

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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Confidential

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STUDENT HEARING OFFICE

<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>July 30, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Fatmata Barrie, Esq.</p> <p>Counsel for DCPS: Tanya Chor, Esq.</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (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.").

II. PROCEDURAL BACKGROUND

On June 5, 2009, Petitioner filed an Administrative Due Process Complaint Notice ("Complaint") against the District of Columbia Public Schools ("DCPS"), alleging that DCPS denied Student a free appropriate public education ("FAPE") by (1) violating a March 15, 2009 Hearing Officer's Determination ("3/15/09 HOD") by failing to conduct an FBA, (2) failing to provide Student with an appropriate IEP (because the IEP does not include a BIP or address Student's ADHD issues) and with appropriate special education and related services, (3) failing to afford Parent an opportunity to participate in a placement meeting, and (4) failing to provide an appropriate placement.

The Student Hearing Office ("SHO") issued a Due Process Hearing Notice that set a prehearing conference date and provisionally scheduled a due process hearing. However, after the SHO's receipt of DCPS's waiver of the resolution session for this case, the case was placed on a 45-day timeline, and the prehearing conference and due process hearing were rescheduled accordingly.

On June 18, 2009, DCPS filed District of Columbia Public School's Response to Parent's Administrative Due Process Complaint. In its Response, DCPS denied the allegations of the Complaint and asserted that it had conducted an FBA for Student, that an eligibility meeting was held and an IEP was developed for on May 15, 2009, and that Student has been receiving educational benefit at his current school.

On June 29, 2009, the hearing officer convened the prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters, including DCPS's Notice of Insufficiency. During the conference, *inter alia*, (1) DCPS agreed to send its FBA to Petitioner's counsel, who agreed to review the document and advise the hearing officer of the status of its first claim, (2) the hearing officer merged Petitioner's third and fourth claim into one claim of an inappropriate placement and denied DCPS's Notice of Insufficiency, (3) and DCPS acknowledged that Student has a full-time IEP and proposed the full-time ED program at a named DCPS middle school for Student. On July 6, 2009, the hearing officer issued a Pre-Hearing Order that summarized the proceedings at the prehearing conference.

By their respective Disclosure Statements dated July 1, 2009, DCPS disclosed nine potential witnesses and eight documents labeled DCPS-01 through DCPS-08, and Petitioner disclosed eleven potential witnesses and fourteen documents (hereinafter Petitioner's Exhibits 1 - 14).

The hearing officer convened the due process hearing on July 8, 2009, and the parties' disclosed documents were admitted into the record without objection. At the outset, Petitioner stated that

it did not intend to pursue its claim of an alleged violation of the 3/15/09 HOD.² Thereafter, DCPS acknowledged that Student's IEP cannot be implemented at his current school but maintained that the school proposed at the prehearing conference can implement the IEP. DCPS also maintained that Student's "placement" is his IEP, which is appropriate. After each party presented its case, Petitioner requested permission to present the testimony of a rebuttal witness on the issue of what constitutes a therapeutic environment. The hearing officer granted the request and scheduled another hearing for July 8, 2009. That additional hearing was held as scheduled, and the hearing officer received the rebuttal testimony of Petitioner's witness prior to continuing the hearing at the parties' request to permit the filing of written closing statements. The deadline for the written closing statements was thereafter extended slightly, upon the parties' request, and the hearing officer subsequently received the closing statements by the extended deadline.

III. ISSUE(S)

1. Did DCPS violate the 3/15/09 HOD?
2. Did DCPS fail to provide Student with an appropriate IEP and appropriate services?
3. Has DCPS failed to provide Student with an appropriate placement?

IV. FINDINGS OF FACT

1. On March 15, 2009, this hearing officer issued a Hearing Officer's Determination and Order that required DCPS to (i) fund an independent neurological evaluation of Student, (ii) complete an FBA within 20 calendar days of the issuance of the Order, and (iii) within 15 calendar days of Petitioner's submission to DCPS of Student's independent evaluation reports, convene an eligibility meeting for Student and, if appropriate, develop an IEP and determine an appropriate placement.³
2. On April 6, 2009, an independent evaluator prepared a neurological evaluation report for Student. The evaluator administered 15 tests to Student, including tests to measure Student's mental, physical, cerebral, and motor functioning. The evaluator ultimately determined that Student demonstrated an overall neurological assessment that was mildly abnormal in areas of gross motor control and motor planning, but showed no evidence of variable attention or difficulty with emotional regulation, immediate and remote memory, or touch and pain sensation. Moreover, Student evidenced no limitations of cerebral function. The evaluator noted Student's previous diagnoses of ADHD and Bipolar Disorder, stating that although ADHD and Bipolar Disorder are generally classified as organic brain disorders, Student has no medical history or neurological findings that

² Despite Petitioner's announced intent not to pursue the claim of a violation of the 3/15/09 HOD, both parties addressed the issue throughout the hearing and in their closing statements, so the hearing officer will address it herein.

³ Petitioner's Exhibit 12; DCPS-07.
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would indicate those conditions contribute to his current level of mental functioning. On the other hand, the evaluator noted that mental and psychological disorders can contribute to organic brain disorders, and Student has a strong family history of such conditions, as well as his diagnoses of ADHD and Bipolar Disorder.⁴

3. On April 9, 2009, an independent evaluator prepared a comprehensive psychological evaluation report for Student, which revealed that the evaluation included a classroom observation and teacher interviews, in addition to intelligence, achievement, visual-motor integration, and personality/emotional testing. Student achieved a Full Scale IQ score of 89, which indicates that his general cognitive ability is within the Low Average range of intellectual functioning. Student performed in the Average range in overall reading skills, and the evaluator noted that Student read fluently and accurately. Student's math skills were diverse, however, as he scored in the Average range on the Math Reasoning subtest but in the Borderline range on the Numerical Operations subtest. The evaluator noted that Student was unable to perform numerical operations on his grade level, and he demonstrated a specific weakness on tasks that required him to add, subtract, multiply, and divide one- to three-digit numbers. Student's scores in overall written language skills and overall oral language skills were in the Average and Low Average range, respectively. Student's scores on the Working Memory and Processing Speed Indices were in the Average and Borderline range, respectively. Student achieved a score in the Average range of functioning on the test for visual-motor integration. Finally, the evaluator noted that Student is easily agitated, throws books, chairs and kicks the classroom door, yells obscenities, and finds it difficult to regain composure once agitated. The evaluator also noted that the evaluation results suggest that Student suffers from ADHD.⁵
4. The administrative record also includes an FBA for Student. However, the FBA is undated and Petitioner's counsel was not provided with a copy of the FBA until June 29, 2009, the date of the prehearing conference. The FBA indicates that Student is a good student when his medication is taken regularly, but Student exhibits out of control behaviors and his academics suffer when he is not on medication. The FBA contains observations of Student's behavior that were made on March 31 and May 1, 2009. The FBA indicates that the team recommended counseling to assist Student in redirecting his behavior, as well as a small group setting as part of Student's educational plan.⁶
5. On May 26, 2009, DCPS convened an Eligibility Meeting for Student. The team noted Student's out of control behaviors when he is not on medication, as well as his control and ability to participate when he is on medication. The team reviewed Student's neurological and comprehensive psychological evaluations, including his ADHD and Bipolar Disorder diagnoses and the medications he takes. The team ultimately determined that Student meets the eligibility criteria for special education as a student with Emotional Disturbance ("ED"), and that Student should receive a full time special

⁴ Petitioner's Exhibit 10; DCPS-05.

⁵ Petitioner's Exhibit 11; DCPS-06.

⁶ DCPS-02; *see* Pre-Hearing Order.
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education program – 27.5 hours, with 1 hour of behavioral support weekly.⁷

6. The team also developed an IEP for Student on May 26, 2009. The IEP provides that Student is to receive 27.5 hours of specialized instruction and 1 hour of behavioral support services, with said services to begin on May 26 and 27, 2009, respectively. Although the IEP indicates that the team did not yet know at the time of developing the IEP whether Student would require extended year services, there is documentation in the record indicating that it was later decided that Student should attend summer school.

The IEP contains Student's baseline levels of performance and annual goals in the areas of Mathematics, Written Expression, and Emotional/Social/Behavioral Development. Student's goals in Mathematics require him to (i) add, subtract, multiply and divide up to three digits, (ii) solve problems involving multiplication and division of any whole number, (iii) demonstrate an understanding of how parentheses affect expressions involving addition, subtraction, and multiplication, and use that understanding to solve problems, and (iv) compare and order integers (including negative integers), positive fractions, mixed numbers, decimals, and percents.

Student's goals in the area of Written Expression require him to (i) develop a working vocabulary and a vocabulary journal, (ii) make distinctions among fiction, nonfiction, and dramatic literature, and use those genres selectively to produce stories or scripts, (iii) create multiparagraph essays, (iii) write explanations of a process that include a topic statement, supporting details, and a conclusion, and (iv) revise writing to improve coherence and progression.

Student's Emotional/Social/Behavioral goals require him to (i) display appropriate social interactions and coping skills in school, (ii) learn and identify feelings, (iii) express and/or display feelings appropriately, (iv) follow directives on first prompt from school staff, (v) maintain appropriate interactions with others, and (vi) learn and display coping skills.⁸

7. At Student's May 26, 2009 eligibility meeting, the team did not discuss possible schools for Student to attend. Moreover, the initial IEP developed by the team did not include a specific school for Student to attend. However, at the June 29, 2009 prehearing conference for this case, DCPS advised Petitioner's counsel that the ED cluster program at a specific middle school had been selected for Student. Thereafter, on July 5, 2009, someone (presumably from DCPS) called Parent and informed her that the placement for Student would be the same school named by DCPS during the prehearing conference. Parent went to visit the school and found that there were metal detectors and trash on the floor. Parent felt that the school was dirty and dingy. She also saw loud students and revealing clothing being worn by the female students and some of the teachers. The security staff, which was at the front door only, seemed to be the only people who were appropriately dressed.

Parent is of the opinion that the named DCPS school will not work for Student. She is concerned that Student will be teased for being in special education. She believes that Student needs extra help and needs to attend a school where he will have 8 to 9

⁷ Petitioner's Exhibit 9.

⁸ Petitioner's Exhibits 8, 14; DCPS-03.
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students and 2 teachers in his class. Parent attended three different private schools and found that she liked one best because the class sizes were small, the teachers were appropriately dressed, the students were respectful, her children asked questions, and Student would never be in the hallway alone.⁹

8. As of the date of the due process hearing, Petitioner's special education consultant had never met Student, had not spoken with any of his teachers, and had never conducted any evaluations for Student. The consultant was of the opinion that (i) Student's IEP goals are too complicated for him, and (ii) a token system should be part of Student's curriculum. The consultant opined that Student's behavior needs to be addressed, but she admitted that it is hard to separate out ADHD and Bipolar Disorder because the behaviors can overlap. The consultant also acknowledged that all six of Student's IEP goals in the Emotional/Social/Behavioral Development area will address ADHD, but the consultant opined that the goals will not address the level to which ADHD affects Student. In the consultant's opinion, Student should have been receiving special education for the last two years, going back to the 2007/08 school year when Parent first requested special education testing. The consultant opined that appropriate compensatory education for Student would consist of a therapeutic educational setting in a private school and tutoring for 2 ½ hours for 3 days per week for two straight calendar years. In formulating this compensatory education plan, the consultant did not take Student's new IEP's hours or provisions into consideration. Finally, the consultant was of the opinion that either a psychologist, social worker, or special education teacher, depending upon expertise, can provide the behavior services that Student needs.¹⁰
9. DCPS's special education specialists received a request for a site location for Student and recommended the middle school DCPS named during the prehearing conference. This school has one ED cluster program with a certified teacher, one behavior specialist, one social worker, and eight students so far, including Student. The maximum allowable class size is 10 students.

In this ED cluster program, all of Student's academic subjects will be in the self-contained classroom, and there are three adults at all times because the social worker and behavior specialist remain in the classroom throughout the day. Student and his classmates will transition from the main class to their electives as a class and they will have an escort. The ED classroom is located on the first floor of the school in a separate wing of the school, and it is the only class on the main floor of its wing. However, there are elective and other general education classes on the floors above and below the main floor of that wing. Student will have limited interaction with general education students. Such interaction will be limited to breakfast in the cafeteria up to the time he and his class are picked up and taken to their classroom, lunch time when they are escorted to the cafeteria by their behavioral specialist who stays with them for the lunch period, and general assemblies when the behavioral specialist and the teacher will also be present with the ED students. When the ED students are escorted to their electives as a class, there may be other non-ED special education students in the classroom but there will not

⁹ Testimony of Parent.

¹⁰ Testimony of Petitioner's special education consultant.

be any general education students there.

This program is therapeutic in that it is self-contained, there is a behavior support person there, as well as a social worker, and there is access to a psychologist 3 days per week. For a therapeutic program, there must be someone present who can deal with behavior and counseling issues, but the person does not necessarily have to be a psychologist. Group counseling and individual counseling are provided. The social worker can perform the therapeutic hold/restraints and can also develop and implement individual behavior plans. The cluster program will receive a new certified teacher for the coming school year, and this teacher has some experience with ED students. DCPS views the cluster program as a step down from a pure therapeutic model because it is in a building with general education students and the goal is to get the students back into a general education setting at some point.¹¹

10. is a full time, special education, therapeutic day program. It offers small class sizes, certified special education teachers, individual and group counseling, art therapy, social workers, speech/language services, and other related service providers. can offer Student individual attention, a behavior management plan and behavior staff. The classrooms are language-based, so Student will receive help with his oral language skills; Student will not be timed in class, which will reduce frustration; and teachers are skilled in ADHD, so they try to keep auditory and other distractions to a minimum. can provide Student with the 27.5 hours per week of specialized instruction listed in his IEP.¹²
11. Overall, a therapeutic program requires a small class size with a low student to staff ratio, staff in the classroom who are trained in positive behavior management strategies, and an integrated behavior management program (such as a point or token system) that provides students with immediate feedback about behavioral expectations, rewards, and consequences of performing or not performing. The clinical staff should be onsite and well trained to administer the IEP in office therapy, and they should also be available to go to the class to assist students in practicing behavior learned in the office when actual stressors are taking place. Case management should be provided by the clinical staff, crisis intervention staff who are trained in safe physical interventions should be available, and consequences must be delivered in the therapeutic program so the students do not escape consequences at school and they feel confident the program has the capacity to meet their needs. A therapeutic ED program can be located in a regular school, but accommodations would have to be made. Daily behavioral consultations can help address any stigmatization issues involved in having the program in a regular school, but only after some of the problematic behaviors that resulted in an ED classification for the students have been addressed.¹³

V. CONCLUSIONS OF LAW

¹¹ Testimony of DCPS special education specialists.

¹² Testimony of Assistant Educational Director.

¹³ Testimony of Director of Clinical Services.

The issues to be determined in this case are whether DCPS (1) violated the 3/15/09 HOD, (2) failed to provide Student with an appropriate IEP and appropriate services, and (3) failed to provide Student with an appropriate placement. Also at issue is Petitioners' request for compensatory education. As the party seeking relief in this action, Petitioner bears the burden of proof. *See* 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

1. Alleged Violation of the 3/15/09 HOD

Petitioner argues that DCPS violated the 3/15/09 HOD by failing to complete the FBA within 20 calendar days of the issuance of the HOD, which has resulted in a rebuttable presumption of harm pursuant to the Consent Decree.¹⁴ Petitioner's Written Closing at 1.

The hearing officer agrees that DCPS violated the 3/15/09 HOD by failing to conduct the FBA within 20 calendar days of the issuance of the HOD. This conclusion is supported by the fact that the FBA includes observations of Student that took place on March 31 and May 1, 2009, while 20 calendar days from the issuance of the 3/15/09 HOD would have been April 4, 2009. The hearing officer further acknowledges that there is a rebuttable presumption of harm from the violation of an HOD,¹⁵ and the hearing officer agrees with Petitioner that the harm resulting from DCPS's failure to timely complete the FBA is that the FBA was not available to be reviewed at Student's eligibility meeting, with the result that Student's IEP does not contain a BIP.¹⁶ As a result, the hearing officer concludes that Petitioner has met its burden of proving that DCPS violated the 3/15/09 HOD by failing to timely conduct an FBA.

2. Appropriateness of IEP and Services

Petitioner contends that Student's IEP is inappropriate because the IEP only contains the ED disability classification, there is no BIP, and Student's goals and objectives are not appropriate to meet Student's educational needs. Petitioner's Written Closing at 2. Petitioner also contends that DCPS failed to provide Student with his special education and related services, which were to begin on May 26 and 27, 2009. *Id.* at 5.

The hearing officer disagrees with Petitioner's assertions regarding the appropriateness of the IEP. First, the hearing officer is not persuaded by the testimony of Petitioner's expert witness that Student's IEP goals are inappropriate because they are too complicated for Student. Student's comprehensive psychological evaluation report indicates that Student read fluently and accurately during the evaluation but demonstrated a specific weakness on tasks that required him to add, subtract, multiply and divide one- to three-digit numbers, performed in the Low Average range in overall language skills, and exhibited behavior problems that included being easily agitated and having difficulty regaining composure once agitated. In turn, Student's IEP team developed IEP goals that require Student to, *inter alia*, add, subtract, multiply and divide up to three digits, develop a working vocabulary and create multiparagraph essays, and display

¹⁴ *See* Consent Decree entered in *Blackman v. District of Columbia*, Civil Action No. 97-1629 (D.D.C. Aug. 24, 2006).

¹⁵ Consent Decree at ¶ 74.

¹⁶ *See* 34 C.F.R. § 300.324(a)(2)(i) (IEP team to consider use of positive behavioral interventions and supports and other strategies to address disabled child's behavior that impedes his/her learning or learning of others)

appropriate social interactions and coping skills in school. These goals were developed subsequent to the team's review of Student's evaluation reports, and the goals seem to directly address problems that were revealed during Student's comprehensive psychological evaluation. As Petitioner notes in its written closing statement, an IEP must "be likely to produce progress, not [. . .] trivial advancement." Written Closing at 2 (internal quotations and citations omitted). Hence, the hearing officer concludes that Petitioner has failed to meet its burden of proving that Student's IEP goals render the IEP inappropriate and unlikely to benefit Student educationally.¹⁷

Second, the hearing officer is not persuaded by Petitioner's argument that the IEP is inappropriate because it contains only an ED disability classification. At the due process hearing, Petitioner complained that the IEP does not contain goals and accommodations to address Student's ADHD. However, Petitioner's own expert witness testified that (1) it is hard to separate out ADHD and Bipolar Disorder because the behaviors can overlap, and (2) all six of Student's IEP goals in the Emotional/Social/Behavioral Development area will address ADHD. Moreover, the services rendered to a Student under IDEIA do not turn on a student's disability classification,¹⁸ and this hearing officer has already determined above that DCPS must add a BIP, or behavior intervention plan, to Student's IEP. Under these circumstances, the hearing officer rejects Petitioner's assertion that Student's IEP is inappropriate because it contains only the ED disability classification.

Third, although the hearing officer does not disagree that Student's IEP is inappropriate for failure to include a BIP, that issue has already been addressed above in subparagraph 1 and it would be inappropriate to reanalyze the issue here.

Finally, the hearing officer agrees with Petitioner's argument that DCPS failed to provide Student with his required special education and related services by failing to implement his IEP. The IEP indicates that Student was to begin receiving specialized instruction and behavioral support services on May 26 and 27, 2009, respectively. However, as of the July 8th and 15th due process hearings in this case, Student had not yet received any services at all because he had not yet been placed at a school that could implement his IEP. Moreover, although the record indicates that Student was supposed to receive extended year services this summer, Student has not received such services. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proving that DCPS failed to provide Student with his required special education and related services.¹⁹

¹⁷ See *Board of Education of the Hendrick Hudson Central School District, Westchester County, et al., v. Rowley et al.*, 458 U.S. 176 (1982) ("*Rowley*") (FAPE requirement satisfied by provision of personalized instruction with sufficient support services to permit child to benefit educationally).

