aide the following week. However, the evidence raises concerns that the aide is not fully dedicated to Student and is serving as a general aide to the teacher.

The evidence further reveals that DCPS did not begin providing Student with behavioral support services until November 2011 but the sessions were 45 – 60 minutes long to help make up for missed services. Similarly, DCPS did not begin providing Student with speech-language pathology services until November 7, 2011, but the services were provided approximately twice per week, which made up for missed services. Finally, with respect to occupational therapy services, however, DCPS began providing the services on October 11, 2011, and primarily provided Student with two 30-minute sessions per week.

Based on this evidence, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS failed to implement Student’s IEP provisions concerning the related services of occupational therapy, speech and language, and behavioral support services. Although the evidence further proves that DCPS has provided Student with a dedicated aide, the evidence indicates that the aide does not always function in the capacity of being solely dedicated to Student. Hence, the hearing officer will order DCPS to ensure that Student’s dedicated aide is functioning as a dedicated aide only and to refrain from allowing the aide to serve in any other capacity.

4. Alleged Failure to Provide an Appropriate Placement

Although IDEA does not define the term educational placement, the meaning falls somewhere between the physical school attended by a child and the abstract goals of a child’s IEP. See *Laster v. District of Columbia*, 439 F. Supp. 2d 60 (D.D.C. 2005) (internal quotations and citations omitted). Hence, “‘placement’ refers to the overall educational program offered, not the

mere location of the program. *Roher v. District of Columbia*, 1989 WL 330800, *3 (D.D.C. 1989).

In the instant case, Petitioner asserts that DCPS denied Student a FAPE by failing to provide her with a full-time out of general education ED placement pursuant to Parent's request at the November 18, 2011 30-day review MDT meeting. However, the hearing officer has already concluded in subsection 1, above, that at the time DCPS adopted Student's June 2011 IEP in November 2011, the IEP was reasonably calculated to enable Student to receive educational benefit, and therefore, DCPS did not deny Student a FAPE by adopting the IEP and rejecting Parent's requests for an ED classification and ED goals, a full-time out of general education IEP, and goals addressing concerns mentioned in Student's existing evaluations. Based on this conclusion and the evidence and explanation provided above in support thereof, the hearing officer concludes that Petitioner has failed to meet its burden of demonstrating that DCPS failed to provide Student with an appropriate placement or overall educational program.

5. 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 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. *Id.* at 524.

In the instant case, Petitioner argues that Student is entitled to compensatory education to compensate for DCPS's violations of IDEA in this case. However, based on the evidence presented, the hearing officer has found only (1) that Student's IEP does not contain appropriate and sufficient information regarding present levels of performance, needs, and baseline data in the IEP sections for Mathematics and Reading, and the IEP does not contain any baseline data in the IEP section for Emotional, Social, and Behavioral Development, and (2) that DCPS has provided Student with a dedicated aide, but the aide does not always function in the capacity of being solely dedicated to Student. Moreover, the evidence does not prove that Student suffered any educational harm or deprivation of educational benefit as a result of these violations. As a result, the hearing officer will order DCPS to correct the deficiencies noted but concludes that it would be inappropriate to make an award of compensatory education under the circumstances of this case.

ORDER

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

1. Beginning March 12, 2012 and extending through the end of SY 2011/12, DCPS shall ensure that Student's dedicated aide is functioning as a dedicated aide to Student only and DCPS shall not allow the aide to serve in any other capacity during school hours on the school days when Student is present at school.

2. Within 15 school days of the issuance of this Order, DCPS shall reconvene Student's MDT meeting and revise Student's IEP so that it contains appropriate and sufficient information regarding Student's present levels of performance, needs, and baseline data in the IEP sections for Mathematics and Reading, and contains sufficient and appropriate baseline data in the IEP section for Emotional, Social, and Behavioral Development.
3. All remaining claims and requests for relief in Petitioner's December 9, 2011 Complaint are **DENIED** and **DISMISSED WITH PREJUDICE**.

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: 3/1/2012

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