DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

RECEIVED
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through

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Date Issued: June 27, 2010

Hearing Officer: Kimm Massey, Esq.

Case No:

Hearing Date: June 15 and 17, 2010
Rooms: 5A and 1, respectively

HEARING OFFICER DETERMINATION

BACKGROUND

Student is a year-old boy, who has just completed grade at a DCPS school.

On April 26, 2010, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS (1) failed to timely identify, locate, and/or appropriately evaluate Student for special education eligibility; (2) failed to review all of the data in its possession in order to determine Student's particular category of disability, his present levels of performance, and his needs for special education and related services, in order to develop an appropriate individualized education plan ("IEP") and determine an appropriate educational placement; (3) failed to create and implement an appropriate, or any IEP for Hasante to address his special education needs; (4) failed to provide Student an appropriate educational placement to address his unique special needs; (5) failed to provide Student with a free appropriate public education ("FAPE"); and (6) wrongfully excluded Student form his education by illegally removing him from his classroom without following procedure for any type of suspension and without considering if Student's actions were manifestations of his disabilities. As relief for these alleged violations of the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. §§ 1400 et. seq., Petitioner requested placement, funding and transportation at/for a nonpublic full-time therapeutic special education placement and compensatory education covering the period from August 2008 through the present.

On May 6, 2010, DCPS filed its Response to the Complaint, asserting therein that it did not suspect Student of having a qualifying disability. Therefore, although DCPS represented that it would schedule a meeting to review Student's evaluations, DCPS asserted that Petitioner's claims concerning Child Find, an IEP, placement, FAPE, and the exclusion of Student were inapplicable because Student was not a student with a disability and was not eligible for special education.

On May 19, 2010, Petitioner filed a Motion for an Expedited Hearing, seeking an expedited hearing on the ground that a delayed hearing would endanger the physical and emotional health and safety of Student and others.

On May 21, 2010, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. During the conference, the hearing officer determined that the six claims alleged in the Complaint could fairly be merged into the following two issues: (1) Whether DCPS violated its Child Find obligations in this case; and (2) Whether DCPS failed to review existing evaluations and other existing information, such as academic performance, behavior, social deficits, and related factors, to determine Student's eligibility and, if appropriate, develop an IEP and provide a placement. The hearing officer issued the Prehearing Order on May 27, 2010.[1]

On May 24, 2010, the hearing officer issued an Order Denying as Moot Petitioner's Motion for an Expedited Hearing, explaining that because the hearing officer received a May 13, 2010 DPC Disposition form indicating that no agreement had been reached by the parties at the resolution session, the 30-day resolution period ended and the 45-day timeline began to run on May 13th, with the result that the granting of an expedited hearing would have shortened the hearing and decision timeline by only one day.

By their respective cover letters dated June 8, 2010, Petitioner disclosed 18 documents (Petitioner's Exhibits 1 through 18) and DCPS disclosed 8 documents (DCPS-1 through DCPS-8). Thereafter, on June 9, 2010, DCPS disclosed two additional documents (DCPS-9 and DCPS-10).

On June 10, Petitioner filed a Motion for Summary Judgment or in the Alternative Motion to Limit Respondent's Evidence. Petitioner's motion for summary judgment was based on DCPS's June 9th disclosures, which consisted of a draft initial IEP for Student and a Letter of Invitation to a Meeting. Petitioner argued that DCPS's submission of those documents constituted an admission that directly contradicted DCPS's Response, with the result that the appropriateness of Petitioner's requested private placement was the only remaining issue to be decided by the hearing officer. Alternatively, Petitioner argued that if the hearing officer determined to deny its request for summary judgment, then the scope of both the due process hearing and DCPS's presentation of evidence should be limited to DCPS's position in its Response and at the prehearing conference. Petitioner also sought to limit DCPS to the witnesses it had disclosed at

[1] The hearing also issued a Revised Prehearing Order on May 27, 2010, primarily to correct the dates of Student's suspension in the parties' stipulation.

the prehearing conference, and Petitioner objected on various grounds to DCPS-3 through DCPS-9.

On or about June 11, DCPS filed its "Response to Petitioner's Motion." In its responsive pleading, DCPS stipulated (1) that Student meets the criteria for a student with a disability under IDEIA, qualifying as other health impaired ("OHI") due to ADHD, (2) that DCPS had not yet held a formal eligibility meeting, and (3) that Student's evaluations were first reviewed on May 13, 2010. DCPS then asserted that only the following two issues remained for decision by the hearing officer: whether Student was entitled to compensatory education (and if so, how much and what type, and an appropriate placement for Student (with DCPS suggesting that Petitioner's requested private placement was too restrictive, so the hearing officer should order DCPS to provide the type of placement the hearing officer deems appropriate.) DCPS also addressed Petitioner's request to limit DCPS's evidenc and the scope of the hearing.

On June 15, 2010, the hearing officer convened the due process hearing for this case.[2] Petitioner's disclosed documents were admitted into the record without objection. Thereafter, Petitioner "renewed" its objection to DCPS-2 through DCPS-9, arguing that the documents had never been disclosed to Parent pursuant to Parent's records request. Petitioner also objected to DCPS-9 and DCPS-10 on the ground that they were untimely disclosed. DCPS represented that its documents were basically forms that were either sent to Parent or developed at meetings Parent attended, and DCPS also pointed out that DCPS-2 through DCPS-8 were timely disclosed. Ultimately, the hearing officer admitted DCPS-2 through DCPS-8 over Petitioner's objection, stating that if it appeared that Petitioner would be unduly prejudiced by any particular document, the hearing officer would limit consideration of the document accordingly. The hearing officer also noted that Petitioner's summary judgment motion was based on DCPS-9 and DCPS-10, with the result that the hearing officer would be unable to grant said motion if the documents were excluded as untimely. Petitioner thereafter withdrew its objection to those two documents, which were admitted into the record without objection.

Prior to receiving witness testimony, the hearing officer granted summary judgment to Petitioner on issue #2 and granted summary judgment in part on issue #1, to the extent of finding that DCPS's Child Find obligation was violated but not to the extent of determining exactly when the obligation was violated, and ruling further that if sufficient evidence was presented to allow a determination of the timing of the violation to be made then the determination would be made. The hearing officer also ruled that DCPS would be limited to presenting testimony from the witnesses it listed at the prehearing conference, because the prehearing conference is an important part of the administrative process and representations made at the conference must be honored. Thereafter, Petitioner presented the testimony of three of its witnesses and the hearing was adjourned.

The hearing officer reconvened the due process hearing on June 17, 2010. Petitioner presented the testimony of its final witness and rested its case, and then DCPS stated that it would "rest on the documents." The hearing officer received Petitioner's closing statement, which was read from a written document that Petitioner's counsel promised to send to the hearing officer by email. Ultimately, the hearing officer agreed that Petitioner would provide the hearing officer

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

and opposing counsel with its written closing plus addendum by midnight on June 17th, and DCPS would then be allowed to submit a responsive closing by close of business on Friday, June 18th. The hearing officer indicated that the instant HOD would nevertheless be issued within 10 days of the June 17th hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to IDEIA, 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. Is Petitioner's proposed placement appropriate for Student? If not, what type of placement does Student require?

2. Is Student entitled to compensatory education? If so, how much and in what form?

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. In SY 2005/06, Student attended kindergarten at a DCPS school, and he was retained in kindergarten at the end of the school year. His final progress report listed grades for second semester only, and indicated that he had made satisfactory progress in the areas of physical development and health/physical education, but needed support in the areas of reading preparation, writing preparation, listening and speaking, literature, mathematics, art and music, social development, and work habits. The progress report further indicated that Student was absent for 20 of the 43 days of instruction during third advisory, but he was not absent at all during fourth advisory.[3]

2. Student attended school in South Carolina during SY 2006/07 and SY 2007/08. Student performed consistently enough in kindergarten during SY 2006/07 to be promoted to first grade. Then in first grade during SY 2007/08, Student earned an A in language arts, a B mathematics, an S for satisfactory in Science Lab although his report indicates that he displayed poor conduct in that class throughout the year, and an E for excellent in social studies theme. The SY 2007/08 report card also indicates that Student consistently performed good and/or satisfactorily throughout the year in art, health and safety, music, and physical education, although the Teacher Notes throughout the year indicate that Student had some initial struggles with self-control in school.[4]

[3] Testimony of Parent; Petitioner's Exhibit 6.
[4] Petitioner's Exhibits 4 and 5.

3. Unbeknownst to Parent at the time, Student received medical intervention and special education evaluations due to concerns about his inappropriate behavior while he was in South Carolina. Hence, on February 2, 2007, a neurodevelopmental cognitive assessment was administered to Student. The evaluator administered achievement, developmental neuropsychological, social/emotional and cognitive testing to Student. The evaluator also detailed Student's behavioral/psychiatric history, noting Student's excessive behavior problems, his reports of seeing a devil that caused him to misbehave, his excessive and escalating defiance and aggression with both adults and children, his in utero exposure to crack cocaine and alcohol, and his imaginary friend. The evaluator noted that Student was receiving Adderal and Risperdal, which were having some beneficial effect, although some of the behavior problems/mood swings remained. Ultimately, the evaluator made the following diagnoses: Bi-polar I Disorder; Attention Deficit Hyperactivity Disorder, and rule out mixed receptive expressive language disorder. The evaluator declined to diagnose a learning disorder, but noted that Student was beginning to exhibit weaknesses in both mathematics and reading skills. The evaluator also recommended that Student's psychiatrist consider prescribing a stimulant medication to Student in the afternoon at around 3 pm, when his behavioral regulation appeared to dissipate.[5]

4. On September 20, 2007, a Necessity Report of Pupil Referred for Special Education Services for the Other Health Impaired or the Orthopedicaly Disabled was completed for Student. The Director of Special Services for Student's school and/or school district completed the referral portion of the form, and a physician completed the lower portion of the form, indicating that Student presented with ADHD and Mood Disorder, that medical care was required on a continuing basis, that the condition was irreversible and caused limited strength, vitality or alertness that could adversely affect Student's educational performance, and that special education services appeared appropriate from a medical standpoint.[6]

5. On November 28, 2007, the South Carolina school district conducted an autism assessment of Student. Ultimately, the autism specialist determined that Student did not demonstrate the profile of an individual with autism and did not meet the criteria for autism services.[7]

6. On July 9, 2008, the South Carolina school district administered the following cognitive and social/emotional assessments to Student: Wechsler Individual Achievement Test-Second Edition, Stanford-Binet Intelligence Scale-Fifth Edition, Behavior Assessment System for Children-Second Edition – Teacher Rating Scale and Parent Rating Scale, and Differential Test of Conduct and Emotional Problems. The evaluation report indicates that the intervention team referred Student to be further evaluated to determine his appropriateness for support from the exceptional children's program. Based on Student's performance on the assessments administered, the evaluator concluded that Student had at least low average to average learning ability with mild academic delay in reading and math but no significant discrepancy between observed and expected performance in any

[5] Petitioner's Exhibit 11.
[6] Petitioner's Exhibit 9.
[7] Petitioner's Exhibit 10.

academic area. On the other hand, behavior was noted as an area that was reported to be troublesome in terms of activity level and aggression. The evaluator ultimately opined that although the classifications of learning disabled or emotionally disabled did not appear to be appropriate for Student, a classification of OHI for ADHD potentially could be suitable and beneficial. However, the final decision could only be made by the multi-disciplinary committee/team.[8]

