

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

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

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

OSSE
STUDENT HEARING OFFICE
2011 OCT -5 AM 9:30

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a _____ year-old male student, who attends a full-time private school located outside of the District of Columbia at DCPS's expense.

On July 21, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS (1) failed to review Parent's independent comprehensive psychological assessment and convene student's MDT to review the findings of same; (2) failed to review Student's IEP on an annual basis; and (3) failed to provide an appropriate special educational placement.

As relief for these alleged denials of FAPE, Petitioner requested findings in Petitioner's favor; that DCPS immediately issue a Prior to Action Notice placing Student at a specified full-time private special education school in the District of Columbia, including transportation services and ESY; that DCPS reconvene Student's IEP team within 5 business days to review the independent comprehensive psychological; and compensatory education.

On August 3, 2011, DCPS filed its Response to the Complaint, asserting therein that the parties convened on December 10, 2011 to review the independent comprehensive psychological evaluation, an updated IEP was developed on April 7, 2011, and Student's current location of services is appropriate.

The parties concluded the Resolution Meeting process by failing to reach agreement on August 4, 2011. However, the parties elected not to prematurely end the resolution period. Therefore, the 45-day timeline will run from August 21, 2011 through October 4, 2011, which is the HOD due date.

On August 9, 2011, DCPS issued an Amended Response to the Complaint, which noted that DCPS had issued a notice of placement for Student to attend a DCPS high school, which DCPS asserted could implement the IEP and provide an appropriate setting. DCPS also issued a Second Amended Response on August 22, 2011, in which it clarified that the April 7, 2011 IEP was a draft IEP only and not a final document.

On August 17, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Petitioner withdrew its claim that DCPS failed to review, and failed to convene the MDT to review, the independent comprehensive psychological evaluation. The hearing officer issued the Prehearing Order on July 25, 2011.

By their respective disclosure letters dated August 24, 2011, Petitioner disclosed twenty-three documents (Petitioner's Exhibits 1 – 23), and DCPS disclosed nine documents (Respondent's Exhibits 1 - 9).

The hearing officer convened the due process hearing on August 31, 2011.¹ DCPS's disclosures and Petitioner's Exhibits 5-13 and 23 were admitted into the record without objection; Petitioner's Exhibits 1-4 and 14-22 were admitted into the record over DCPS's objection. During the hearing, Petitioner withdrew its claim that DCPS failed to conduct an annual review of Student's IEP. Petitioner also invoked the "stay put" provisions of IDEA, and the hearing officer ruled that "stay put" applied, with the result that Student would remain at the location of services he was attending when the Complaint was filed. Thereafter, the hearing officer received opening statements, testimonial evidence, and closing statements prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

ISSUE(S)

The issue to be determined is as follows:

1. Did DCPS fail to provide Student with an appropriate special education placement/location of services, taking into account that a change in location allegedly was recommended at a March 18, 2011 reentry meeting but DCPS did nothing to comply with the recommendation?

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

FINDINGS OF FACT²

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is sixteen years old, and he attends a full-time private special education day school located outside of the District of Columbia at DCPS's expense.³
2. Student's current IEP is dated June 29, 2010. The IEP lists Emotional Disturbance ("ED") as Student's primary disability, and it requires Student to receive 29 hours per week of specialized instruction outside general education and 60 minutes per week of behavioral support services outside general education. The IEP states that Student does not require ESY or a dedicated aide. The following classroom accommodations are included on the IEP: reading of test questions (math, science, and composition only), repetition of directions, small group testing, and extended time on subtests. The IEP also includes a Post-Secondary Transition Plan.⁴
3. Petitioner has a BIP that is dated March 9, 2010, which requires Student to work with his counselor during therapy sessions on identifying appropriate ways to communicate and on the importance of taking responsibility for his actions. The BIP lists free time in the gym, a positive call to Parent, and time with preferred staff as rewards/reinforcements. The BIP lists time-out in classroom, seclusion, exclusion, call to parent, and physical restraint as consequences.⁵
4. At Student's March 9, 2010 IEP meeting, Parent wanted to explore other potential locations of services for Student, but the team agreed that Student's current location was appropriate. Parent also attempted to discuss location of services at Student's June 2010 IEP meeting, but DCPS stated it was not prepared to have that discussion. There was no discussion of reducing Student's IEP hours at either the March 2010 or June 2010 meeting, nor was there any discussion of reducing Student's IEP hours at his December 2010 meeting.⁶
5. On March 18, 2011, Student's current private school conducted a reentry meeting for Student to return to school after he had been suspended for placing his finger in the principal's face, cursing and being defiant. The school agreed, *inter alia*, that a meeting would be set up with DCPS to discuss placement in the following weeks.⁷

² To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

³ See Complaint at 2.

