DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

[redacted]

Petitioner,

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Hearing Officer: Kimm Massey, Esq.

Case No: 2012-0680

Room Nos: 2006(11/29/12); 2003 (12/3/12)

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HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a [redacted], who presently attends a private school for disabled children located in the District of Columbia. On September 28, 2012, Petitioner filed a Complaint against DCPS, alleging that DCPS failed to (1) comprehensively evaluate Student in all areas of his suspected disabilities every three years and as conditions warranted; (2) provide Student with an individualized education program ("IEP") that is reasonably calculated to provide him with educational benefit for the school years ("SY") 2011/12 and 2012/13; and (3) provide Student with an appropriate educational placement for at least SU 2011/12.

On October 9, 2012, DCPS filed its Response, which asserted the following defenses: (1) DCPS did not fail to comprehensively reevaluate Student; (2) the other related services provided in Student's IEP are appropriate, and Student's transition plan is based on assessment data and is appropriate; and (3) Student's placement and location of service are appropriate.

The parties concluded the Resolution Meeting process by participating in a resolution session on October 17, 2012. No agreement was reached, but the parties agreed not to shorten the 30-day resolution period. Therefore, the 45-day timeline initially was set to begin on October 29, 2012 and end on December 12, 2012. However, on December 4, 2012, Petitioner filed a Motion for a Continuance due to the unavailability of co-counsel to participate in day 2 of the scheduled due process hearing for this case on December 3, 2012 because of a family emergency, which the chief hearing officer granted on December 6, 2012, with the result that the 75-day timeline for this case was extended to January 18, 2013, which is now the HOD deadline.

On October 25, 2012, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer issued a Prehearing Order on October 30, 2012.

By their respective letters dated November 21, 2012, DCPS disclosed seven documents (Respondent's Exhibits 1-7), and Petitioner disclosed fifty-four documents (Petitioner's Exhibits 1-54).

The hearing officer convened the due process hearing on November 29, 2012.[1] DCPS's disclosed documents and Petitioner's documents 1-20, 22 and 25-54 were admitted into the record without objection. DCPS objected to the admission of Petitioner's Exhibits 21 and 23 on the ground that they were not submitted to the agency and were completed after the Complaint was filed, and DCPS objected to Petitioner's Exhibit 24 on the ground that it was untimely. The hearing officer admitted Petitioner's Exhibit 24 over objection under the discretion afforded the hearing officer under 34 C.F.R. § 300.512(b)(2); the hearing officer also admitted Petitioner's Exhibits 21 and 23 for limited purposes over objection.

Petitioner's counsel advised the hearing officer that DCPS had provided independent educational evaluations, so independent evaluations were no longer being requested but Petitioner nevertheless intended to prove a denial of a free appropriate public education ("FAPE") in connection with that claim. Thereafter, the hearing officer received the parties' opening statements and Petitioner's testimonial evidence. As the time reserved for the hearing had elapsed by then, the hearing officer adjourned the hearing.

The hearing officer reconvened the hearing on December 3, 2012, but co-counsel for Petitioner was unavailable to participate in the hearing due to a family emergency. Petitioner's counsel represented by telephone that Student no longer wished to attend his unilateral placement, so Petitioner was withdrawing the request for placement at and reimbursement for the unilateral placement, and was instead requesting that DCPS convene a meeting to determine an appropriate school for Petitioner. Ultimately, Petitioner made an oral request for continuance, and the hearing officer and the parties determined that January 7, 2013 was the first available date for all concerned. Petitioner filed its formal written continuance request on December 4, 2013, and as noted above, the chief hearing officer granted the continuance by order dated December 6, 2013.

The hearing officer reconvened the hearing on January 7, 2013, at which time DCPS presented its testimonial evidence and the hearing officer received the parties' closing statements. The hearing officer then brought 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 IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

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

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS fail to comprehensively evaluate Student in all areas of suspected disability every 3 years and as conditions warranted?

2. Did DCPS fail to provide an IEP reasonably calculated to provide educational benefit for SY 2011/12 and SY 2012/13?

3. Did DCPS fail to provide an appropriate location of services for SY 2011/12 and SY 2012/13?

FINDINGS OF FACT[2]

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 a [redacted], who at the time of the due process hearing, was attending a private special education school located in the District of Columbia.[3]

2. Student has a history of retentions. Hence, he has been retained at least 5 times during his academic career.[4]

3. Student has a history of attending non-public placements.[5]

4. Student has a history of incarceration. Hence, he was incarcerated before he began attending a DCPS senior high school in SY 2011/12, and prior to that, he was in the custody of the Department of Youth and Rehabilitative Services ("DYRS").[6]

5. Student attended a DCPS senior high school from February through June of 2012 during SY 2011/12, and from late August to late September in SY 2012/13. Thereafter, Student began attending, by way of a unilateral placement, the private special education school he was attending at the time of the due process hearing.[7]

6. Petitioner did not prove, or even attempt to prove, that DCPS was the responsible LEA for Student during any part of the two year limitations period applicable to this

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[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.
[4] Testimony of psychologist.
[5] *See* Petitioner's Exhibits 29 and 32, Petitioner Exhibit 54 at 1.
[6] Testimony of Student.
[7] Testimony of Student; testimony of psychologist.

case other than February through June of 2012 and August to September of 2012. Hence, those are the only periods of time at issue in this case.

7. Student's current IEP is dated March 20, 2012. The IEP identifies Student's primary disability as Intellectual Disability (also known as Mental Retardation) (hereinafter referred to as "ID"). The IEP requires Student to receive 26 hours per week of specialized instruction, 30 minutes per month of speech-language services, and 1 hour per week of behavioral support services, with all instruction and services to be provided outside general education.

   The IEP contains annual goals in the academic areas of math, reading and written expression, as well as in the areas of communication/speech and language and emotional, social and behavioral development. The IEP indicates that Student's present levels of educational performance for the academic areas are based on evaluations conducted in 2008. The IEP states that Student's present levels of educational performance in the area of communication is based on a speech and language progress report from September 2008, but that progress report is not included in the administrative record. The source of the information in the present level of educational performance for emotional, social and behavioral development is not indicated.

   The IEP also contains a post-secondary transition plan that is based on a C.I.T.E. Learning Styles Instrument, a Self-Directed Search ("SDS") and an Interest Inventory that were administered in 2012. The transition plan goals require Student to research careers, schools and requirements of schools, and to obtain a Metro disability farecard.[8]

8. Student's goals in the area of communications on the March 20, 2012 IEP are not appropriate because they are not functional, they are too general and broad, and they are not age appropriate. The goals should address the functional skills Student needs to acquire to accomplish what he needs to do in life as a 21-year old. Student also needs help with processing.[9]

9. The transition program in Student's March 20, 2012 IEP is clearly for failure to provide appropriate goals. The plan is based on assessments that were not the type of data driven assessments needed to determine the baselines and develop goals. Moreover, the plan was not tailored individually to meet Student's needs.[10]

10. Student's most recent evaluations were conducted in November 2012, after the filing of the due process Complaint, pursuant to DCPS's October 18, 2012 written authorization for independent comprehensive psychological, vocational, and speech/language evaluations issued in connection with the resolution session meeting for this case.[11] As a result, Student's IEP team has not yet been provided with an

[8] Petitioner's Exhibit 27.
[9] Testimony of speech pathologist.
[10] *See e.g.,* testimony of DCPS nonpublic unit manager; testimony of vocational evaluator.
[11] *See* Petitioner's Exhibits 6, 22-24; Respondent's Exhibit 2.

opportunity to review the evaluation results and modify Student's educational programming accordingly.

11. Student's previous evaluations were psychological, psychiatric, and psychoeducational evaluations conducted in 2008 by DC Superior Court's Child Guidance Clinic, DC Department of Mental Health, and DYRS. Student also received an October 2008 supplement to his psychoeducational evaluation by a private assessment service on a referral from a juvenile detention facility. Student was a "committed youth" at the time of this supplement.[12]

12. The administrative record does not include a previous speech and language evaluation for Student, but the record does include previous speech and language progress reports for Student from September 2009 and June 2010.[13]

13. Student's most recent psychoeducational evaluation reveals that he has an overall IQ of 64, which is in the Extremely Low range, and his academic functioning is between the 2nd and 4th grade levels. The evaluator rendered a diagnosis of Mild Mental Retardation ("MR") and a rule out diagnosis of Posttraumatic Stress Disorder. Student's current cognitive scores are consistent with his previous evaluations (2008 IQ = 66), and his current academic functioning is substantially similar to his previous level of academic functioning (2008 academic functioning = 2nd to 4th grade levels).[14]

14. Student's weakness is his very slow processing speed, which is even slower than his cognitive ability would suggest. As a result of his very slow processing speed, it will take Student longer than his peers to understand directions and process information. This very slow processing speed causes Student to delay longer than normal in answering questions, which was evident during the due process hearing for this case and during his evaluations.[15]

15. At the end of SY 2011/12, Student earned primarily Ds and Fs as final grades at the DCPS senior high school he was attending, although Student also earned a B in English III.[16]

16. At the DCPS senior high school he attended from February to June and August to September of 2012, Student was not upstairs with the general population. Instead, he was placed downstairs with a smaller group of children who had behavior problems. These children were on medication and they acted out when they did not take their medication. Hence, there were a lot of distractions in the classroom. The other students were also much younger than Student, and some were as young as 13 and 14

[12] *See* Petitioner's Exhibits 17-20.
[13] *See* Petitioner's Exhibits 34 and 43.
[14] Testimony of psychologist; Petitioner's Exhibits 17 and 22.
[15] Testimony of psychologist; testimony of vocational evaluator; testimony of speech pathologist.
[16] Petitioner's Exhibit 46.

years old. Student did not like attending school with children who were so young, so he did not attend school every day.[17]

17. Student requires placement in a school that offers a specialized program experienced in dealing with MR and small, self-contained classes.[18]

18. Petitioner has requested compensatory education in the following forms and amounts: two hours of vocational support per week from December 1, 2012 to December 1, 2013; two hours per week of afterschool tutoring from December 1, 2012 to December 1, 2013; and a 120-hour summer program for intensive career development, including vocational support and academic remediation. However, on its face, this proposed compensatory education plan is inappropriate because it fails to link the services being requested with specific harm resulting from the alleged denials of FAPE and, therefore, fails to demonstrate how the services requested would provide the educational benefits that likely would have accrued from special education services DCPS should have supplied in the first place. Indeed, the proposed plan was based on a review of Student's academic records and the skills he does not possess, as opposed to a concentration on the alleged deficiencies resulting from the brief period Student spent at the DCPS senior high school.[19]

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 Comprehensively Evaluate

IDEA requires a public agency to ensure that a reevaluation of each disabled child occurs if the child's parent or teacher requests one, and at least once every 3 years but not more than once a year unless the public agency and the child's parents agree otherwise. 34 C.F.R. § 300.303(a)(2)-(b).

As part of any reevaluation, the child's IEP team must review existing data on the child and determine what, if any, additional data are needed to determine whether the child continues to have a disability and the educational needs of the child, the present levels of academic achievement and related developmental needs of the child, whether the child continues to need special education and related services, and whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the child's IEP and to participate, as appropriate, in the general education curriculum. 34 C.F.R. § 300.305(a). If the team determines that no additional data are needed, the public agency must notify the child's parents of that determination and the reasons for the determination, and of the right of the parents to request an assessment to determine whether the

[17] Testimony of Student; *see also*, testimony of vocational evaluator.
[18] *See* Petitioner's Exhibit 22 at 10.
[19] *See* Petitioner's Exhibit 54; testimony of DCPS nonpublic unit manager; testimony of vocational evaluator.

child continues to be a child with a disability and the educational needs of the child. 34 C.F.R. § 300.305(d)(i).

In the instant case, Petitioner argues that DCPS denied Student a FAPE by failing to conduct evaluations of Student to determine Student's level of functioning, especially since Student's previous evaluations were performed in 2008. DCPS disagrees, arguing that the IEP team determines what assessments are necessary for a student and the mere fact that Student's previous evaluations were dated 2008 does not mean evaluations were necessary if the team did not determine that additional evaluations were necessary. DCPS also points that IDEA does not require any specific assessments in an evaluation or reevaluation.

A review of the evidence in this case reveals that Student reentered the DCPS school system in February 2012. At that time, the only existing evaluations for Student had been conducted in 2008, which was more than three years earlier. Nevertheless, when DCPS convened an IEP meeting for Student in March 20, 2012 to conduct an annual review of Student's IEP, DCPS failed to conduct a reevaluation of Student. This is in clear violation of IDEA, which requires a reevaluation of each disabled child not less than once every three years. *See* 34 C.F.R. § 300.303(a)(2)-(b), *supra.*

While DCPS is correct that IDEA does not require the administration of particular assessments, IDEA does require that a reevaluation of a disabled child include a review of existing data on the child and a determination of what additional data, if any, are needed to determine appropriate educational programming for the child. *See* 34 C.F.R. § 300.305(a), *supra.* If the team determines that no additional data are needed, then the LEA must notify child's parents, or in this case the adult child, of that determination, the reasons for the determination, and the right of the adult child to request an assessment nevertheless. *See* 34 C.F.R. § 300.305(d)(i), *supra.* DCPS's failure to comply with these obligations constituted a procedural violation of IDEA.

Petitioner does not allege any specific educational harm flowing from DCPS's failure to evaluate/reevaluate Student, primarily because DCPS funded independent evaluations for Student during the course of this case and those evaluations were completed in November 2012. Instead, Petitioner indicated its intent to rely upon DCPS's failure to evaluate Student to demonstrate that Student's IEP is inappropriate. As Petitioner has asserted a separate claim based upon the alleged inappropriate IEP, the hearing officer will conduct the relevant analysis in connection with that claim. As for this claim, where no specific educational harm has been alleged, the hearing officer concludes that DCPS's procedural violation of IDEA by failing to timely reevaluate Student did not rise to the level of a denial of FAPE in this case. *See, e.g.,* 34 C.F.R. § 300.513(a)(2) (hearing officer may find denial of FAPE only where procedural inadequacies impeded child's right to FAPE, impeded Parent's opportunity to participate in decision-making, or caused deprivation of educational benefit); *Lesesne v. D.C., 447 F.3d 828 (D.C. Cir. 2006)* (only procedural violations that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable).

2. <u>Appropriateness of IEP</u>

Under IDEA, an IEP is a written statement for each child with a disability that must include, *inter alia*, a statement of the child's present levels of academic achievement and functional

performance, including how the child's disability affects the child's involvement and progress in the general educational curriculum; a statement of measurable annual goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum and to meet each of the child's other educational needs resulting from the disability; and a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or personnel supports that will provided to enable the child to advance appropriately, to be involved in and make progress within the general education curriculum and participate in nonacademic activities, and to be educated and participate with other disabled and nondisabled children. 34 C.F.R. § 300.320(a).

Overall, the requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, a disabled child's IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.* In determining whether an IEP is reasonably calculated to provide educational benefit, the measure and adequacy of the IEP is to be determined "as of the time it is offered to the student." *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *cert. denied*, 555 U.S. 1173 (2009).

In the instant case, Petitioner asserts that Student's IEP is inappropriate because it is based on outdated test data from 2008 and a 2008 progress report for speech/language services, which means that the goals are not tailored to Student's individual needs; it includes a transition plan that is not based on proper assessment data and contains inappropriate transition goals and services; and the IEP provides insufficient speech/language and behavioral support services. DCPS disagrees, arguing that the IEP is appropriate because Student's academic and cognitive levels have not changed since 2008, which means Student did not suffer any educational harm as a result of the IEP being based on older evaluations, and his transition plan was based on three different transition tools.

A review of the evidence in this case reveals that Student's goals in the area of communications on the March 20, 2012 IEP are not appropriate because they are not functional, they are too general and broad, and they are not age appropriate. Moreover, Student's transition plan is based on assessments that were not the type of data driven assessments needed to determine the baselines and develop goals, so the transition goals are inappropriate and the transition plan is not tailored to meet Student's individual needs. Based on these deficiencies, the hearing officer concludes that Petitioner has met its burden of establishing that DCPS denied Student a FAPE by failing to provide him with an appropriate IEP.

Moreover, the evidence reveals that Student's IEP is based on 2008 assessment data, but more recent data was collected in November 2012 during the course of the instant case that the IEP team has not yet had an opportunity to review and take into consideration in developing Student's educational programming. Therefore, the hearing officer will order DCPS to convene an IEP meeting for Student to review the recent evaluation data and review and revise Student's IEP as appropriate to correct the deficiencies noted above and to incorporate, as appropriate, the results of Student's recent evaluations.

3. Alleged Failure to Provide an Appropriate Location of Services

Under IDEIA, a public agency must provide an appropriate educational placement/location of services 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*, include an appropriate secondary school and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17.

In the instant case, Petitioner alleges that the DCPS senior high school DCPS assigned Student to attend in February 2012 is inappropriate for Student because it offers programming for emotionally disturbed children, while Student is ID and requires a program for ID students. DCPS has not acknowledged that the DCPS senior high school is inappropriate for Student; nevertheless, DCPS agreed at the due process hearing to find an appropriate program for Student since he has not yet aged out of special education.

The evidence in this case reveals that DCPS placed Student in a school for children with behavioral problems, instead of a school that could address his severe intellectual deficiencies. The evidence further reveals that Student requires placement in a school that offers a specialized program experienced in dealing with MR and small, self-contained classes. Under these circumstances, the hearing officer concludes that DCPS denied Student a FAPE by failing to provide him with an appropriate location of services. To remedy this denial of FAPE, the hearing officer will order DCPS to convene an IEP meeting for Student and assign Student to attend a school that offers a specialized program experienced in dealing with MR and small, self-contained classes.

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). The ultimate award of compensatory education must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Id.*

In the instant case, Petitioner has requested the following forms and amounts of compensatory education in the following forms and amounts: two hours of vocational support per week or one year; two hours per week of afterschool tutoring for one year; and a 120-hour summer program for intensive career development, including vocational support and academic remediation. However, on its face, the proposed compensatory education plan is inappropriate because, *inter alia*, it fails to demonstrate how the services requested would provide the educational benefits that likely would have accrued from special education services DCPS should have supplied in the first place.

Nevertheless, Petitioner has presented enough detailed evidence in this case to permit the hearing officer to perform the fact-specific inquiry required by *Reid* to support an award of compensatory education. As a result, the hearing officer has determined to award Student funding for the requested 120 hours of summer programming for intensive career development, which shall include vocational support and academic remediation. At Petitioner's option, said programming shall be provided by Seeds of Tomorrow, or by another provider of Petitioner's choice.

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 convene an IEP meeting for Student to (1) review the evaluation data from Student's November 2012 psychoeducational, vocational and speech/language evaluations, (2) review and revise Student's IEP as appropriate to provide Student with appropriate communication goals and an appropriate transition plan, and to incorporate, as appropriate, the results of Student's recent evaluations, and (3) assign Student to a school that offers a specialized program experienced in dealing with MR and small, self-contained classes.

2. DCPS shall provide Petitioner with funding for 120 hours of summer programming for intensive career development, which shall include vocational support and academic remediation. At Petitioner's option, said programming shall be provided by Seeds of Tomorrow, or by another provider of Petitioner's choice.

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: 1/18/2013

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