¹⁸ See 34 C.F.R. § 300.304(c)(6) (Evaluations must be sufficiently comprehensive to identify all of child's special education and related services needs, whether or not commonly linked to child's disability classification); 34 C.F.R. § 300.324 (in developing IEP, team must consider, *inter alia*, results of initial or most recent evaluation).

¹⁹ *Rowley*, 458 U.S. 176 (FAPE is tailored to unique needs of handicapped child by means of IEP; FAPE requirement satisfied by provision of personalized instruction with sufficient support services to permit child to benefit educationally).

3. Appropriateness of Placement or Site Location

Petitioner argues that DCPS has failed to provide Student with an appropriate placement because DCPS has yet to meet to determine an appropriate placement for Student. Petitioner's Written Closing at 3. On the other hand, DCPS argues that an appropriate placement was made at Student's eligibility meeting because "placement" refers to the amount of and type of special education services provided and is a matter parents should be involved in, whereas the "site" or "location" for the placement is an administrative matter that is within DCPS's discretion. See DCPS's Written Closing at 4; DCPS 7/14/09 Memorandum of Law at 6. Hence, at the due process hearing, DCPS asserted that it would provide a location for implementation of Student's IEP by the start of the 2009/10 school year, and no claim will exist until Student has attended the site and it can be seen how he reacts.

The hearing officer acknowledges the existence of case law holding that "'placement' refers to the overall educational program offered, not the mere location of the program."²⁰ However, the hearing officer also notes that in one such case, the *A.K.* case, the court ultimately held that the IEP at issue was not reasonably calculated to enable the student to receive educational benefits because it failed to identify a particular school for the student attend.²¹ Moreover, the *White* court did **not** rule that the IDEIA regulations do not provide a parental right to provide input into the location of services; instead, the court assumed *arguendo* that such a right existed and concluded that the school district complied with said procedural requirement.²² Ultimately, however, the *White* court ruled that a parent does not have a right to compel the school district to place his/her child in a specific school.²³

In this case, the evidence reveals that DCPS failed to discuss an appropriate school for Student during his eligibility meeting and then developed an initial IEP that did not identify a school for Student to attend. Indeed, it was not until the June 29, 2009 prehearing conference in this case that DCPS first revealed to Petitioner the school it had selected for Student. Fortunately, Parent was able to visit the school prior to the date of the due process hearing.

Although Parent was not impressed with the physical condition of the school and the behavior of the general education students who were attending summer school there, the school offers a self-contained ED cluster program that will have a class-to-staff ratio of no more than 10 to 3. The program offers a full-time behavior specialist, a full-time social worker, very limited interaction with non-special education students, constant supervision, group and individual counseling, a social worker who can perform therapeutic holds/restraints and develop/implement individual behavior plans, and a certified special education teacher. Moreover, although DCPS considers

²⁰ *Roher v. District of Columbia*, 1989 WL 330800, *3 (D.D.C. 1989) ("*Roher*"); see also, *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) ("*White*") (citations omitted) ("[e]ducational placement," as used in the IDEA, means educational program-not the particular institution where the program is implemented); *A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) ("*A.K.*") ("educational placement" as used in stay put provision refers to overall educational environment rather than precise location where disabled student educated) (citing *AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004)).

²¹ *A.K.*, 484 F.3d at 681.

²² *White*, 343 F.3d at 380.

²³ *Id.*, 343 F.3d 373.

the program to be a step down from a pure therapeutic model because it is housed in a building with general education students and the goal is to ultimately transition the students into a general education setting, a therapeutic ED program can be located in a regular school so long as appropriate accommodations are made.