⁴ Respondent's Exhibit 9.

⁵ Respondent's Exhibit 1.

⁶ Testimony of educational advocate #1.

⁷ Petitioner's Exhibit 13.

6. The DCPS Placement Monitor contacted Parent to say that she was concerned about the incident with Student and to ask what kind of placement Parent was looking for. The Placement Monitor called Parent several times and came to the home at least one time. The Placement Monitor mentioned the neighborhood DCPS school but did not say Student would have to attend that school; instead, she said that Student could go to any DCPS school and play sports.⁸
7. On March 14, 2011, DCPS issued a letter of invitation to an MDT meeting on April 26, 2011. DCPS scheduled an MDT meeting for Student that was to take place during the week of April 6, 2011. However, due to DC-CAS testing, that meeting was rescheduled to April 14, 2011.⁹
8. At Student's August 4, 2011 resolution session, DCPS issued a Prior Written Notice for Student to attend his neighborhood DCPS senior high school. The Notice indicates that the school is an appropriate location of services that can implement Student's IEP. Parent and the educational advocate were expecting a full-time setting for Student since, to their knowledge, the MDT had not reduced Student's IEP hours. However, the DCPS representative stated that there had been an April IEP meeting, at which Student's hours were reduced to 15 hours per week of specialized instruction and 30 minutes per week of behavioral support services. Neither Parent nor her advocate had heard of or attended the meeting, and the April 7, 2011 IEP DCPS provided to Parent had not been signed by Parent.¹⁰
9. The neighborhood school to which DCPS has assigned Student offers a continuum of services from inclusion to self-contained programs for ED, LD, and ID, and it also provides transition support. The school's self-contained ED academy provides out of general education services for ED students in grades 9 through 12 and up to age 22. The students presently in the program are all on the diploma track and receive instruction in co-taught classes unless the teacher is dually certified in special education and the content area. The program focuses on art integration with a strong vocational component via an automotive program that offers a certificate and a radio broadcasting program that includes producing and creating music with a sound studio.
The students arrive at the academy through a separate entrance from the rest of the school located in the rear of the building with academy staff present who try to gauge the students' temperament as they come in. The students then go to the second floor of the school, which has been renovated for the academy, where they have breakfast with social workers assigned to the breakfast area to assess the students and/or address any concerns. Thereafter, the students attend a morning meeting with the whole academy, including staff members, and the students receive information and positive affirmations in the meeting. Students are then dismissed to their classes with a printed schedule with a grid, which serves as a visual cue. Teachers greet the students at the classroom door, and each class has 3 to 5 staff members who may include a special education teacher, a

⁸ Testimony of Parent.

⁹ Respondent's Exhibit 3; Petitioner's Exhibit 15.

¹⁰ Testimony of educational advocate #2; DCPS-5.

content area teacher, a behavior tech, a teaching assistant, and a social worker. Social workers are required to observe the students in class to facilitate better FBAs and BIPs.

Students eat lunch in either the student lounge, which has flat screen televisions, or in other smaller or larger environments, and students can receive tutoring help with homework or other instruction during lunch. Students also receive therapy at the school through counseling sessions and through group activities, such as baking cookies, that attempt to get the children to socialize in different ways and receive counseling in diverse settings. The academy also offers a level system for behavior that allows students to earn privileges, such as off-campus lunches and field trips. The level system helps to monitor social/emotional progress and social workers help to monitor that as well through groups for students who don't like standard therapy. The academy focuses on facilitating pro-social coping skills throughout the day starting with the morning meetings, and it also focuses on positives and students' strengths instead of consequences and weaknesses.¹¹

10. The ED program at the DCPS neighborhood school would offer Student approximately 27.5 to 28 hours per week of specialized instruction outside general education with no interaction with disabled peers, except, for example, at a pep rally or similar event for which Parent has signed a permission slip. However, all extracurricular activities at the high school, such as sports, academic programs, band, etc., are available to all students, including special education students. There are currently 40 students in the ED program, with a projected enrollment of approximately 100 students. At present, there are no more than 6 students in the largest classes, which consist of 9th and 10th graders. Some of the classes have only 1-2 students presently, and these tend to be the 11th and 12th grade classes. The maximum class size is 16 students with 3 to 5 adults. There are 15 special education teachers assigned to the academy, and to the extent possible, each special education teacher is assigned to a particular co-taught content teacher's class.¹²
11. With respect to Student's BIP, although the neighborhood school cannot provide Student with free time in the gym as a reward pursuant to his BIP, it can offer him another area where he can engage in similar activities, and it offers a time-out/crisis room.¹³
12. Student's neighborhood DCPS school can provide him with educational benefit and can substantially implement his IEP and BIP.

