

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

OSSE
Student Hearing Office
July 11, 2013

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a _____ year old male, who currently does not attend any school at all. On April 26, 2013, Petitioner filed a complaint against respondent DCPS, alleging that DCPS denied Student a free appropriate public education (“FAPE”) by (1) failing to identify an appropriate educational setting for Student for SY 2012/13; (2) refusing to hold a meeting to review an independent evaluation; and (3) developing an inadequate IEP. As relief for these alleged denials of FAPE, Petitioner requested a finding of a denial of FAPE, and that DCPS be required to identify an appropriate location of services after the development of a new IEP based on Student’s November 2012 psychoeducational assessment, and fund Student’s compensatory education plan, to include tutoring, therapeutic and other counseling services.

The Respondent filed its response on May 7, 2013. Therein, DCPS asserted that Student refuses to leave the house according to Parent; that Student is not enrolled because he never entered the school building even though Parent registered him; that Student was found eligible as an Intellectually Deficient (“ID”) student based on his recent psychological evaluation but he received services as an Emotionally Disturbed (“ED”) student last year; and that DCPS has full-time ID programming at Student’s neighborhood school that would be appropriate but Student must attend school.

The parties did not participate in a resolution session. The 45-day timeline began on May 27, 2013 and will end on July 10, 2013, which is the HOD date.

On June 10, 2013, the hearing officer 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 June 11, 2013.

By their respective letters dated June 19, 2013, Petitioner disclosed ten documents (Petitioner's Exhibits 1-10) and DCPS disclosed ten documents (Respondent's Exhibits 1-10).

The hearing officer convened the due process hearing on June 26, 2013, as scheduled.¹ All documents disclosed by the parties were admitted into the record without objection. The hearing officer received opening statements and testimonial evidence from the parties, then at Petitioner's request, the hearing officer instructed the parties to submit written closing statements with the following deadlines: Petitioner - June 28th; and DCPS – July 1st. The parties timely submitted the written closing statements.

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)

1. Did DCPS fail to identify an appropriate educational setting for SY 2012/13 (because Student requires a more restrictive setting)?
2. Did DCPS fail to timely hold a meeting to review Student's 11/27/12 independent psychoeducational evaluation?
3. Did DCPS develop an inappropriate IEP for Student on 3/27/12?

FINDINGS OF FACT²

1. Student is a year old male, who presently does not attend any DCPS school.
2. Student most recently attended his neighborhood DCPS high school. Student began attending the school as a grader in August of 2011 with an IEP from his previous charter school. Student's attendance was not very good during SY 2011/12, and he was also suspended on a few occasions for disruptive behavior, not getting along with peers or teachers, and not being able to sit in class for long periods of time. Toward the end of the school year, Student broke his jaw and was absent for several months as a result; however, Student returned to school for the last few weeks of the school year.³
3. Attendance interventions attempted by DCPS during SY 2011/12 included an attendance plan, several meetings with Parent, and eventually a truancy report. Hence, DCPS referred Student to DC Superior Court for truancy in March of 2012, with an allegation that Student had been truant for 33 days from September to December 2011 while enrolled at his neighborhood DCPS school.⁴

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 Parent; testimony of SEC; *see also*, Respondent's Exhibit 10.

⁴ Testimony of SEC; Respondent's Exhibit 6.