7. Student returned to the District of Columbia in SY 2008/09 and attended second grade at a Charter School for at least the first advisory. His report card for the first advisory indicates that he received overall grades of As in physical education, Spanish, art and music; a B in math; Cs in science and reading language arts; and a D in social studies. Student also earned primarily Gs for good, with one E for excellent and a few Ss for satisfactory, in the subcategories in character development. The Teacher Comments indicate that Student was progressing nicely academically in second grade for the first quarter. According to Parent, however, Student left the charter school after a couple of months due to his behavior and social problems. So, mom enrolled him in the neighborhood school.[9]

8. By the third advisory of SY 2008/09, Student was attending his current DCPS school, which is an "open space" school. When Parent enrolled Student at the school, she gave the secretary all of Student's documents from South Carolina.[10]

9. Student's final DCPS report card for SY 2008/09 indicates that he received grades of 1-below basic for the third and fourth advisories in reading/English/language arts, mathematics, science, and social studies; and grades of 2-basic for the third and fourth advisories in health and physical education. In the areas of work habits and personal/social skills, Student displayed the desired behaviors, such as following directions and rules and practicing self-control, only rarely or with frequent prompting. The teacher comments indicate that Student had "simply been absent too much to make any consistent academic progress" during third advisory. He also displayed combative and disrespectful behavior when he was in class. The Teacher Comments for fourth advisory indicate that, with classroom support from Parent, Student had begun to make significant progress in the areas of behavior and academics. The teacher stated that Student needed to attend summer school to maintain developing skills.[11]

10. On March 30, 2009, Student received a psychiatric evaluation at Children's National Medical Center. The evaluating psychiatrist noted Student's psychiatric history of "attention-deficit-hyperactivity disorder (combined type), 'bipolar disorder' rule out mixed receptive expressive language disorder." The primary concerns to be addressed were Student's chronic disruptive behaviors characterized by hyperactivity, impulsivity, and inattentiveness both at school and at home that were escalating in intensity, frequency and duration. Ultimately, the psychiatrist issued the following Axis I

[8] Petitioner's Exhibit 8.
[9] Petitioners' Exhibit 3; testimony of Parent.
[10] Petitioner's Exhibit 2; testimony of Parent.
[11] Petitioner's Exhibit 2.

diagnoses: "ADHD combined type, rule out learning disorder relatively occasion disorder. Oppositional defiant disorder." The psychiatrist recommended multimodal treatment to include behavioral therapy, parent management training and medication management in the form of Adderall XR 10 mg by mouth daily.[12]

11. Student remained in his DCPS school for third grade during SY 2009/10. By third advisory, he had received grades of 1-below basic for every advisory in all subjects reported – namely, reading/English/language arts, mathematics, science, and social studies. He received no grades at all for the subjects of art, music, and health/physical education. The report card indicates that Student displayed the desired behaviors in the categories of work habits and personal/social skills primarily only rarely or with frequent prompting. The Teacher Comments for first and second advisory indicate that although Student was capable of completing his school work, he rarely stayed within the classroom to access instruction and was continuously disruptive in class. The teacher noted that Student would yell, throw things, run around and bother others during class, and the teacher expressed hope that "the strategies suggested by the SST [student support team] will prove effective very soon." The Teacher Comments for the third advisory indicated appreciation that Parent had sat with Student for most of the advisory and hope that Parent would continue to do so. The teacher stated that Student completed some of the class assignments but experienced difficulty during other assignments because of the instruction time he missed while acting out during the first two advisories.[13]

12. On November 20, 2009, Student's teacher completed an SST Request Form for Student, which indicated that Student was unable to complete assignments because of his behaviors that distracted himself and others, which included speaking very loudly, sitting upside down in his chair, climbing on closets, and throwing things at other students. The teacher noted that Student appeared capable of doing well and had been observed reading fluently on a few occasions. However, the teacher also noted that Student had to be escorted from the room on several occasions because he was putting himself or others in danger. Parent also completed an SST form, indicating thereon that she wanted Student to work with others, be able to complete his assignments, and get good grades.[14]

13. Student has struggled in class at his current DCPS school. He doesn't finish his work, and then he gets very upset and frustrated. He doesn't socialize with the other children and has no friends at home either. He walks out of class, and the school usually calls Parent to come up to the school. He hasn't gone on any field trips with his class because he hasn't been allowed to go unless Parent could go also. So, he's been sent to other classrooms or the library or gym until his class returns from the field trip. Student's behavior at home and at school has included hollering, screaming, throwing things, and basically "having fits." In the fall of 2009, Student had a temper tantrum at school and then left the school, but no one knew he had left. Parent received a call asking her to come to school. She was on the way to the school when she saw Student walking across

[12] Petitioner's Exhibit 7.
[13] Petitioner's Exhibit 1.
[14] Petitioner's Exhibit 16; DCPS-5.

the street crying hysterically and saying over and over, "I want my mommy." He had no coat or book bag.[15]

14. One of DCPS's solutions for handling Student has been to have Parent come up to the school and sit in class with Student all day. This began during Student's second grade school year, and it continued into the third grade school year, when Parent was asked to come in 3 days per week to sit with Student. Parent agreed to sit with Student because she could see that the school staff couldn't handle him. Although Student would fidget and could not focus on the work for more than about 5 minutes at a time when Parent was there, he did not run around and throw things or engage in other extreme behaviors. On the occasions when Parent did not sit with Student in school, Student would be sent to another teacher, to the library or to the gym teacher.[16]

15. On December 1, 2010, DCPS issued a written letter of invitation for Parent to attend an SST meeting for Student on December 15, 2010.[17]

16. On January 1, 2010, Student's SST issued an Initial Meeting Report, which indicated that Student would follow a 504 Plan and the following strategies would be implemented: seating near teacher, standing near Student when giving instructions, avoid distracting stimuli, use computer assisted instruction, and give extra time to complete assignments.[18]

17. On February 17, 2010, Petitioner's counselor sent a detailed letter to the principal of Student's DCPS school. In the letter, counsel listed Student's diagnoses, Parent's previous request for special education evaluations and services, and various ways in which DCPS allegedly violated special education and other laws. Counsel concluded by requesting that DCPS immediately convene an MDT meeting for Student and suggesting three potential meeting dates.[19]

18. By letter dated April 20, 2010, Student was accepted for admission into a nonpublic, highly-structured, full-time therapeutic special education day school, pending written approval stating a funding source. (The tuition at the school is approximately per year.) The school primarily serves students with severe emotional and behavioral disorders. The goal is to help manage behaviors and make the children available for learning so that they can transition into a less restrictive environment. Students usually stay at the school approximately 2 to 3 years, but the earlier the child begins attending the school the shorter the length of time he or she will likely be required to attend. As Student would be starting the school a little later in his academic career, he would likely have to attend the program for 2 years to achieve the desired results.

    This private school occupies its own separate wing of the physical building where it is located. There are 4 classrooms, each with a teacher, an assistant teacher, and perhaps 2 to 3 dedicated aides. There are up to 8 students in each class, with 3 to 4 tables

[15] Testimony of Parent.
[16] Testimony of Parent.
[17] Petitioner's Exhibit 17.
[18] DCPS-6.
[19] Petitioner's Exhibit 12.

in each class and 2 to 3 students and perhaps 1 support staff at each table. Each teacher is Master's level state certified in special education by the Maryland State Department of Education, all teaching assistants and dedicated aides have bachelor's degrees in a related area, and all related service providers are certified. The staff receives restraint training for crisis prevention intervention as a last resort after other de-escalation techniques have been used. The staff also participates in professional development 3 to 4 times per year and weekly meetings concerning each classroom.

