

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

Student Hearing Office
810 First Street, NE, 2nd Floor
Washington, DC 20002

OSSE
Student Hearing Office
March 08, 2013

PETITIONER,¹
on behalf of STUDENT,

Date Issued: March 8, 2013

Petitioner,

Hearing Officer: Peter B. Vaden

v.

DISTRICT OF COLUMBIA
PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

INTRODUCTION AND PROCEDURAL HISTORY

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by Petitioner (the “Petitioner” or “Mother”), under the Individuals with Disabilities Education Act, as amended (the “IDEA”), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“DCMR”). In her Due Process Complaint, Petitioner alleges that Student was denied a free appropriate public education (“FAPE”) for the 2011-2012 school year because DCPS failed to provide an appropriate

¹ Personal identification information is provided in Appendix A.

placement, failed to provide special education and related services and breached an August 2011 settlement agreement to convene an Individualized Education Program (“IEP”) team meeting.

Student, an AGE young man, is a resident of the District of Columbia. Petitioner’s Due Process Complaint, filed on December 26, 2012, named DCPS as respondent. The case was assigned to the undersigned Hearing Officer on December 27, 2012. The parties met for a resolution session on January 10, 2013 and were unable to reach an agreement. The 45-day deadline for issuance of this Hearing Officer Determination began on January 26, 2013. On January 23, 2013, the Hearing Officer convened a prehearing telephone conference with counsel to discuss the hearing date, issues to be determined and other matters.

The due process hearing was held before the undersigned Impartial Hearing Officer on February 21, 2013 at the Student Hearing Office in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. The Petitioner was represented by PETITIONER’S COUNSEL². Respondent DCPS was represented by DCPS COUNSEL.

The Petitioner testified by telephone and called as witnesses, Student and SPECIAL EDUCATION TUTOR. DCPS called no witnesses. Petitioner’s Exhibits P-1 through P-33 were admitted into evidence without objection. Petitioner’s Exhibits P-34 through P-38 were admitted over DCPS’ objection to the timeliness of prehearing disclosure. DCPS’ Exhibits R-2, R-3, R-4, R-5, R-8, R-10, R-11, R-13 and R-14 were admitted over Petitioner’s objections. DCPS did not offer Exhibits R-1, R-6, R-7, R-9, R-12 and R-15 after Petitioner noted her objections. Counsel for both parties made opening and closing statements. There was no request for post-hearing briefing.

² On the day of the hearing, Petitioner informed the Hearing Officer by telephone that she was unable to attend the hearing because she was ill. She was permitted to testify by telephone.

JURISDICTION

The Hearing Officer has jurisdiction under 20 U.S.C. § 1415(f) and DCMR tit. 5-E, § 3029.

ISSUES AND RELIEF SOUGHT

The issues alleged by Petitioner are:

- WHETHER DCPS DENIED STUDENT A FAPE BY BREACHING AN AUGUST 2011 SETTLEMENT AGREEMENT COMMITMENT TO CONVENE AN IEP MEETING WITHIN 30 DAYS OF RECEIVING IEE COMPREHENSIVE PSYCHOLOGICAL EVALUATION AND SPEECH-LANGUAGE EVALUATION, WHICH WERE FAXED TO DCPS ON JANUARY 10, 2012;
- WHETHER DCPS DENIED STUDENT A FAPE BY PLACING HIM AT FIFTH CITY HIGH SCHOOL FOR THE PERIOD MARCH 20, 2012 THROUGH THE END OF THE 2011-2012 SCHOOL YEAR, WHICH WAS AN INAPPROPRIATE SCHOOL PLACEMENT; and
- WHETHER DCPS DENIED STUDENT A FAPE BY FAILING TO PROVIDE SPECIAL EDUCATION OR RELATED SERVICES FOR THE ENTIRE 2011-2012 SCHOOL YEAR.³

For relief, Petitioner seeks an order for DCPS to fund an Independent Educational Evaluation (“IEE”) Vocational II evaluation of Student and, upon receipt, to promptly convene Student’s IEP team to review the assessment and revise Student’s IEP as appropriate. In addition, Petitioner seeks an award of compensatory education, as compensation for the harm resulting from DCPS’ alleged failure to provide special education and related services to Student for the 2011-2012 school year and failure to provide an appropriate educational placement from March 20, 2012 through the end of the 2011-2012 school year.

³ See Prehearing Order, Jan. 23, 2013. An additional issue identified in the Prehearing Order, whether DCPS denied Student a FAPE by failing to provide an educational placement for the period December 1, 2011 through March 20, 2012, was withdrawn by Petitioner at the beginning of the due process hearing.

FINDINGS OF FACT

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

1. Student is an AGE resident of the District of Columbia. Testimony of Student.
2. Student is eligible for special education and related services under the primary disability classification, Specific Learning Disability (SLD). Exhibit P-2.
3. Student's May 19, 2010 IEP, developed at FIRST CITY HIGH SCHOOL, provided Student 1 hour per week of Specialized Instruction outside general education and 1 hour per week of Specialized Instruction in general education. The IEP provided no Related Services. Exhibit P-30.
4. For the 2009-2010 and 2010-2011 school years, Student was enrolled in First City High School. Exhibit R-13. He was placed in GRADE for both years. Student had major attendance and behavior issues. During the 2010-2011 school year, he did not go to school. Student was expelled from First City High School. Testimony of Student.
5. Mother decided to enroll Student at SECOND CITY HIGH SCHOOL for the 2011-2012 school year because it was Student's neighborhood school. Testimony of Mother. In a September 28, 2011 email to COMPLIANCE CASE MANAGER, Petitioner's Counsel inquired if Compliance Case Manager ever heard back from anyone at Second City High School about Student's attending there. Compliance Case Manager responded that she had spoken with Second City High School and the school had been advised to accept Student. - but that Mother had yet gone to the school to register Student. Petitioner's counsel responded by email on October 5, 2011 that Mother was very excited that Second City High School would admit Student and she would go to the school to register him. Second City High School did not allow

Student to enroll because the school was only accepting first time Grade students, and Student would have to repeat Grade for the third time. Exhibit P-14.

6. On October 5, 2011, Compliance Case Manager informed Petitioner's Counsel by email that because Second City High School did not allow Student to enroll, Petitioner had the option of enrolling Student at THIRD CITY HIGH SCHOOL or First City High School. Exhibit P-14.

7. On October 14, 2011, Compliance Case Manager informed Petitioner's Counsel by email that Third City High School now had a cap and Student would not be able to register there, but that Student could register at First City High School at any time and DCPS would provide transportation. On October 17, 2011, a DCPS education specialist informed Petitioner's counsel by email that she would meet Mother at First City High School to register Student at a time convenient to Mother. Exhibit P-14. Mother did not enroll Student at First City High School. The evidence does not establish why Student did not enroll at First City High School.

8. On December 1, 2011, Mother agreed to enroll Student at FOURTH CITY HIGH SCHOOL. Exhibit P-11. On January 31, 2011, Mother reported that Fourth City High School told her that Student had to enroll in Second City High School. Exhibit P-13. On February 7, 2012, a DCPS representative attempted to assist Student to enroll at Fourth City High School. Exhibit P-15. Petitioner's attorney learned on March 16, 2012 that the principal at Fourth City High School never allowed Student to enroll. Exhibit P-16.

9. On March 20, 2012, DCPS issue a Prior Written Notice to Petitioner's Counsel informing Petitioner that Student's "location of services [had] been ordered to [FIFTH CITY HIGH SCHOOL] for the 2011-2012 SY." Exhibit P-17. With the assistance of a DCPS representative, Student was "officially enrolled" at Fifth City High School on March 28, 2012.

Exhibit P-19.

10. After Student enrolled at Fifth City High School, he did not attend school. Student testified that he did not feel safe there because of other students at the school who had “jumped” “his group” of people. Student did not attend school for the rest of the 2011-2012 school year. Testimony of Student.

11. Student enrolled at SIXTH CITY HIGH SCHOOL for the 2012-2013 school year. Exhibit R-2. Student’s attendance at Sixth City High School is bad. He does not want to go to school because he already failed at First City High School. Testimony of Student. As of the date of the due process hearing, Student was not attending school. Testimony of Special Education Tutor.

12. On January 2, 2013, DCPS submitted a Truancy Referral Form to the D.C. Superior Court reporting that Student had been truant 25 days between September 7, 2012 and November 13, 2012. Exhibit R-2.

13. On August 12, 2011, Petitioner filed a prior due process complaint on behalf of Student (the “August 12, 2011 Complaint”). In the August 12, 2011 Complaint, Petitioner alleged, *inter alia*, that DCPS had denied Student a FAPE by failing to evaluate him in all areas of suspected disabilities. Exhibit P-1.

14. In an August 30, 2011 Settlement Agreement (the “Settlement Agreement”) between Student’s father and DCPS, the parties agreed, *inter alia*, that:

Within 30 business days of receipt of the Independent Speech and Language Evaluation and the Independent Psychological Evaluation, DCPS will convene a MDT meeting to review both evaluations; review and revise the student’s IEP, if necessary; discuss placement, if necessary and discuss and determine compensatory education, if warranted.

Exhibit P-2.

15. The independent Psychological Evaluation was completed on or about November 14, 2011. Exhibit P-31. The independent Speech and Language Evaluation was completed on or about November 21, 2011. Exhibit P-32. Counsel for Petitioner forwarded both independent evaluations to the principal of First City High School, by facsimile, on January 10, 2012. Exhibit P-10.

16. On May 3, 2012, DCPS' Compliance Case Manager sent an email letter of invitation to Petitioner's Counsel inviting Petitioner to attend a Multidisciplinary Team ("MDT") meeting on May 22 or May 23, 2012 to discuss Student's status. DCPS did not initially receive a response from Petitioner's Counsel. DCPS proposed additional meeting dates for June 2012. Student's MDT/IEP team met to review the independent evaluations on June 6, 2012. Exhibit P-20, P-22, P-23, P-24.

17. At the June 6, 2012 meeting, the IEP team lacked existing data to determine Student's Present Levels of Performance and needs, because Student had not attended school during the 2011-2012 school year. Based upon the November 14, 2011 Psychological Evaluation, the IEP team determined that Student should receive 15 hours per week of Specialized Instruction outside general education, 6.5 hours per week of Specialized Instruction in general education, 120 minutes per month of Speech-Language Pathology and 120 minutes per month of Behavioral Support Services. Exhibit P-38.

18. At the June 6, 2012 IEP team meeting, DCPS proposed compensatory education services for Student. In a letter emailed to Petitioner's Counsel on June 12, 2012, Compliance Case Manager wrote that "these services are intended to remediate any educational harm to the student through today's date." By email on July 11, 2012, Petitioner's Counsel requested a correction that the services were "intended to remediate any education harm to the student

pursuant to the August 30, 2011 SA.” Compliance Case Manager replied by email that “‘to date’ is referring to the June 6, 2012 date that you and petitioner received the Comp Ed Authorization letter.” Petitioner’s Counsel informed Compliance Case Manager by email on July 16, 2012 that “we will treat this [Comp Ed] authorization letter as DCPS’ determination of comp. ed. pursuant to the August 30, 2011 SA. . .” Exhibit P-24.

19. Between August 2012 and December 2012. Special Education Tutor provided approximately 120-125 hours of 1:1 tutoring services to Student, under the June 12, 2012 compensatory education authorization letter. The services were provided at a library in 2 hours sessions, three times a week. According to Special Education Tutor, during the four months of tutoring, Student progressed approximately from a 6th grade equivalency level to a 7th to 8th grade equivalency level in reading comprehension, writing and math. Testimony of Special Education Tutor.

CONCLUSIONS OF LAW

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

Petitioner’s Claim for Relief

Petitioner seeks compensatory education and other relief for DCPS’ alleged denial of FAPE to Student during the 2011-2012 school year. Specifically Petitioner asserts that DCPS denied him a FAPE by failing to provide special education and related services for the entire school year, by failing to convene an IEP meeting to review Student’s independent educational evaluations within 30 days of submission to DCPS, as provided in the Settlement Agreement and by placing Student at Fifth City High School, an alleged inappropriate placement from March 20, 2012. through the end of the school year. DCPS denies that Fifth City High School was an

inappropriate placement and contends that Student has already been provided compensatory education for the alleged 2011-2012 school year violations.

Burden of Proof

The burden of proof in a due process hearing is the normally responsibility of the party seeking relief – the Petitioner in this case. *See* DCMR tit. 5-E, § 3030.3. *See, also, Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528, 536, 163 L.Ed.2d 387 (2005); *Hester v. District of Columbia*, 433 F.Supp.2d 71, 76 (D.D.C. 2006).

Petitioner, citing the *Blackman-Jones Consent Decree* (the “*Decree*”), contends that Student is entitled to a rebuttable presumption of harm for failure to receive timely implementation of the August 30, 2011 Settlement Agreement. *See Blackman v. District of Columbia*, 2006 WL 2456413, 20-22 (D.D.C. 2006). It appears that the rebuttable presumption of harm provision from the *Decree* was terminated by court order on November 22, 2011. *See Order, Blackman v. District of Columbia*, Case 1:97-cv-01629-PLF, Document 2273 (D.D.C. Nov. 22, 2011). Assuming, *arguendo*, that the rebuttable presumption of harm provision were still in force, the *Decree* applied to two classes of plaintiffs. The class to which Student claims membership consists of persons whose HODs or settlement agreements were not timely implemented. *Decree* at 10, Civ. No. 97-1629 [Dkt. No. 1762-4].⁴ To benefit from the rebuttable presumption of harm provision, the *Decree* required that an eligible class member first address compensatory education at an IEP meeting. If dissatisfied with the resolution of his request for compensatory education at the IEP meeting, the class member was allowed to then request a due process hearing. *Decree* at 22. In this case, Petitioner did address compensatory education at the June 6, 2012 IEP meeting and DCPS issued a compensatory education

⁴ On July 5, 2011, the District of Columbia was released the *Blackman* portion of the *Blackman-Jones Consent Decree*. *See Order, Blackman v. District of Columbia*, Case 1:97-cv-01629, PLF Document 2259 (D.D.C. July 5, 2011).

authorization letter. Petitioner was dissatisfied and Petitioner's Counsel notified DCPS on July 16, 2012, that, "we will treat this authorization letter as DCPS' determination of comp. ed. pursuant to the August 30, 2011 SA, as this was the requirement of the meeting." Exhibit P-24. Although not in agreement with the language of the authorization letter, Petitioner accepted DCPS' compensatory education services and Student received 120-125 hours of 1:1 tutoring.

Assuming the *Decree* were still in force, if Petitioner had been dissatisfied with the resolution of her request for compensatory education for Student's failure to receive timely implementation of the settlement agreement, she was required to request a due process hearing then – not after she accepted and Student received all of the DCPS-funded tutoring services. Therefore, even if the *Decree's* rebuttable presumption of harm provision were still in effect, I find that Petitioner and Student would not be entitled to benefit from the *Decree's* burden-shifting provision.

ANALYSIS

1. DID DCPS DENY STUDENT A FAPE BY BREACHING AN AUGUST 2011 SETTLEMENT AGREEMENT COMMITMENT TO CONVENE AN IEP MEETING WITHIN 30 DAYS OF RECEIVING IEE COMPREHENSIVE PSYCHOLOGICAL EVALUATION AND SPEECH-LANGUAGE EVALUATION, WHICH WERE FAXED TO DCPS ON JANUARY 10, 2012?

Petitioner contends that DCPS denied Student a FAPE by not convening an IEP team to review his IEE psychological and speech-language evaluations until May 2012, some four months after Petitioner's Counsel forwarded the evaluation reports to DCPS. The Settlement Agreement required DCPS to convene the IEP team within 30 days of receipt of the evaluations. The IDEA does not empower a due process hearing officer to sanction a party for violating a settlement agreement, except to the extent that a Local Education Agency's ("LEA") failure to comply with the settlement agreement results in an independent violation of the IDEA or denial

of FAPE. *See, e.g., H.C. ex rel. L.C.. v. Colton-Pierrepoint Central School District*, No. 08-4221-CV, 52 IDELR 278, 109 LRP 44855 (2d Cir. July 20, 2009) (summary order) (Hearing Officer had no authority to enforce settlement agreement - essentially a contract between the parties.) Therefore, my inquiry must be whether DCPS' alleged untimely review of the independent evaluations violated the IDEA, not whether DCPS breached the Settlement Agreement.

Under the IDEA, an LEA is obliged to assure that the IEP team reviews evaluations and information provided by the parents of a child with a disability, *see* 34 CFR § 300.305(a), and revises the IEP, as appropriate, to address the results of any reevaluation and information provided. *See* 34 CFR § 300.324(b). In this case, Petitioner's Counsel forwarded Student's independent psychological and speech-language evaluations to DCPS on January 10, 2012. DCPS did not attempt to schedule an IEP team meeting to review the evaluations until May 3, 2012.