The hearing officer acknowledges that DCPS failed to timely provide its selected school site for Student. However, said untimeliness resulted in only *de minimis* harm because Student missed, at most, approximately a month of services at the end of the 2008/09 school year and the half-day summer school program. Moreover, it should be noted that any denial of FAPE that occurred as a result of DCPS's failure to timely select a school for Student will be addressed herein in connection with Petitioner's claim that DCPS failed to provide Student with his required IEP services.²⁴ Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS provided Student with an inappropriate placement (or location) in this case. Moreover, faced with a choice between selecting either an appropriate DCPS school or a full-time private special education school of Parent's choice, the hearing officer must place Student in the appropriate DCPS school.²⁵

4. Relief to be Awarded

Petitioner has requested that the hearing officer award Student compensatory education services in the form of tutoring and in the amount of 2.5 hours of tutoring, 3 times per week, for two calendar years, to include both the school years and summers. Petitioner's compensatory education witness, a special education consultant who did not qualify as an expert for purposes of compensatory education, testified that she developed this proposed compensatory education plan based on the fact that Parent first requested testing of Student in 2007/08. The witness further testified that she did not take Student's new IEP into account in developing the proposed compensatory education program.

Petitioner asserts that because the hearing officer previously determined in the 3/15/09 HOD that Student was denied a FAPE, an award of compensatory education is appropriate in this case. However, the previous case involving Student has already been fully and fairly litigated, and the HOD does not indicate that Petitioner reserved the right to seek compensatory education at a later date. Hence, to the extent that an award of compensatory education may be appropriate, it must be limited to any denials of FAPE found in this case.

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.²⁶ 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

²⁴ See § 1, *supra*, where hearing officer concludes that DCPS failure to timely provide a school for Student resulted in its failure to provide him with the required special education and related services.

²⁵ See D.C. Code § 38-2561.02(c) (provided the placement is appropriate, placements are to be made in following order of priority: DCPS schools and charters, then private or residential schools in the District, then facilities outside of the District).

²⁶ *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005) ("*Reid*").
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would have accrued from special education services the school district should have supplied in the first place.²⁷

The hearing officer has determined in this case (1) that DCPS violated the 3/15/09 HOD by failing to timely conduct an FBA, with the result that Student's IEP does not contain an BIP, (2) that DCPS failed to provide Student with his required IEP services beginning on May 26 and 27, 2009, and (3) that Petitioner failed to meet its burden of proving the additional claims alleged. The hearing officer also notes that Student's IEP provides goals in the areas of mathematics, written expression, and emotional/social/behavioral skills, but Student has not yet had an opportunity to begin working on those goals due to DCPS's failure to timely provide him with an appropriate placement.

Based on these determinations and the factual circumstances of this case, the hearing officer concludes that it would be appropriate to (1) order DCPS to develop and implement a BIP for Student once the coming school year has started and Student has begun attending his new school, and (2) award Student compensatory education in the form and amount of three hours of tutoring per week and two hours of independent counseling per month, for the approximately four and one-half month period extending from the date of issuance of this HOD through the end of the first half of the 2009/10 school year. This award of compensatory education is intended to provide Student with additional support as he transitions into his new full-time ED program and school site, thereby allowing Student to obtain from the start of the 2009/10 school year the educational benefits he likely would have received at the start of the year had DCPS placed him at the new site in May 2009 and allowed him to become acclimated at the end of the 2008/09 school year.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proving that DCPS failed to comply with the 3/15/09 by failing to timely conduct an FBA and failed to provide Student with his required IEP services, but Petitioner otherwise failed to meet its burden of proof.

VII. ORDER

1. Within the first 30 days of the 2009/10 school year, DCPS shall develop and begin implementing a BIP for Student.
2. Student is hereby awarded compensatory education in the form and amount of three hours of tutoring per week and two hours of independent counseling per month, for the duration of the approximately four and one-half month period extending from the date of issuance of this HOD/Order through the beginning of Winter/Christmas Break for the 2009/10 school year. Any sessions missed during the designated period shall not be

²⁷ *Reid*, 401 F.3d at 524.
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added to the end of the period, and in no event shall the authorized period be extended beyond the beginning of the 2009/10 Winter/Christmas Break.

3. Petitioner's June 5, 2009 Complaint is otherwise **DISMISSED**, and the remaining requests for relief therein are hereby **DENIED**.

/s/ Kimm H. Massey

Kimm H. Massey, Esq.
Impartial Due Process Hearing Officer

Dated this 30th day of July, 2009.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).