This private school also has an occupational therapy room, a library, a time-out room, clinician officers for the related service providers, a de-escalation room whch is used before the time-out room, a curriculum room and a playground out back. Students are grouped together by skills and abilities, and there are 2 potential classrooms that Student could be placed in – one with children at the pre-K to 1st grade level and one with children at the 1st to 3rd grade level. Each class currently has 7 students. The school also looks at social peers and academic peers in choosing a class for a child because they want the child to be able to make friends. In addition to concentrating on academics, the school also builds a foundation for learning by teaching the children how to ask for help, take a movement break, use squeeze toys, and employ other techniques. The goal is to teach the children to use techniques and skills to be available so they don't always have to leave the classroom or disrupt the class. Every Student receives an FBA, and each student also has a behavioral intervention plan. Each child is assigned a mental health therapist who provides a minimum of 1 hour of services to the child each week. There is a psychologist who is available for consultation with family and staff. There is also a behavior team, with 2 members who walk the hallways and monitor the classrooms. The school also monitors the classrooms through monitors that have placed in the offices, and there are telephones in the classrooms. Each child goes home with a daily progress sheet, and the school offers monthly parent groups. If Student is placed at the school, an IEP would be created for him and the IEP would be amended after a 30-day review period. The school day runs from 9 am to 3 pm, with 30 to 45 minutes per period. The school also offers a summer program that runs from June 28 through July 31st.[20]

19. On April 26, 2010, Petitioner filed the Complaint that initiated this action.

20. On May 4, 2010, an investigator from Petitioner's counsel's office conducted an observation of Student at school. When the investigator first arrived, she was informed that Student was not in class and had not been in class all morning because of his behavior. Student was sent back to his classroom, where the students were beginning to work on math worksheets. As soon as student was given crayons and a worksheet, he pushed the paper and crayons off the desk and began saying that he did not want to do it and was not going to do it and wanted to go to the counselor's room. The teacher asked Student to wait while she taught the rest of the class and then she would help him, but Student kept talking and pushing things off the desk and began kicking the items around. Student eventually got up and pushed away the white board, which had been arranged to form a makeshift wall, and left. No one followed Student. He came back approximately three minutes later and again told the teacher he did not want to do the work but wanted

[20] Petitioner's Exhibit 13; testimony of private school Director of Education.

to go see the counselor. This time when Student left through the hole he'd created by pushing away the white board, he did not return.[21]

21. On May 13, 2010, DCPS conducted the resolution session for this case. During the resolution session, DCPS MDT members reviewed for the first time Student's 2007 autism assessment summary and neurodevelopmental cognitive assessment, his 2008 psychoeducational evaluation, and his 2009 psychiatric evaluation.[22]

22. For three school days, from May 13 thru 17, 2010, Student was suspended from school.[23] This was Student's only formal suspension from school.[24]

23. On a Friday in June 2010 shortly before the due process hearing in this case, Parent received a call from the school telling her that Student had had a bad day and tried to hang himself with the cords from a set of headphones. Student had gotten upset in music because he wanted to play the maracas but was told it was time to go back to class. Student began throwing the maracas up in the air. Once he returned to his regular classroom, he got up from his desk and walked over to the headphones. He stuck one end of the headphone cord into a hole on the map at the front of the classroom, and then he took the other end of the cord and wrapped it around his neck and began making choking noises. The classroom teacher took a picture of Student with her cell phone and sent it the school's security. As far as Parent could ascertain, no one attempted to help or stop Student.[25]

24. On June 10, 2010, DCPS developed a draft initial IEP for Student, which did not identify a primary disability for Student but indicated that Student should receive 2 hours per day of specialized instruction in an outside of general education setting. The IEP does not list any related services for Student.[26]

25. On June 11, 2010 DCPS stipulated in writing that Student meets the criteria for a student with a disability under IDEIA, qualifying as other health impaired due to ADHD.[27]