4. Student did not attend school at all during SY 2012/13. Parent enrolled Student at the neighborhood high school in August 2012, but when Student failed to attend school, DCPS dropped Student from the rolls. Parent enrolled Student again in October 2012, but DCPS once again dropped him from the rolls for failure to attend. Parent enrolled Student a final time in January 2013; nevertheless, Student did not begin attending school.⁵
5. Student's case manager at the neighborhood school made no attempts to contact Student or Parent during SY 2012/13, despite Student's non-attendance at school. The SEC at the neighborhood school made no attempts to contact Student or Parent during SY 2012/13; however, once the SEC learned in January that Parent had enrolled Student in school, the SEC began communications with Petitioner's counsel regarding an MDT meeting for Student.⁶
6. Student has had serious problems with school for quite some time, primarily due to his limited cognitive ability. Student's lack of understanding of what was going on in class contributed to his acting out behavior, lack of interest in school, and later to his lack of attendance at school.⁷
7. Student's February 24, 2012 Progress Report reveals that Student was receiving failing all of his classes during third term of SY 2011/12.⁸
8. Student's previous IEP was dated March 30, 2011. This was the IEP in effect when Student began attending the DCPS neighborhood high school at the start of SY 2012/13. This IEP identified Student's primary disability as speech or language impairment ("SLI"), and under the IEP Student was entitled to receive 20 hours per week of specialized instruction in general education and 30 minutes per week of behavioral support outside general education under the IEP. The IEP also indicated that Student required the support of a dedicated aide.⁹
9. On March 27, 2012, DCPS convened an IEP meeting for Student. Student's disability classification was changed to ED at the meeting, even though there were no meetings or evaluations conducted before the IEP meeting. Moreover, as the classification was already on the IEP when Parent received it, Parent had no change to agree or disagree with the changed classification. During the meeting, Parent asked DCPS to assist her with finding another school for Student that had no more than half of the students at the neighborhood school because a smaller school would be more appropriate for Student, but DCPS wanted to keep Student at the neighborhood school and see how things worked out for him there in regular education before making any changes.¹⁰
10. Student's most recent IEP is dated March 27, 2012. The IEP identifies Student's primary disability as ED, and it requires Student to receive 10 hours per week of specialized instruction in general education, 10 hours per week of specialized instruction outside general education, and 30 minutes per week of behavioral support services outside

⁵ Testimony of Parent.

⁶ Testimony of SEC.

⁷ Testimony of clinical psychologist.

⁸ Petitioner's Exhibit 3; Respondent's Exhibit 2.

⁹ Petitioner's Exhibit 1; Respondent's Exhibit 1.

¹⁰ Testimony of Parent.

general education. The IEP indicates that Student does not require a dedicated aide or extended school year services.

The IEP contains goals in the academic areas of Mathematics, Reading, and Written Expression, as well as goals in the area of Emotional, Social and Behavioral Development. The Present Level of Educational Performance (“PLOP”) section for each academic area contains the relevant scores for that particular area from Student’s March 19, 2013 Woodcock Johnson Achievement Test. The PLOP for mathematics and written expression also reference Student’s failing grades. All three PLOPs for the academic areas end with the following sentence: “[Student] as (sic) multiple absences and suspension (sic) which have had a negative impact on his success within the classroom.”

With respect to the area of Emotional, social and Behavioral Development, the PLOP references Student’s poor attendance, poor behavior, and notes that Student has a difficult time managing his emotions which results in frequent confrontations with staff. Student’s sole annual goal in this area requires Student to learn and demonstrate the skills needed to reduce his social/emotional deficits, which is to be evidenced by mastering objectives concerning the following: improving attendance and promptness to class; following directives based on school rules that are given by any school staff member; utilizing anger management techniques; appropriately verbalizing feelings; and demonstrating an understanding of his own limitations and asking for assistance when needed.

The IEP also contains a post-secondary transition plan, which contains no student input, assessment results, long range or short-term goals, or any other substantive information due to Student’s “excessive absences and truancy issues.”¹¹

11. Student has a Full Scale IQ of 63, which is in the Extremely Low range. Student also has Limited to Very Limited reading, math and written language skills. Overall, Student’s academic ability is very poor.¹²
12. During a November 2012 psychoeducational evaluation, which resulted in a diagnosis of mild mental retardation (“MR”) for Student, as well as diagnoses by history of mood disorder NOS and attention deficit hyperactivity disorder, Student often complained that he finds school to be too difficult. More specifically, Student stated that he found school to be a difficult place, where he didn’t understand what was going on and felt he needed help but was unable to express that, which led to Student ultimately not attending school.¹³
13. There is no documentary or testimonial evidence in the administrative record indicating exactly when Petitioner provided DCPS with a copy of Student’s November 2012 independent evaluation. However, there is evidence that Petitioner sent the independent evaluation to DCPS in or about January of 2013.¹⁴
14. DCPS initially declined schedule a meeting to review Student’s independent evaluation unless Parent enrolled Student at the neighborhood school and/or Student began attending school. However, on February 25, 2013, DCPS sent a Letter of Invitation (“LOI”) to an MDT meeting for Student to Petitioner’s counsel. Counsel acknowledged receipt of the letter by February 27, 2013 email. On March 5, 2013, DCPS emailed counsel that it was

¹¹ Petitioner’s Exhibit 4; Respondent’s Exhibit 3.

¹² Petitioner’s Exhibit 5; testimony of clinical psychologist.

¹³ Petitioner’s Exhibit 5; testimony of clinical psychologist.

¹⁴ See Petitioner’s Exhibit 7 at 8 and 12.

still waiting for confirmation of the meeting date and time. Ultimately, the parties agreed to convene the meeting on March 20th.¹⁵

15. On March 20, 2013, DCPS attempted to convene the scheduled MDT meeting, but Parent did not appear and Petitioner's counsel had no documentation giving her permission to proceed, so the parties agreed to reconvene at 9:30 a.m. on either April 10th or 12th, depending upon Parent's confirmation.¹⁶
16. DCPS attempted to convene the MDT meeting at 9:30 a.m. on April 12, 2013, for the express purpose of reviewing Student's independent psychological evaluation and reviewing/revising Student's IEP if needed. However, Parent arrived one hour late at 10:30 a.m., so the meeting was rescheduled for April 19, 2013.¹⁷
17. On April 19, 2013, DCPS convened the MDT meeting for Student with Parent in attendance and Petitioner's counsel participating by phone. The team reviewed Student's independent evaluation and agreed with the recommended diagnosis of ID. Petitioner's counsel disagreed that the neighborhood DCPS high school could meet student's needs, but the DCPS school psychologist did not feel that a full-time IEP was warranted due to poor attendance. DCPS suggested that Parent look into wraparound services outside of school for Student, and DCPS asked Parent to bring Student to school and/or encourage his attendance. Ultimately, DCPS determined that the neighborhood high school would remain Student's location of services. DCPS further stated that no changes could be made to Student's IEP because of lack of access due to non-attendance, but Student's services could be changed after 30 days of attendance by Student. Parent and her counsel disagreed with DCPS's decisions regarding location of services and the lack of revisions to the IEP.¹⁸
18. Parent, through Petitioner's counsel, has asked DCPS, via the SEC at Student's school, for Student's records many times, but DCPS has been unable to provide Student's records.¹⁹
19. Now that Student has been gone from school for an entire school year, he needs individualized support to help draw him back into school so that he re-engages and feels comfortable in school dealing with the deficits that he knows he has. Student also needs much smaller classes, individual therapy for at least one to two hours per week, and a third party monitor or community support worker to help him get to school.²⁰
20. As compensatory education for the alleged denials of FAPE in this case, Petitioner has requested: the provision to Parent of a full set of Student's academic records; an FBA to address truancy, academic failure, confrontations within the school environment, and other behaviors that interfere with Student's ability to access school; a BIP based on the FBA; a vocational assessment, which can be a powerful tool for helping Student re-engage in school by helping him make a connection between school and his future; an MDT/IEP meeting to review all evaluations and applicable records, update the IEP, including the related services and transition plan, update the graduation plan, and ensure

¹⁵ Respondent's Exhibits 5 and 7.

¹⁶ Respondent's Exhibit 6.

¹⁷ Respondent's Exhibit 7.

¹⁸ Respondent's Exhibit 9.

¹⁹ Testimony of SEC.

²⁰ Testimony of clinical psychologist.

Student's needs are being addressed; school engagement services consisting of mentoring services in the amount of 4 hours per week for 6 months and then 2 hours per week for 6 months at a cost of \$65 per hour, and counseling services in the amount of 2 hours per week for 6 months at a cost of \$95 per hour; and a credit recovery program with special education support, to include summer credit recovery in the amount of 1 credit (220 hours of tutoring and \$350 per .5 credit) and SY 2013/14 school year credit recovery in the amount of 2 credits to include (5 hours per week of tutoring during the school year and \$350 per .5 credit).

