

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

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

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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE  
2011 DEC -2 AM 11:08

**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**

Student is an \_\_\_\_\_ year-old male, who attends \_\_\_\_\_ grade at a DCPS elementary school.

On September 22, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS denied Student a FAPE by failing to provide an IEP reasonably calculated to provide educational benefit, failing to provide an appropriate placement/location of services able to implement the IEP, and failing to follow proper procedure in determining the educational placement. As relief for these alleged denials of FAPE, Petitioner requested findings in its favor, funding of a placement of Parent's choosing for the remainder of SY 2011-12 with transportation services, and an MDT meeting within 30 days of Student's enrollment and attendance at the new school to review progress, revise the IEP to specifically identify the classes where Student receives specialized instruction, in what setting and how often, and revise the IEP to include social and emotional goals to address Student's depression and compensatory education services.

The parties concluded the Resolution Meeting process by failing to reach agreement on October 14, 2011, but the parties did not elect to shorten the 30-day resolution session. Hence, the 45-day timeline for this case started on October 23, 2011 and will end on December 6, 2011, which is the HOD due date.

On September 16, 2011, DCPS filed its Response to the Complaint, asserting therein that Petitioner alleged facts outside the statutory period of limitations, barred by previous settlement agreements and *res judicata*/collateral estoppel, and previously litigated and decided on May 11,

2011; the 5/11/11 HOD already decided what the IEP was required to provide for educational benefit and the current IEP comports with that; the IEP is being implemented and related services are being provided; the 5/11/11 HOD says within 10 days of the MDT meeting at which the new IEP was developed, DCPS shall provide notice of the selected placement, and DCPS complied with that; and DCPS is implementing the IEP at the current location and providing all related services, and it has not changed Student's placement to a full-time out of general education placement.

On October 26, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. The hearing officer issued the Prehearing Order on October 28, 2011.

By their respective disclosure letters dated November 15, 2011, Petitioner disclosed twenty-four documents (Petitioner's Exhibits 1 – 24) and DCPS disclosed 4 documents (Respondent's Exhibits 1 - 4).

The hearing officer convened the due process hearing on November 22, 2011.<sup>1</sup> Both parties' disclosed documents were admitted into the record without objection. Thereafter, the hearing officer received opening statements, testimonial evidence, and closing statements 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 issues to be determined are as follows:

1. Did DCPS fail to provide an IEP reasonably calculated to provide educational benefit, because (a) the IEP fails to list areas of instruction for 7 hours of specialized instruction included on the IEP, and (b) Student needs a full-time out of general education IEP, as reflected by his experience at the current school?
2. Did DCPS fail to provide an appropriate location of services that can implement the IEP, in that the IEP requires 25 hours of specialized instruction but Student only has 18 hours of instruction time available at the current school, and it is unclear whether Student is receiving any or all of the required related services?
3. Did DCPS fail to follow proper procedure in determining Student's educational placement by changing Student's placement at his DCPS school to require Student to be in the special education class all day without Parent's knowledge or involvement and without an MDT meeting?

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

## FINDINGS OF FACT<sup>2</sup>

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 an            year-old male, who currently attends        grade at a DCPS elementary school.
2. Student's primary disability is specific learning disability ("SLD").<sup>3</sup>
3. On May 11, 2011, an impartial hearing officer issued an HOD and Order that required, *inter alia*, (1) the MDT to meet with Petitioner and her advocate to review and redraft Student's IEP so that special instruction is provided in all academic classes and all classes requiring reading or mathematics, such as computer classes; (2) the MDT, Parent and her advocate, and the central office staff needed to propose a placement to review Student's IEP and determine the least restrictive environment ("LRE") for its implementation; and (3) DCPS to provide a prior notice of placement to the selected placement within 10 business days of the MDT/IEP meeting. In the HOD, the hearing officer determined that "placement involves more than the determination of the number of hours of service a student is to receive under his/her IEP. That is, the number of hours of service does not address where along the continuum of services as identified under IDEA a student's program will be implemented." The hearing officer further determined "that Student does not require removal from the general education setting for the entire school day . . . [and his] needs for a small, highly structured setting do not preclude his participation in the general education environment for nonacademic portions of the school day such as lunch and recess."<sup>4</sup>
4. On June 1, 2011, DCPS convened an MDT meeting to review and redraft Student's IEP per the May 11, 2011 HOD. The team determined that the IEP would include a total of 24.5 service hours, including 2 hours per month of adapted physical education outside general education, 7.5 hours per week of unspecified specialized instruction in general education, 10 hours per week of special education services in reading outside general education, and 5 hours per week of special education services in math outside general education. Student's ultimate IEP, dated June 2, 2011, also included 4 hours per month of occupational therapy services outside general education, 2 hours per month of speech-language pathology outside general education, and 2 hours per month of behavioral support services outside general education, for a total of 26.5 hours of special education and related services each week. The IEP includes annual goals for all related services

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<sup>2</sup> 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.

<sup>3</sup> Petitioner's Exhibit 20 at 1; Respondent's Exhibit 2 at 1.

<sup>4</sup> Petitioner's Exhibit 9 and Respondent's Exhibit 1 at 16, 17, 18-19.

and all areas of special education services, except the 7.5 hours of unspecified specialized instruction. The team determined that Student should have access to his non-disabled peers but DCPS did not have a site to offer at the time. DCPS stated that it had 10 business days, or until June 15, 2011, to make a site location determination and issue a PNOP "for another DCPS school or a site location that provides the least restrictive environment."<sup>5</sup>

5. Parent and her advocate were in agreement with the IEP at the time it was developed, but Parent indicated a desire to be included in the location of services selection process.<sup>6</sup>
6. By email dated June 7, 2011, the Compliance Case Manager ("CCM") who participated in the June 1, 2011 MDT meeting advised Petitioner's representatives that either that day or the next day she hoped to have a few site location options for Parent to consider. By email dated June 13, 2011, the CCM forwarded to Petitioner's counsel a Prior to Action Notice assigning Student to attend the DCPS school he presently attends. The email stated that the school could implement Student's IEP and would also allow Student to be with his non-disabled peers.<sup>7</sup>
7. Student began attending his current DCPS school at the start of SY 2011/12. For the first week of school, Student and the other disabled students stayed in their homeroom classes all day. For the next week or two, Student remained in his general education homeroom class for science, and the special education teacher pulled Student out of class for 2.5 hours of reading and 1 hour of math instruction daily, for a total of 3.5 hours of specialized instruction per day. Thereafter, the special education teacher and Student's homeroom teacher spoke and agreed that Student would begin staying with the special education teacher all day because he was having a hard time grasping concepts in the general education homeroom class.

For the first few weeks Student was in the self-contained special education class all day, he was with 5 to 6 students, he received 2.5 hours of language arts in the morning and after recess, he received 1 – 1.5 hours of math instruction and his specials, which totaled approximately 3.5 – 4 hours of specialized instruction each day. Then, the schedule changed again because two 1-hour reading interventions were put in place. Student participated in the first reading intervention group, which consisted of approximately 8 students in the special education class. When the second reading intervention group was receiving instruction in the special education classroom, Student went to math in his previous general education homeroom class with a mixture of general education and special education students.

Student's schedule has changed a number of times since he began attending his current DCPS school. At or around the end of September, Student began taking a "Great Sports" class on Friday afternoons for 1.75 hours, but the class was cancelled after approximately 1 month.<sup>8</sup>

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<sup>5</sup>Petitioner's Exhibit 23 at 2; Petitioner's Exhibit 20; Respondent's Exhibit 2; testimony of advocate.

<sup>6</sup>See Petitioner's Exhibit 20.

<sup>7</sup>Petitioner's Exhibits 21 and 22; Respondent's Exhibit 3.

<sup>8</sup>Testimony of special education teacher.

8. DCPS did not reconvene Student's MDT meeting in connection with any of the changes to Student's schedule during SY 2011/12 that increased or decreased the amount of time he spent in the self-contained special education class.
9. There is no evidence that Student has received any of the 7.5 hours of specialized instruction in a general education setting he is entitled to receive under his IEP to ensure that he is receiving specialized instruction in all academic classes and all classes requiring reading and math.
10. Student's current DCPS school has not fully implemented his IEP during SY 2011/12 by providing him with 24.5 hours of specialized instruction each week, despite the many changes that have been made to Student's schedule since the school year began.
11. The "Weekly Teaching Schedule" DCPS included in the administrative record for this case indicates that, with the exception of one hour spent eating lunch and having recess, Student's entire school day every day is spent receiving either specialized instruction or related services. However, this schedule does not accurately reflect Student's school day.<sup>9</sup>
12. The evidence of record is conflicting but tends to indicate that Student is receiving physical education with general education teachers and the children from his homeroom class, instead of the adaptive PE called for in his IEP.<sup>10</sup>
13. Student has been receiving all of his related services at the current DCPS school since the first or second week of SY 2011/12. Indeed, Student has been receiving 1 hour per week of speech services, instead of the 30 minutes per week of speech services called for by the IEP.<sup>11</sup>
14. Petitioner has secured an acceptance for Student to attend a private special education school located outside of the District of Columbia. The admissions staff believes that the school is appropriate for Student. The school serves preschool through high school students with language impairment, language learning disabilities, sensory motor disabilities, OHI, ADHD, and higher level autism spectrum issues. The school can serve a maximum of 60 students; there are presently 54 students at the school. The average class size is 8 – 10 students, with a certified special education teacher and an aide with a bachelor's degree in each class. The school provides both push-in and pullout related services consisting of speech pathology, occupational therapy and counseling/social work services, as well as physical therapy services if needed. The school also offers art, music, drama and library, and assistive technology is used in classes. The school utilizes the curriculum of the funding source, such as DCPS, but modifies the curriculum for the students. When Student visited the school, he was able to easily integrate into the program, he showed good attention span and work effort, and he socialized with the other students. The annual tuition at the school is \_\_\_\_\_ excluding related services, which

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<sup>9</sup> Respondent's Exhibit 4; testimony of special education teacher.

<sup>10</sup> See testimony of special education teacher.

<sup>11</sup> Testimony of special education teacher.

are offered at the following rates: speech/language services per hour; occupational therapy or physical therapy services per hour; and counseling/social work services per hour. Student would also require transportation services to attend this school.<sup>12</sup>

15. The private special education school that has accepted Student for admission is reasonably calculated to enable Student to receive educational benefit.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

#### **1. Alleged Failure to Provide an Appropriate IEP**

IDEA defines a free appropriate public education to mean special education and related services that, *inter alia*, are provided in conformity with an IEP. 34 C.F.R. § 300.17(d). The FAPE required by the Act is tailored to the unique needs of the handicapped child by means of an IEP. Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). As a result, "a student's IEP must be 'reasonably calculated to enable the child to receive educational benefits.'" *Hinson* (quoting *Rowley*, 458 U.S. at 206-7).

##### **a. Unspecified Specialized Instruction**

Petitioner has asserted that Student's IEP is inappropriate because the IEP fails to specify the areas of instruction for 7 hours of specialized instruction included on the IEP. The evidence in this case proves that Student's IEP includes 7.5 hours per week of unspecified specialized instruction in general education, even though a previous hearing officer specifically ordered DCPS to have Student's MDT redraft Student's IEP so that special instruction is provided in all academic classes and all classes requiring reading or mathematics, such as computer classes. By failing to specify the areas of instruction and/or classes to be covered by the unspecified 7.5 hours of inclusion services, the IEP fails to ensure that Student receives the additional support he needs in all classes involving reading and math, with the result that the IEP is not reasonably calculated to enable Student to receive educational benefits. Hence, this hearing officer concludes that Petitioner has met its burden of proving this claim.

As a FAPE requires specialized services to be provided in conformity with an IEP, and here, the relevant portion of the IEP is too lacking in specifics to serve as a guide for the provision of 7.5 hours of specialized instruction in general education, the hearing officer will order DCPS to specify precisely the classes and/or areas of instruction where Student will receive said specialized instruction and to do so in a manner that ensures Student will receive special instruction in all academic classes and all classes requiring reading and mathematics.

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<sup>12</sup> Testimony of Director of lower middle school at private school.

## **b. Full-Time Services**

Petitioner has further asserted that Student needs a full-time out of general education IEP, as reflected by his experience at the current school. However, the previous hearing officer specifically ruled that Student does not require removal from the general education setting for the entire school day and that his needs for a small, highly structured setting do not preclude his participation in the general education environment for nonacademic portions of the school day such as lunch and recess. Due to the frequently changing nature of Student's schedule since he began attending the current DCPS school, in addition to the deficits in the IEP noted above, Student never received the type of placement envisioned by the previous hearing officer and the record is lacking in evidence based on Student's experience at the current DCPS school that is sufficient to persuade this hearing officer to alter the former hearing officer's decision. Hence, the hearing officer concludes that Petitioner has failed to meet its burden of proving that Student requires a full-time out of general education IEP.

## **2. Alleged Failure to Propose an Appropriate Location of Services**

IDEA provides that a FAPE consists of special education and related services that, *inter alia*, are provided at an appropriate elementary school in conformity with an IEP. See 34 C.F.R. § 300.17. Hence, the determination of whether the current location of services is appropriate turns on whether the Student's DCPS school can implement his IEP. See *Hinson v. Merritt Educational Ctr.*, 579 F.Supp.2d 89, 104 (D.D.C. 2008) (to show placement is inappropriate, plaintiff must show school is unable to implement the IEP as written); *T.T. v. District of Columbia*, 2007 U.S. District Lexis (D.D.C. July 23, 2007) (plaintiffs' challenge to public schools selected by DCPS was rejected where plaintiffs could not prove public schools were unable to implement the student's IEP).<sup>13</sup>

In the instant case, Petitioner has asserted that the current location of services cannot implement Student's IEP, because the IEP requires 25 hours of specialized instruction but Student only has 18 hours of instruction time available at the current school, and it is unclear whether Student is receiving any or all of the required related services. The only evidence in this case concerning Student's receipt of related services indicates that Student has received all of his related services, and in fact, is actually receiving twice the amount of speech and language services he is entitled to under his IEP. As this evidence was uncontradicted, the evidence does not support Petitioners' claim that Student has not been receiving some or all of his related services.

On the other hand, Student's IEP calls for him to receive 24.5 hours per week of specialized instruction in adaptive PE, reading, math, and one or more unspecified areas. Petitioner has asserted that Student's schedule at the current school only allows for 18 hours of instruction time. However, the evidence in this case proves that Student's schedule has changed so

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<sup>13</sup> The case law cited in this section actually holds that where the IEP has been determined to be appropriate, the appropriateness of the location of services turns upon whether it can implement the IEP. Although the hearing officer has determined that the IEP in this case is inappropriate for failure to specify the areas of instruction to be covered by 7.5 hours of specialized instruction in general education, there has been no finding that Student requires more or less specialized instruction or related services than the IEP calls for, and the hearing officer specifically rejected Petitioner's assertion that Student requires a full-time IEP. Hence, evidence that the current location of services can implement the IEP would support a determination that the location of services is appropriate.

frequently since he began attending his current DCPS school that it is impossible to determine exactly how many hours of instruction time are available to him, although it appears that Student generally has received approximately 3.5 to 4 hours per day of specialized instruction in reading and math, for a total of approximately 17.5 to 20 hours of specialized instruction per week. The evidence also tends to indicate that Student has been receiving physical education in a general education class with his non-disabled peers instead of the adaptive physical education required under his IEP, and the evidence further suggests that Student has not received any of the 7.5 hours of unspecified inclusion services listed on his IEP. Under these circumstances, the evidence supports a finding that Student's current DCPS school has failed to implement his IEP since he began attending the school, despite the many changes to Student's schedule. Hence, the hearing officer concludes that Petitioner has met its burden of proving that the current DCPS school is an inappropriate location of services.

"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 by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *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, Westchester County v. Rowley*, 456 U.S. 176, 207)). As the evidence in this case proves that the program at the private school that has accepted Student is reasonably calculated to enable Student to receive educational benefits, given its small class sizes, certified special education teachers, and push-in and pullout related services, among other elements, the hearing officer will award Student a placement at the private school, with transportation, for the remainder of SY 2011/12.

### **3. Alleged Failure to Follow Proper Procedures in Determining Placement**

"LEAs must make proper placement decisions involving parental participation to ensure that a disabled child has access to a FAPE. The parent must have a full, meaningful opportunity to participate in the placement decision." *Long v. District of Columbia*, 780 F.Supp.2d at 59 (internal citations omitted). *See also*, 34 C.F.R. § 300.116(a)(1) (placement decision to be made by a group of persons that includes the parents).

In the instant case, Petitioner has asserted that DCPS failed to follow proper procedure in determining Student's educational placement by changing Student's placement at his DCPS school to require Student to be in the special education class all day without Parent's knowledge or involvement and without an MDT meeting. The evidence supports Petitioner's assertion. Although the evidence proves that Student spent all day in the self-contained special education class at his current DCPS school for only approximately two weeks, the evidence is nevertheless clear that DCPS made a determination to move Student from his general education homeroom class to a self-contained special education class without convening an MDT meeting and inviting Parent to participate. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proof on this claim.

#### 4. Compensatory Education

Under the theory of compensatory education, courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005). In the instant case, Petitioner has requested that the MDT be ordered to determine the appropriate compensatory education services for Student. However, as (1) the denials of FAPE identified herein began at the start of the current school year and will end within a week of the issuance of this decision, with the result that the denials of FAPE extended for less than three months, and (2) the hearing officer has awarded Student a private school placement to ensure that he receives a FAPE moving forward, the hearing officer declines to award compensatory education to Student on the ground that the private school placement will compensate Student for any denials of FAPE suffered during the first few months of SY 2011/12. See *Branham v. District of Columbia*, No. 04-7084 (D.D.C. 2005) (award of private-school placement is prospective relief aimed at ensuring child receives tomorrow the education required by IDEA); *Mr. I. and Mrs. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1<sup>st</sup> Cir. 2007) (appellate court affirmed district court's decision to decline compensatory education request where district court reasoned that IEP it ordered would necessarily take into account the identified denials of FAPE).

#### ORDER

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

1. Within 7 calendar days of the issuance of this Order, DCPS shall begin funding Student's attendance at the private school that has accepted him for admission, in the amount of less the amount of tuition applicable to the portion of SY 2011/12 that has already elapsed. DCPS shall also provide Student with transportation to and from the private school and provide funding for Student's related services at the school in the amount of per hour for speech-language services, per hour for occupational therapy services, and per hour for counseling services. DCPS shall provide the ordered funding and transportation for the remainder of SY 2011/12.
2. Approximately 30 days after Student begins attending the private school pursuant to Paragraph 1 above, DCPS shall convene an MDT meeting to (i) specify precisely the classes and/or areas of instruction where Student will receive specialized instruction, (ii) ensure that the revised IEP requires Student to receive special instruction in all academic classes and all classes requiring reading and mathematics, (iii) review Student's social/emotional goals to determine whether goals to address depression should be added; and (iv) make such other revisions to the IEP as the team deems necessary.
3. All other requests for relief in Petitioner's September 22, 2011 Complaint are **DENIED**.

**NOTICE OF RIGHT TO APPEAL**

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

Date: 12/2/2011

/s/ Kimm Massey

Kimm Massey, Esq.  
Hearing Officer