26. On March 5, 2010, Petitioner's educational consultant conducted an observation of Student in his homeroom class at his current DCPS school. At the beginning of the observation Student was at the back of the classroom working on a reading assignment with another child for approximately 20 minutes. After that, Student sat for approximately 1½ hours doing absolutely nothing. The teacher called Student twice but he did not respond, so she continued to work with other children. Student was totally self-contained during this period, although he did tap a little on the wall his desk faced. This self-contained behavior raised concerns of hallucinations, delusions, and imaginary friends. This is not typical behavior for children with emotional disturbance. Once it

[21] Testimony of investigator.
[22] DCPS stipulation in its June 11, 2010 Response to Petitioner's Motion; *see also*, DCPS-1.
[23] Stipulation of the parties; *see also*, Petitioner's Exhibit 14.
[24] Testimony of Parent.
[25] Testimony of Parent.
[26] DCPS-9.
[27] DCPS's June 11, 2010 Response to Petitioner's Motion.

was time to transition to lunch, Student became very hyper and began knocking furniture around and pushing other kids as he tried to get in line. From the consultant's perspective, it seemed as if she had observed three different children.[28]

27. Student's social/emotional well-being is the biggest area of concern. He is chronically disruptive in class, can become physically aggressive, and sometimes becomes a danger to himself and others in class. His classmates are concerned about spending time with him, so he's very isolated. He also spends lots of time out of his classroom. His dangerous behavior is very extreme, and it is important to get him into an appropriate placement quickly. An appropriate placement would not only focus on academics, but would also teach Student social skills and the ability to get along with other children and remain stable. Student needs a full-time therapeutic special education program, with an emotional basis, that addresses needs of children with significant emotional concerns. It should offer a low student-teacher ratio, intensive individual and group therapy, family training, an integrated therapeutic program where the therapist is in class a large part of time and resides in the school, and a special education curriculum. The placement should also offer a small setting where Student can be carefully watched to ensure he does not hurt himself and where therapeutic restraint can be used. The placement should be 100% special education, as Student has not benefited from being with non-disabled peers and his emotional instability will prevent him from so benefiting at this time. The private school that accepted Student by letter dated April 20, 2010 is a very structured therapeutic program that offers all of the components Student needs. Petitioner's educational consultant has been familiar with the school for approximately 35 years, has sent other students there and seen them graduate or move on to less restrictive environments, and visited the school on March 21, 2010 to observe the actual class that she believes would be appropriate for Student.[29]

28. In terms of compensatory education, Student would benefit greatly from receiving individual tutoring during the month of August when he is off from school. However, Student should not be provided with after-school tutoring as a form of compensatory education because it would place too much pressure on Student and deprive him of much needed downtime. Moreover, the provision of therapy/counseling would not be advisable during the month of August when Student is off from school because 1 month will not be enough time for Student to establish a relationship with a new therapist.[30]

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. **Placement**

[28] Testimony of educational consultant.
[29] Testimony of educational consultant.
[30] Testimony of educational consultant.

IDEIA provides that 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. Moreover, "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 provided by said school 'is reasonably calculated to enable the child to receive educational benefits.'" *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 v. Rowley*, 458 U.S. 176).

In the instant case, DCPS has essentially conceded that, although Student qualifies for special education services under IDEIA as a child with a disability, DCPS has failed to hold an eligibility meeting for Student to determine his eligibility, develop an appropriate IEP, and determine an appropriate placement. Hence, that DCPS has violated IDEIA in this case is beyond dispute. *See* 34 C.F.R. §300.306. Indeed, even DCPS acknowledges that, under the circumstances of this case, it is left to this hearing officer to determine an appropriate placement for Student.[31]

The evidence in this case proves that Student has a long history of emotional, social and behavioral issues, that Student's behavior can become so disruptive and physically aggressive in class that he becomes a danger to himself and others, that Student's current DCPS "open space" school is an unsafe environment for Student where the staff is unable to control him, and that Student needs a full-time therapeutic special education program, with an emotional basis, that will not only focus on Student's academic needs but will also address his significant emotional concerns and teach him social skills. An appropriate placement for Student will also offer a low student-teacher ratio, a small setting where Student can be carefully monitored, intensive individual and group therapy as well as family training, and a special education curriculum. The evidence in this case further proves that the private special education school that accepted Student for admission by letter dated April 20, 2010 is a very structured therapeutic program that offers all of the components Student needs. As a result, the hearing officer concludes that the private school is an appropriate placement for Student that can provide him with educational benefit, and the hearing officer will order DCPS to fund Student's placement at, and provide Student with transportation to, the private school. *See Branham v. District of Columbia*, 427 F.3d 7, 11-12 (D.C. Cir. 2005) (award of a private school placement should be based upon a fact-intensive and child-specific inquiry and should be designed to ensure child receives prospectively the education required by IDEA).

2. <u>Compensatory Education</u>

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.

[31] *See* DCPS's Response to Petitioner's Motion at 1.

In the instant case, the evidence proves that although Student was retained in kindergarten by DCPS, Student subsequently left the jurisdiction and did not return to DCPS until two school years had passed, during which he performed well academically, as demonstrated by his report cards, but experienced ongoing social and emotional problems, as demonstrated by his evaluation reports. Upon returning to the District of Columbia in SY 2008/09, Student initially attended a charter school. He returned to DCPS in the second half of SY 2008/09, at which time Parent provided DCPS with all of Student's documents from South Carolina, which included documents that diagnosed Student with ADHD, Bipolar Disorder and Mood Disorder, and suggested that Student should receive special education services under a classification of OHI for ADHD. Although Student was absent frequently during the third advisory of SY 2008/09, his behavior problems were nevertheless so problematic that by the fourth advisory Parent had been asked to come to school and sit with Student every day, and by the end of the school year, Student had received grades of 1below basic in all of his academic classes. During SY 2009/10, Student's behaviors continued to escalate and his academic progress suffered as a result. Despite Student's ongoing struggles, DCPS failed to identify Student as a child potentially requiring special education services and, even as late as May 6, 2010, asserted in connection with the instant case that it did not suspect Student of having a qualifying disability.

Based on the evidence in this case, the hearing officer concludes that as of the fourth advisory of SY 2008/09, when DCPS had in hand all of Student's evaluations from South Carolina and had observed firsthand for an entire advisory Student's social, emotional and behavior problems in class, DCPS was on notice that Student potentially was a child with a disability and its Child Find obligations under 34 C.F.R. § 300.111 were triggered. As a result, the hearing officer further concludes that Student is entitled to an award of compensatory education that covers the period extending from the fourth advisory of SY 2008/09 through the end of SY 2009/10.

Upon careful consideration of Petitioner's compensatory education evidence in this case, the hearing officer concludes that the 700 hours of tutoring requested as compensatory education by Petitioner is excessive and based too heavily on a formula that was not designed to ensure that Student receives the educational benefits that likely would have accrued from special education services DCPS should have supplied in the first place. Nevertheless, Petitioner has provided the hearing officer with sufficient evidence to conclude that individual tutoring for Student during the month of August when he is off from school, together with the services Student will receive at the private school where the hearing officer has determined to place Student, which school focuses on transitioning its students into a less restrictive environment, will prospectively compensate Student for the past deficient program he received from DCPS. Accordingly, the hearing officer will award Petitioner compensatory education in the form and amount of individual one-on-one tutoring for three hours each weekday during the month of August during each year he attends the private school that accepted him by letter dated April 20, 2010.

ORDER

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

1. DCPS shall provide Student with funding for and transportation to the private school that accepted him for admission by letter dated April 20, 2010. Said funding and transportation shall begin within 7 calendar days of the issuance of this Order so that Student may participate in summer school for summer 2010, and said funding and transportation shall continue for either 2 years or until the staff at the school determines that Student is ready to be transitioned into a less restrictive environment, whichever occurs sooner.

2. DCPS shall provide funding for Student to receive individual one-on-one tutoring for three hours each weekday during the month of August during each year Student attends the private school referenced in paragraph 1 above.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: 6/27/2010

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