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:

¹¹ Testimony of SEC.

¹² Testimony of SEC.

¹³ Testimony of SEC.

Placement

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. In this regard, a FAPE consists of special education and related services that, *inter alia*, are provided at an appropriate secondary school in conformity with an IEP. See 34 C.F.R. § 300.17. However, it should be noted that "educational placement," as used in IDEA means the overall educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) ("*White*") (citations omitted); see also, *A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) (citing *AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004)).

In this case, Petitioner is not challenging Student's overall educational program as reflected by the contents of his IEP or contending that there has been a change in placement. Instead, Petitioner is challenging the location of services DCPS has assigned for Student, contending that Student's neighborhood DCPS high school is unable to implement Student's IEP and unable to implement to implement Student's BIP because it cannot provide free time in the gym. On a procedural level, Petitioner further contends that DCPS failed to comply with a recommendation for a placement meeting that was made at Student's March 18, 2011 reentry meeting.

DCPS acknowledges that the parties agreed a change in placement would be held, but DCPS contends that for one reason or another no placement meeting was held. However, DCPS asserts that it ultimately issued a Prior Written Notice to Student's neighborhood DCPS school and that the neighborhood school can provide the instruction and services Student requires and provide Student with meaningful educational benefit.

A review of the evidence confirms Petitioner's contention that the participants in Student's March 18, 2011 reentry meeting recommended that a placement meeting be held for Student. Further review of the evidence demonstrates that DCPS attempted to conduct the recommended meeting by issuing a letter of invitation to a meeting and even scheduling and then rescheduling the meeting during April 2011. However, it does not appear that the meeting ever went forward, although the evidence does not indicate why the meeting never went forward. Nevertheless, at a resolution session on August 4, 2011, several weeks prior to the start of the current school year, DCPS issued a Prior Written Notice to Student's neighborhood DCPS school. Under these circumstances, and given that Student does not require ESY, the hearing officer concludes that if DCPS committed a procedural violation by failing to hold a placement meeting for Student, any such procedural violation did not rise to the level of a denial of FAPE. See 34 C.F.R. § 300.513(a)(2) (to constitute denial of FAPE procedural violations must impede child's right to FAPE, significantly impede parents' right to participate, or cause deprivation of educational benefit); *Lesesne v. D.C.*, 447 F.3d 828 (D.C. Cir. 2006) (procedural violations constitute viable IDEA claim only if they affected student's substantive rights).

With respect to Petitioner's substantive claim that the neighborhood DCPS school cannot implement Student's IEP, the hearing officer notes that the evidence in this case proves otherwise. Hence, the evidence demonstrates that the school offers a full-time out of general

education ED academy with, *inter alia*, counseling services, a strong vocational component, and a low staff-to-student ratio. Although the school offers 27.5 to 28 hours of instruction per week and Student's IEP calls for 29 hours per week of specialized instruction, the approximately one hour difference is *de minimis* at best, especially since Student would have no interaction with his non-disabled peers at the school unless Parent gives written permission for him to participate in an extra-curricular activity or other event such as a pep rally. Similarly, the fact that the school can implement all aspects of Student's BIP other than providing a gym where Student can receive free time as a reward is of little significance because the school can provide another area which will serve a similar function. Hence, the neighborhood school is reasonably calculated to provide Student with educational benefit, and the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS has provided Student with an inappropriate location of services. See *Matthew J. v. Massachusetts Dept. of Educ.*, 27 IDELR 339 (D.C. Mass. 1998) (citing *Florence County School District Four v. Carter*, 510 U.S. 7, 13 (1993)) (school placement was appropriate where it was reasonably calculated to enable student to receive educational benefit); *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) (provision of FAPE requires that the education to which access is provided be sufficient to confer educational benefit upon the child).

ORDER

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

1. All claims and requests for relief in Petitioner's July 21, 2011 Complaint are **DENIED AND DISMISSED WITH PREJUDICE**.

NOTICE OF RIGHT TO APPEAL

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

Date: 10/4/2011

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer