

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

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

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

2011 DEC 19 AM 9:42

STUDENT HEARING OFFICE
DSSSE

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is an _____ year-old male student, who attends a DCPS senior high school.

On October 4, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to provide a free and appropriate public education by failing to implement Student's IEP. Petitioner essentially complained that Student's IEP requires full-time out of general education specialized instruction and behavior support services outside general education, but Student has been placed in regular education classes at his DCPS high school.

On August 19, 2011, DCPS filed its Response to the Complaint, asserting that Student is in a full-time special education placement, all of his classes are outside general education, and social workers are providing counseling to Student when he attends school.

The parties concluded the Resolution Meeting process by participating in a resolution session on October 14, 2011. No agreement was reached, and the parties did not agree to shorten the resolution session. Hence, the 45-day timeline began on November 4, 2011 and will end on December 18, 2011, which is the HOD deadline.

On November 2, 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 November 8, 2011.

By cover letter dated November 9, 2011, Petitioner disclosed eight documents (Petitioner's Exhibits 1 – 8). By cover letter dated November 28, 2011, DCPS disclosed five documents (Respondent's Exhibits 1 - 5).

The hearing officer convened the due process hearing on December 5, 2011.¹ DCPS's disclosures and Petitioner's Exhibits 1-4 and 7-8 were admitted into the record without objection; Petitioner's Exhibits 5-6 were admitted into the record over DCPS's relevance objection. Thereafter, the hearing officer received opening statements, testimonial evidence, and closing statements prior to bringing the hearing to a close.

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 IDEA, 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. Has DCPS failed to implement Student's IEP because the IEP calls for 31 hours of specialized instruction outside general education and 1 hour of behavioral support services outside of general education, but Student is attending regular education classes and not receiving counseling at his DCPS school?

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 an _____ year-old male, who is attending _____ grade at a DCPS senior high school. Prior to SY 2011/12, Student attended a full-time program at a different DCPS school. However, that school closed at the end of SY 2010/11 and the program was relocated to Student's current DCPS school. As a result, Student's current school now offers an expanded academy for students with special needs who have Emotional Disturbance ("ED") as their primary disability.³
2. Student's current IEP is dated October 26, 2010. The IEP identifies Student's primary disability as ED, and it requires Student to receive 31 hours per week of specialized

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

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 Testimony of Student; testimony of Assistant Principal; Petitioner's Exhibits 1 and 8; *see* Complaint.

instruction outside general education, and 1 hour per week of behavioral support services outside general education.⁴

3. Student began attending his current DCPS school in late September/early October 2011. As of October 28, 2011, Student had been newly added to the case load of a social worker at his current DCPS high school for psycho-social counseling.⁵
4. As of November 2, 2011, Student's schedule at his current DCPS high school consisted of the following classes: Extended Literacy 9, English I, Principles of Botany, Automotive Technology I, D.C. History & Government, Algebra II & Trigonometry, Employability Skills, and Writing Workshop II-A.⁶
5. The ED program Student attends at his current DCPS high school is located in a segregated area on the ground floor of the school. However, Student's Reading Workshop and Automotive Technology classes are located outside the school building.⁷
6. The ED program Student attends at his current DCPS high school is designed to offer out of general education courses leading to a high school diploma. The program is supposed to offer co-taught classes that include a general education teacher and a special education teacher in each class, unless a teacher is dually certified in special education and the relevant content area. However, a number of Student's classes are being taught by a general education teacher only. For example, Student's Botany class has been taught by a general education teacher only since the start of SY 2011/12, Student's Automotive Technology class is taught by 2 general education teachers, each of whom teaches a portion of the students in the class, and Student's D.C. History class is being taught by a substitute. Moreover, at present, there is no teacher at all for Student's Reading Workshop class, and the teacher for Student's English class also recently left the school.⁸
7. Student's current DCPS school is not implementing his IEP because it is not providing Student with 31 hours per week of specialized instruction.
8. DCPS is in the process of trying to hire new teachers to staff the classes at the ED academy at Student's current school. A new dually certified teacher is expected to take over Student's D.C. History class soon, and an offer has been made to a special education teacher to join the general education teacher in Student's Botany class. Many of the new teachers in the program are new hires to DCPS, and DCPS is working on getting these teachers certified in the District through the reciprocity process.⁹
9. Student has been accepted for admission at a non-public special education school that offers a 100% out of general education environment and services disabled children only.

⁴ Petitioner's Exhibit 2.

⁵ Testimony of Student; Petitioner's Exhibit 3; Respondent's Exhibit 5.

⁶ Petitioner's Exhibit 4; testimony of Student.

⁷ Testimony of Student.

⁸ Testimony of Assistant Principal; testimony of Student.

⁹ Testimony of Assistant Principal.

The tuition at the school is _____ per year, including related services. The school offers small class sizes with 8 to 10 students, a behavior modification plan for each student, social-emotional staff to provide therapy, and a transitional/vocational program. A class with 9 students who all have ED as their primary disability has been identified for Student, who would have the opportunity to transition to different subjects throughout the day and participate in the transitional/vocational program. Student would also have the opportunity to receive 1-on-1 instruction as needed and to utilize computers in the school. The school can implement Student's IEP.¹⁰

10. The non-public special education school, which has accepted Student for admission, is reasonably calculated to provide Student with 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:

Implementation of IEP

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. Where, as here, there is no contention that the student's IEP is inappropriate, the determination of whether the current location of services is appropriate turns on whether the school can implement the student's 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).¹¹

In this case, Petitioner is challenging the location of services DCPS has assigned for Student, contending that the DCPS high school is unable to implement Student's IEP by providing him with 31 hours of specialized instruction per week and 1 hour of behavioral support services per week outside of general education. A review of the available evidence proves that Student's current DCPS school is failing by a significant margin to provide Student with 31 hours per week of specialized instruction outside general education. Moreover, the ED program at the current

¹⁰ Testimony of Admissions Director of non-public school; see Petitioner's Exhibit 7.

¹¹ 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.

school is in such a state of flux at present with teachers who have recently left and new teachers expected but not yet on board that the hearing officer is not persuaded that the school can begin to consistently implement Student's IEP in the near future. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proving that Student's current DCPS school is not implementing his IEP.

"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 non-public school that has accepted Student is reasonably calculated to enable Student to receive educational benefits, given, *inter alia*, its 100% out of general education environment, small class sizes, behavior modification plan for each student, social-emotional staff, and transitional/vocational program, the hearing officer will award Student a placement at the private school, with transportation, for the remainder of SY 2011/12.

ORDER

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

1. Within 10 school days of the issuance of this Order, DCPS shall begin funding Student's attendance at the non-public full-time special education 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. DCPS shall provide the ordered funding and transportation for the remainder of SY 2011/12.

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: 12/16/2011

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer