

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

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

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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No.:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**

Student is a \_\_\_\_\_ year-old \_\_\_\_\_ who is currently attending a private full-time special education school at DCPS's expense. Student's current IEP lists Emotional Disturbance ("ED") as his primary disability and provides for him to receive 24.5 hours per week of specialized instruction outside general education, 2.5 hours per week of behavioral support services, and .5 hour per week of speech-language pathology services.

On March 2, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS denied Student a free appropriate public education ("FAPE") by failing to provide an alternative location of services despite the conflicts Student has been having at his current school, and by failing to provide Student with a dedicated aide as requested at Student's September 2010 and January 2011 MDT meetings. As relief for these alleged denials of FAPE, Petitioner requested, *inter alia*, placement and funding at a specified private school with transportation, that DCPS either fund or conduct a formal observation and/or assessment to address the need for a dedicated aide, and that DCPS reconvene the MDT to review the observation/assessment and Student's progress at the new school.

On March 17, 2011, DCPS filed its Response to the Complaint, asserting therein that DCPS has provided Student with an appropriate amount and type of special education services in an

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appropriate setting, that Student's MDT never determined that Student requires a dedicated aide, and that DCPS has provided Student with the least restrictive environment in a fully-funded private school where Student has access to FAPE.

On March 23, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. The hearing officer issued the Prehearing Order on March 28, 2011.

By their disclosure letters dated April 7 and April 8, respectively, Petitioner disclosed forty-six documents (Petitioner's Exhibits 1 – 46), and DCPS disclosed DCPS-1 through DCPS-8.

The hearing officer convened the due process hearing on March 28, 2011.<sup>1</sup> Both parties' disclosed documents were admitted into the record without objection. Thereafter, the hearing officer received opening statements, testimonial evidence, and closing statements.

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.").

### **ISSUE(S)**

The issues to be determined are as follows:

1. Did DCPS deny Student a FAPE by failing to provide an alternative location of services despite the conflicts Student has been having at his current school?
2. Did DCPS deny Student a FAPE by failing to provide Student with a dedicated aide as requested at Student's September 2010 and January 2011 MDT meetings?

### **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's current IEP is dated January 7, 2011. The IEP lists Emotional Disturbance as Student's primary disability and requires Student to receive 24.5 hours per week of specialized instruction, 2.5 hours per week of behavioral support services, and .5 hour per week of speech-language pathology services.<sup>2</sup>

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

<sup>2</sup> Petitioner's Exhibit 4.

2. During SY 2009/10, Student attended his former private full-time special education school at DCPS's expense. However, that school closed at the end of SY 2009/10.<sup>3</sup>
3. The Meeting Notes from Student's January 13, 2010 MDT meeting at his former private school reveal that Parent was called several times but failed to answer and participate in the meeting. Student's math teacher stated that Student had been improving lately, and that he was working hard and had good behavior when taking medication. Student's English teacher gave a positive report. Student's therapist stated that Student was a good worker and wanted to do well in class, but the administration of his medication was not consistent, which interfered with his behavior because he has a hard time not acting out when not on medication. The team reviewed Student's behavior intervention plan, which included steps to address excessive talking, instigating arguments, and utilizing time outs. The team noted that there were no issues with transportation and ultimately determined that Student's former school continued to be appropriate for him.<sup>4</sup>
4. At the beginning of SY 2010/11, Student began attending his current private full-time special education school at DCPS's expense.<sup>5</sup>
5. On September 14, 2010, the Progress Monitor for Student's current private school observed Student in his classroom. At the time, the students in the class were to move from station to station, completing their work at one station and moving on to the next station. Student displayed extremely disrespectful behavior towards all staff and students present. Student had been removed from class prior to the start of the observation, and when he returned he began cursing aloud, first to no one in particular and then to the teachers and the aide. After several attempts at redirection, Student was asked to leave the room and go to the time out room, which he did willingly. Upon his return to the classroom, Student had to be redirected several times for inappropriate language/talking and not doing his work. Ultimately, however, Student completed his first work station and moved on to the computer station.<sup>6</sup>
6. On September 30, 2010, DCPS convened a 30-day review meeting for Student. Several calls were made to Parent, who did not answer and did not participate in the meeting. Petitioner's educational advocate was present for the meeting. The staff at Student's current private school indicated that Student had begun to adjust and was coming along with his behavior and completing work, although he'd had a rough start. Student's academic struggles in math and writing were noted, as well as his need for assistance with reading directions. However, these were the same academic difficulties Student exhibited when he began attending the current school a month earlier. The staff at the current school also noted that Student was receiving behavioral support services and beginning to acclimate, and Student was doing well in his speech/language sessions. The team noted that Student had been absent 8 times as of September 30, 2010, and it

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<sup>3</sup> Petitioner's Exhibits 7 and 8; testimony of advocate; testimony of Parent.

<sup>4</sup> Petitioner's Exhibit 10.

<sup>5</sup> Testimony of advocate.

<sup>6</sup> DCPS-5; Petitioner's Exhibit 35.

appeared that he did not like to attend school on Fridays. Ultimately, however, the team determined that the current school continued to be an appropriate location of services.<sup>7</sup>

7. Prior to the September 30, 2010 meeting, Student had been involved in two incidents which consisted of fighting with/physical aggression toward peers, once in the classroom and once on the bus. Thereafter, between October 25, 2011 and January 3, 2011, Student's behavior in school or on the bus resulted in Incident Reports on 9 different days. However, only two of the incidents concerned Student's behavior in school and all the rest of the incident reports concerned Student's poor/inappropriate behavior on the bus.<sup>8</sup>
8. On October 15, 2010, Student's current private school issued a Progress Report, which indicated that Student was easily distracted in class, either attempted to work but didn't complete it or did not attempt work, did not complete homework, and was not progressing satisfactorily. On the other hand, the Progress Report stated that student reported to class on time, had good peer relationships, worked independently, and respected self/others/property.<sup>9</sup>
9. On January 7, 2011, DCPS convened another MDT meeting for Student. Once again, several calls were made to Parent, who failed to answer. Parent did not attend the meeting, but the educational advocate was present. After restating Student's current levels of below-grade performance based upon August 2010 testing, the team reviewed Student's strengths and weaknesses. Strengths included passage comprehension in reading, basic concepts in math, improvement and ability to complete work when medicated, can be pleasant and talkative with staff, Student usually re-directable by the school's Director, very open in individual therapy, able to deescalate quickly from incidents in school, works for about 20 minutes in speech/language pullout sessions, and transitioning from speech/language sessions has improved. Weaknesses included problem solving in math, decoding in reading, unwillingness to complete challenging work, Student often disrupts classroom, often walks out of class, often has to go to the quiet room to be get refocused, Student leaves classroom frequently and refuses to do work when not medicated, staff has issues keeping Student on task, frequency of disruptions had increased since the 30-day review, tells inappropriate stories in class, struggles with authority, can be a bully with peers, and often refuses to work when speech/language sessions held in class. The team noted that Parent had raised concerns about the appropriateness of the school but tabled the discussion unit Parent was available. Ultimately, the team agreed that the school continued to be appropriate for Student. Upon the advocate's request, the team agreed to consider a dedicated aide for Student and noted that DCPS would conduct at least 2 observations to determine whether an aide is required. The Director of the school also suggested moving Student to another classroom to see if that resulted in improvement.<sup>10</sup>

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<sup>7</sup> Petitioner's Exhibit DCPS-1 and DCPS-2; Petitioner's Exhibits 5 and 6.

<sup>8</sup> Petitioner's Exhibits 13 - 24.

<sup>9</sup> Petitioner's Exhibit 30.

<sup>10</sup> DCPS-3; Petitioner's Exhibits 2 and 3.

10. Subsequent to the January 7, 2011 MDT meeting for Student, Student's behavior in school or with the transportation staff resulted in 5 Incident Reports. Two of the incidents involved physical aggression towards/fighting with peers.<sup>11</sup>
11. On March 17, 2011, DCPS's Progress Monitor for Student's current private school conducted an observation of Student during lunchtime. It appeared to the Monitor that Student had not met the requirements to receive computer time during lunch, and the teacher reminded Student that it would be a good time to complete some of his incomplete assignments. Although Student was able to follow directions within 2 prompts from the teacher, he engaged in conversations that bordered on the inappropriate about his hustle on the streets, tattoos, and basketball, and he used curse words once or twice. Student also passed gas several times in class. About 15 to 20 minutes into the observation, Student quieted and began watching a peer play video games.<sup>12</sup>
12. On March 21, 2011, DCPS's Progress Monitor for Student's current private school conducted another observation of Student in the morning while individual assignments were being completed. It appeared that Student was trying to leave when the Monitor arrived, because he was opening the door. However, once he let the Monitor in, Student went back to his seat and worked on his assignment independently. Student was able to complete two worksheet assignments independently without distraction prior to leaving for his individual behavior support services. When the Monitor returned after Student's therapy session, Student was at the center desk working one-on-one with the teacher. The Monitor's presence seemed to make Student a little more vocal, and Student also conversed with the teacher and rapped while working. Overall, Student was able to follow directions within the first or second prompt. When Student moved to the computer center to work on assigned academic tasks, he initially appeared more engaged in his peer's computer but he ultimately completed his work and was allowed free time. Student's teacher stated that Student was having a good day, but Student generally did not complete much work. The Director of the school also informed the Monitor that earlier in the morning, Student had refused to work or remain in class and had asked to work in the hallway next to the Director's office.<sup>13</sup>
13. On April 5, 2011, DCPS convened another MDT meeting for Student to discuss the allegations in the instant Complaint, discuss and determine the need for a dedicated aide, and discuss and determine Student's location of services. The staff at Student's current private school stated that Student exhibits disrespectful behavior towards the staff members at the school, often using foul language and even threatening to physically assault staff members on occasion. On the other hand, the staff also reported that the occurrence of Student's negative behaviors had decreased since he was moved into a male teacher's classroom after Winter Break, although Student continues to attempt to leave the school building before release time. Moreover, Student's new teacher reported that Student can be redirected and deescalated with verbal warnings and prompts most times. The new teacher further stated that Student's disrespect is primarily geared toward

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<sup>11</sup> Petitioner's Exhibits 25 - 29.

<sup>12</sup> DCPS-6; Petitioner's Exhibit 36.

<sup>13</sup> DCPS-7; Petitioner's Exhibit 37.

female staff members, that Student's motivation to attend school and complete assignments is very low, and that Student does not complete any homework and will only complete classwork when an incentive is presented or offered. Student's Progress Monitor reported that Student had vastly improved since September, can access the curriculum with the support of his new teacher, and can be redirected pretty quickly. The Progress Monitor reported that during her two March observations she did not see any behavior that warranted the assistance of a dedicated aide. Although Parent opined that the current private school is not an appropriate location of services for Student, the Progress Monitor and the team agreed that the current school is appropriate for educating Student and is appropriate based on Student's progress and decrease in negative behaviors.<sup>14</sup>

14. Student's previous teacher at the current private school does not believe the school is a bad fit for Student, nor does she believe Student needs an aide. From her perspective, Student simply needed a lot of redirection, which she and her two assistants were able to provide. Sometimes the redirection worked, and sometimes it didn't. Nevertheless, while in her class, Student made progress in writing and math. At the beginning of the year, Student could not write a complete sentence, but by the time he left his initial class he could write a 3-4 sentence paragraph. Similarly, at the beginning of the year, Student did not know how to complete the borrowing operation in math, but he had worked on borrowing and was starting on multiplication by the time he was moved to his new class.<sup>15</sup>
15. Parent is not satisfied with Student's current private school because she feels that Student has had problems there since the first day. Parent reports that the school calls her frequently to complain about Student, and that Student's coat was torn once and he has come home with scratches a couple of times as a result of restraints used on him at school. However, the school paid Parent for the torn coat. Although the school moved Student to another class in response to Parent's concerns, it seems to Parent that Student continues to have the same problems. Parent also believes that Student needs an aide because he works better one-on-one.<sup>16</sup>
16. Student has been conditionally accepted to attend another private school located in the District of Columbia that services ED and LD students. Student's conditional acceptance is based upon a review of the documents/academic records contained in his referral packet. Student's acceptance has not been changed to unconditional because a parent interview is required to change an acceptance from conditional to unconditional, and Parent has not yet gone to visit/interview at the school.<sup>17</sup>

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<sup>14</sup> DCPS-9; Petitioner's Exhibit 1; testimony of Progress Monitor.

<sup>15</sup> Testimony of special education.

<sup>16</sup> Testimony of Parent; testimony of Progress Monitor.

<sup>17</sup> Testimony of Principal at requested private school.

17. As compensatory education for the alleged violations in the instant case, Petitioner has requested 15 hours of independent counseling services and 25 hours of independent tutoring.<sup>18</sup>

### **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:

#### **Location of Services**

Under IDEA, a public agency must provide an appropriate educational placement 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. IDEA does not require an LEA to furnish every special service necessary to maximize each disabled child's potential. Instead, IDEA requires that each disabled child be provided with a basic floor of opportunity consisting of access to specialized instruction and related services which are individually designed to provide educational benefit to the disabled child. See *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982).

In the instant case, Petitioner asserts that Student's current location of services is inappropriate and he requires a new location of services because his behaviors have declined significantly since he began attending his current school, with the result that he has been unable to access his education. To the contrary, however, the evidence in this case demonstrates that although Student had a rough time after he transitioned to his new full-time private school, he made academic progress in his initial class despite his constant behavior problems, and he has made progress with his behavior since he was switched to a new class after Winter Break. Moreover, Student is being provided with full-time special education in a private therapeutic setting at DCPS's expense, and there has been no claim or evidence that the school cannot and/or is not implementing Student's full-time IEP. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of demonstrating that DCPS denied Student a FAPE by failing to provide him with an alternative location of services.

#### **Dedicated Aide**

An IEP must include, *inter alia*, a statement of the special education and related services to be provided to the disabled child. 34 C.F.R. § 300.320(a)(4). Under IDEA, "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34(a). Under appropriate circumstances, such related services can include a dedicated aide.

In this case, Petitioner argues that Student requires the services of a dedicated aide to access FAPE, and that the aide is needed for safety reasons because of Student's unwillingness to remain in the classroom as well as for academics. However, the evidence in this case does not

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<sup>18</sup> Petitioner's Exhibit 46.

provide support for Petitioner's claim that Student needs an aide to access FAPE. To the contrary, the evidence shows that Student has made both academic and behavioral progress at his current private school without the services of a dedicated aide. The evidence further demonstrates that although Student has struggled with his behavior at his current school, the school's staff has been able to redirect Student with verbal prompts and warnings, and Student has also established a close connection with the Director of the school, who can and frequently does redirect Student. As a result, the hearing officer concludes that Petitioner has failed to meet its burden of demonstrating that DCPS denied Student a FAPE by failing to provide him with a dedicated aide.

### **Compensatory Education**

As Petitioner has failed to prevail on the claims asserted in this action, there is no justification for an award of compensatory education. *See Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005) (under theory of compensatory education, courts and hearing officers may award educational services to compensate for a past deficient program).

### **ORDER**

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

1. Petitioner's March 2, 2011 Complaint is **DISMISSED WITH PREJUDICE** and all requests for relief therein are **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: 4/27/2011

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