An LEA's failure to timely convene an IEP meeting to revise a child's IEP violates the IDEA. *Cf. Foster v. District of Columbia*, Civil Action No. 82-0095, Memorandum Opinion and Order of February 22, 1982, at 4 (D.D.C.) (J.H. Green, J.) ("Any agency whose appointed mission is to provide for the education and welfare of children fails that mission when it loses sight of the fact that, to a young, growing person, time is critical. While a few months in the life of an adult may be insignificant, at the rate at which a child develops and changes, . . . a few months can make a world of difference in the life of that child." *Id.*) The violation is procedural, not substantive. *See, e.g., D.R. ex rel. Robinson v. Government of District of Columbia*, 637 F.Supp.2d 11, 18 (D.D.C.2009) (DCPS' delay in convening the team meeting amounts to a failure to meet procedural deadline.) *Cf. Smith v. District of Columbia*, 2010 WL 4861757, 3

(D.D.C. 2010) (Failure to timely reevaluate is at base a procedural violation of IDEA;) *LeSesne ex rel. B.F. v. District of Columbia*, Civil Action No. 04–620(CKK), 2005 WL 3276205, at 8 (D.D.C. July 26, 2005) (characterizing cases “where a student is seeking a reevaluation, but is already in a placement” as involving procedural violations of IDEA).

I conclude, therefore, that DCPS’ four-month delay in convening Student’s IEP team to review his independent evaluations was a procedural violation of the IDEA. Because this was a procedural violation, to establish a denial of FAPE, Petitioner was required to show that the delay affected Student’s substantive rights. *See, e.g., Taylor v. District of Columbia*, 770 F.Supp.2d 105, 109-110 (D.D.C.2011) (IDEA claim is viable only if DCPS’ procedural violations affected the student’s substantive rights.) When the IEP team finally met on June 6, 2012, it increased, substantially, Student’s special education and related services over his April 20, 2010 IEP.⁵ Student’s Specialized Instruction was increased from 2 hours per week to 15 hours per week. The IEP team also added new related services, including two hours per month of Speech-Language Pathology and two hours per month of Behavioral Support Services. I find that because DCPS’ delay in convening the IEP team resulted in a postponement, by several months, of needed updates to Student’s IEP, DCPS’ procedural violation did affect Student’s substantive rights and resulted in a denial of FAPE. *Compare D.R. ex rel. Robinson v. Gov’t of D.C.*, 637 F.Supp.2d 11, 18–19 (D.D.C.2009) (finding that the defendant’s nine-month delay in reviewing evaluations affected the student’s substantive rights because the student’s most recent IEP differed from the one previously issued.)

⁵ Neither party offered in evidence an IEP for the intervening period between April 2010 and Jun 2012. The June 6, 2012 IEP indicates that Student’s last IEP annual review meeting had been held on April 27, 2012. It seems unlikely that Student’s IEP was reviewed on that date because on May 3, 2012, Compliance Case Manager sent an email to Petitioner’s Counsel inviting him to attend an IEP meeting in May 2012 to review the IEE evaluations, review and revise Student’s IEP, if necessary and discuss compensatory education. Exhibit R-14.

2. DID DCPS DENY STUDENT A FAPE BY FAILING TO PROVIDE SPECIAL EDUCATION OR RELATED SERVICES FOR THE ENTIRE 2011-2012 SCHOOL YEAR?

Petitioner contends that DCPS denied Student a FAPE because it failed to provide special education or related services for the entire 2011-2012 school year. At the due process hearing, Petitioner withdrew her separate claim that DCPS failed to provide Student an educational placement from December 1, 2011 through March 20, 2012. Therefore, this issue is best understood as a claim that for the 2011-2012 school year, DCPS failed to implement Student's April 20, 2010 IEP⁶, which provided Specialized Instruction, but no Related Services. The IDEA is violated when a school district deviates materially from a student's IEP. *See Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (“[A] material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.”); *accord S.S. ex rel. Shank v. Howard Road Acad.*, 585 F. Supp. 2d 56, 68 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F.Supp.2d 73, 75 (D.D.C.2007). *Wilson v. District of Columbia*, 770 F.Supp.2d 270, 275 (D.D.C.2011).

The evidence in this case is that for the 2011-2012 school year, prior to October 5, 2011, DCPS failed to provide Student an educational placement because Student's neighborhood high school would not enroll him. On October 5, 2011, DCPS offered to enroll Student at First City High School. The hearing evidence did not disclose Petitioner's reason for not enrolling Student at First City High School, but whatever the reason, Petitioner has not shown that First City High School was unable or unwilling to implement Student's IEP needs. *See, Jenkins v. Squillacote*, 935 F.2d 303, 304-305 (D.C. Cir.1991) (DCPS is obligated to devise IEPs for each eligible child,

⁶ It is not clear from Petitioner's evidence what IEP was in effect for Student prior to June 6, 2012. The only IEP preceding that date offered into evidence was the April 20, 2010 IEP (Exhibit P-30).

mapping out specific educational goals and requirements in light of the child's disabilities and matching the child with a school capable of fulfilling those needs.) Student eventually enrolled at Fifth City High School on March 28, 2012, but he never attended the school. As with First City High School, Petitioner has not shown that Fifth City High School was unable or unwilling to implement Student's IEP needs.

Whether Student's not attending school after October 5, 2011 was caused by Petitioner's failure to enroll the Student in First DCPS High School, Student's unwillingness to attend school,⁷ DCPS' failure to identify an appropriate school setting, or other reasons cannot be determined from the evidence in this case. On this record, I find that Petitioner, who had the burden of proving that DCPS failed to provide Student special education for the entire 2011-2012 school year, has not met that burden, except to establish that DCPS failed to provide Student a suitable placement before October 5, 2011. I conclude therefore that DCPS denied Student a FAPE by failing to provide him special education services from the first day of school, August 22, 2011, through October 5, 2011.

3. DID DCPS DENY STUDENT A FAPE BY PLACING HIM AT FIFTH CITY HIGH SCHOOL FOR THE PERIOD MARCH 20, 2012 THROUGH THE END OF THE 2011-2012 SCHOOL YEAR, BECAUSE FIFTH CITY HIGH SCHOOL WAS AN INAPPROPRIATE SCHOOL PLACEMENT?

On March 20, 2012, DCPS issued a Prior Written Notice placing Student at Fifth City High School. Petitioner contends that Fifth City High School was an inappropriate placement because Student did not feel safe there. Student testified that when he went to enroll at Fifth City High School on March 28, 2012, he recognized other students there who had "jumped" "his

⁷ Student has not regularly attended school since the 2009-2010 school year. In *Garcia v. Board of Educ. of Albuquerque*, 2007 WL 5023652 (D.N.M. 2007), the court addressed the problem of a high school student who had a pattern of extreme truancy. The court found that the "IDEA does not provide a remedy for this kind of case - where the access to a free and appropriate public education is wide open, but the student refuses to attend school and refuses the numerous and extensive educational opportunities afforded to her." *Id.*

group.” Student did not attend Fifth City High School or any other school for the rest of the 2011-2012 school year. Petitioner contends that Fifth City High School was not an appropriate placement, because it did not provide a safe environment for Student.

It is implicit in the IDEA’s FAPE requirement that an LEA must provide a safe educational environment for every child with a disability. “A local government meets its federal and local statutory obligations to implement a student’s IEP - and thus provide a FAPE - where public placement is ‘reasonably calculated to enable the child to receive educational benefits.’” *T.T. v. District of Columbia*, 2007 WL 2111032, 9 (D.D.C.2007), quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982). The IDEA requires, *inter alia*, that an LEA provide supportive services “as are required to assist a child with a disability to benefit from special education.” *See* 34 CFR § 300.34 (Definition of Related services). A safe educational environment is a basic requirement for a child to benefit from special education. *Cf. Charlie F. by Neil F. v. Board of Educ. of Skokie School Dist. 68*, 98 F.3d 989, 993 (7th Cir.1996) (Concluding that at least in principle relief is available under the IDEA, where teacher invited her pupils to express their complaints about child with disability, leading to humiliation and fistfights, because both the genesis and the manifestations of the problem were educational.)

If an unsafe educational environment at Fifth City High School kept Student from benefitting from special education, DCPS may not have met its obligation to provide a FAPE. However, Petitioner’s evidence falls far short of establishing that Fifth City High School did not offer a safe educational environment. Student testified that he did not want go to Fifth City High School because of safety concerns. I discount this testimony because Student also did not attend First City High School during the 2010-2011 school year and he is not now regularly attending

Sixth City High School. Student did not claim to have safety concerns about either of those schools. Also, no corroborating evidence was offered that the Fifth City High School environment was unsafe for Student or that Student or Mother requested school staff to investigate his alleged safety concerns. Neither did Petitioner offer any evidence that Fifth City High School was unable to implement Student's IEP. I conclude, therefore, that Petitioner has not met her burden of proof to show that Student's placement at Fifth City High School was not reasonably calculated to enable him to receive educational benefits.

REMEDY

In this decision, I have found that Student was denied a FAPE because DCPS failed to provide him an educational placement from the beginning of the 2011-2012 school year through October 5, 2011 and because DCPS delayed, for approximately four months, convening an IEP team to review Student's IEE educational evaluations. Petitioner seeks an award of compensatory education as a remedy. DCPS responds that Student has already been provided compensatory education for its denials of FAPE during the 2011-2012 school year and Student is not entitled to additional relief.

When a material violation of IDEA occurs, a Hearing Officer has broad discretion to fashion an equitable remedy. *See* 20 U.S.C. § 1415(i)(2)(C)(iii) (“[T]he court ... shall grant such relief as the court determines is appropriate”). The proper amount of compensatory education, if any, depends upon how much more progress a child might have shown if he had received the required special education services and the type and amount of services that would place the child in the same position he would have occupied but for the LEA's violations of the IDEA. *See Walker v. District of Columbia*, 786 F.Supp.2d 232, 238-239 (D.D.C.2011) (citing *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C.Cir. 2005)). Where there has been a

previous denial of FAPE, it will be a “rare case when compensatory education is not appropriate.” *Parents of Student W. v. Puyallup School Dist., No. 3*, 31 F.3d 1489, 1496-97 (9th Cir.1994). Yet “[t]he essence of equity jurisdiction” is ‘to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.’ *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944).” *Reid, supra*, 401 F.3d at 524.

This is one of those rare cases where even though there was a denial of FAPE, an award of compensatory education is not due. “Compensatory education is, as the term suggests, educational service that is intended to compensate a disabled student who has been denied the individualized education guaranteed by the IDEA.” *Walker v. District of Columbia*, 786 F.Supp.2d 232, 238 (D.D.C.2011) (citations and internal quotations omitted.) Petitioner has established that DCPS’ violations of the IDEA during the 2011-2012 school year denied Student a FAPE. But, I agree with DCPS that Student has already been compensated. At the June 6, 2012 IEP meeting, DCPS agreed to provide Student with 120-125 hours of compensatory education. DCPS’ compensatory education authorization letter stated that the services were intended to remediate any educational harm to Student through June 6, 2012. When Petitioner’s Counsel sought a change in the authorization letter to state that the compensatory education was provided “pursuant to the 8/30/2011 SA,” DCPS refused this change. Petitioner then had the choice of rejecting DCPS’ compensatory education authorization or accepting it on the terms upon which it was offered. *Cf. Pierola v. Moschonas*, 687 A.2d 942, 947 (D.C.1997) (In fact, even if the creditor affirmatively rejects the debtor’s offer of accord and satisfaction, the accord and satisfaction will still be effective if the creditor proceeds to cash the check. . . . If he takes the satisfaction, he is bound by the accord.) Petitioner, who was represented by counsel, elected

to accept the compensatory education offered by DCPS and, in effect, “cashed the check.” Student received the benefit of publicly-funded 1:1 two-hour tutoring sessions, three times per week, for four months. Even if Petitioner had not accepted DCPS’ compensatory education authorization, her evidence does not establish that the compensatory education Student received was inadequate to compensate for DCPS’ denial of FAPE. Accordingly I decline to grant Student a compensatory education award.

IEE EDUCATIONAL EVALUATION

In his request for relief, Petitioner also requested that DCPS be ordered to fund an IEE Vocational II evaluation of Student. At the due process hearing, Petitioner adduced no evidence in support of this request. I find that Petitioner has not met her burden of proof to establish that Student is entitled to this IEE evaluation.

SUMMARY

Although I find that DCPS denied Student a FAPE during the 2011-2012 school year, Petitioner has already accepted, and Student has received, compensatory education from DCPS. Based upon the fact-specific analysis of the equities in this case, I conclude that an award of additional compensatory education relief is not warranted.

ORDER

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

All relief requested by the Petitioner in this matter is denied.

Date: March 8, 2013

s/ Peter B. Vaden
Peter B. Vaden, Hearing Officer

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).