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:

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner's claims.

Educational Setting

Under IDEIA, 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*, include an appropriate secondary school and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17.

Each public agency must ensure that a continuum of alternative placements is available to meet the needs of disabled children for special education and related services. The continuum must include alternative placements such as instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and must make provision for supplementary services, such as resource room or itinerant instruction, to be provided in conjunction with regular class placement. 34 C.F.R. § 300.115.

In the instant case, Petitioner argues that Student required a more restrictive setting for SY 2012/13 than the large neighborhood senior high school he was assigned to attend with an IEP that provided for only 10 hours per week of specialized instruction in general education, 10 hours per week of specialized instruction outside general education, and 30 minutes per week of behavioral support services outside general education, without the dedicated aide that was required under his previous IEP. In support of this argument, Petitioner points out that Student failed to make academic progress, and therefore received no educational benefit, at the neighborhood school during SY 2011/12. Petitioner also argues that Student was so completely alienated from the educational environment by the end of SY 2011/12 that he failed to attend school at all during SY 2012/13, but instead of addressing the situation by providing a more restrictive setting for Student, DCPS unilaterally dropped him from the rolls twice for non-attendance.

DCPS disagrees with Petitioner's position, arguing that DCPS has tried to convince Student of the importance of an education, but Student is a _____ year-old who has decided that he would

rather not attend school, and DCPS cannot be at Student's home in the mornings to force him to go to school. DCPS notes that it referred Student to the D.C. Superior Court's truancy program so that he could receive truancy assistance from a probation officer, and it held two or three attendance meetings to address Student's truancy problem during SY 2011/12, but DCPS is unable to point to any efforts it made to re-engage Student in the educational process during SY 2012/13, the year at issue in the instant Complaint.

A review of the evidence in this case demonstrates that during SY 2011/12 at the neighborhood DCPS high school, Student exhibited poor attendance and disruptive behavior that resulted in several suspensions, and Student failed to make academic progress. Nevertheless, DCPS reassigned Student to attend the same educational placement for SY 2012/13. When Student failed to attend the school at all during SY 2012/13, DCPS did not attempt to contact Student/Parent to address the truancy or explore whether a different educational setting might produce a better result. Instead, DCPS unilaterally dropped Student from the school's rolls on two consecutive occasions. Parent requested a smaller setting for Student at the MDT meetings DCPS held in March of 2012 and April of 2013, but DCPS determined each time that the neighborhood school would remain Student's assigned location of services. Indeed, even after Student's disability classification was changed to ID in April of 2013, DCPS made no attempt to move Student to an ID program to better meet his needs, even though Student's DCPS neighborhood high school offers full-time ID programming. Ultimately, Student did not attend even one day of school during SY 2012/13, with the result that he received no educational benefit at all from the assigned school, and DCPS did nothing other than repeatedly state that Student needed to come to school and avail himself of the services being offered before DCPS could determine whether Student required different programming or a different educational setting.

Based on the evidence outlined above, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to provide Student with an appropriate educational setting for SY 2012/13. *See Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176, 200 (1982) (implicit in the Congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child).²¹ The hearing officer will, therefore, require DCPS to identify an appropriate educational setting/location of services for Student for SY 2013/14.

Evaluation Review

Under IDEA, each public agency must ensure that a disabled child's IEP team reviews the child's IEP periodically, but not less than annually, and revises the IEP as appropriate to address, *inter alia*, the results of any reevaluation and information about the child provided by the parent. *See* 34 C.F.R. § 300.324(b)(1).

In the instant case, Petitioner argues that DCPS unduly delayed scheduling a meeting to review Student's independent evaluation, as requested by Parent, while DCPS argues that DCPS scheduled the requested meeting multiple times only to have Petitioner repeatedly fail to timely show up.

²¹ With respect to DCPS's evidence and argument that Student failed to register at the DCPS neighborhood school during SY 2012/13, the hearing officer notes that DCPS's obligation to make FAPE available to each disabled child residing in the District is triggered by the child's residency, not his enrollment or registration. *See D.S. v. District of Columbia*, 54 IDELR 116 (D.D.C. 2010).

A review of the evidence in this case demonstrates that Petitioner provided Student's independent evaluation to DCPS in or about January 2013, and DCPS initially declined to schedule a meeting to review the evaluation unless Parent enrolled Student at the neighborhood school and/or Student began attending school. However, on February 25, 2013, DCPS began making efforts to schedule the requested meeting. Thereafter, Parent failed to attend the first scheduled meeting and arrived an hour late for the second scheduled meeting, with the result that the meeting ultimately did not take place until April 19, 2013. Hence, the evidence reveals that DCPS and Parent are equally responsible for the MDT's delay in reviewing Student's independent evaluation, and the hearing officer concludes that Petitioner has failed to meet its burden of proof on this claim. *See e.g., J.J. v. District of Columbia*, 768 F. Supp. 2d 214 (D.D.C. 2011) (behavior of parent and her attorney that caused a delay in convening a meeting was not to be held against LEA).

IEP

The FAPE required by IDEA is tailored to the unique needs of a disabled child by means of the IEP. *See Rowley, supra*, 458 U.S. 176. Hence, IDEA defines a FAPE to mean special education and related services that are provided, *inter alia*, in conformity with an IEP. *See* 34 C.F.R. § 300.17(d).

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." *Rowley*, 458 U.S. at 203. Hence, the IEP, and therefore the personalized instruction, . . . should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.* at 203-4. 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 argues that Student's March 2012 IEP contained an insufficient amount of services, did not contain sufficient data in the PLOP sections, and failed to address Student's truancy and behavior problems. DCPS disagrees, arguing that the IEP was reasonably calculated to provide Student with the required floor of educational benefit at the time it was developed.

A review of the evidence in this case reveals that at the time the March 2012 IEP was developed, Student was exhibiting poor attendance and disruptive behavior that had resulted in several suspensions, and he was failing all of his classes. Nevertheless, DCPS did not increase the amount of specialized instruction or behavioral support it would provide Student each week, although DCPS did determine to provide half of the specialized instruction – ten hours each week -- outside general education. Moreover, DCPS eliminated from Student's IEP the requirement that he be provided with a dedicated aide, DCPS changed Student's disability classification from SLI to ED without any evaluation or other identified data to support that change, the IEP does not include a BIP to address Student's disruptive behaviors, and the transition plan in the IEP contains no student input, assessment results, long range or short-term goals, or any other substantive information. Under these circumstances, the evidence proves that Student's March 2012 IEP was not reasonably calculated to provide Student with educational benefit at the time it was developed. Hence, the hearing officer concludes that Petitioner has met its burden of proof on this claim, and the hearing officer will require DCPS to convene a meeting

to revise Student's IEP so that it is reasonably calculated to provide Student with educational benefit, taking into account the results of his most recent psychoeducational assessment.

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 every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award 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.* at 524.

In the instant case, Petitioner has included in the record a proposed compensatory education plan and testimony in support thereof. Upon consideration of the plan and supportive testimony, the hearing officer concludes that an award of the following components of the plan will provide the educational benefits that likely would have accrued to Student from the special education services DCPS should have supplied in the first place: the provision to Parent of access to Student's academic records; an FBA; a BIP; a vocational assessment; and school engagement services consisting of mentoring services in the amount of 4 hours per week for 6 months and then 2 hours per week for 6 months at a cost of \$65 per hour. Therefore, the hearing officer will award these services to Student herein as compensatory education.

ORDER

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

1. As compensatory education in this case, DCPS shall provide Petitioner with the following items: access to Student's academic records; an FBA; a BIP; a vocational assessment; and school engagement services consisting of mentoring services in the amount of 4 hours per week for 6 months and then 2 hours per week for 6 months at a cost of \$65 per hour. The FBA, BIP and vocational assessment shall be completed within 30 calendar days of the issuance of this Order.
2. Within 15 calendar days of completion of the FBA, BIP and vocational assessment ordered above, DCPS shall convene an MDT meeting to (i) revise Student's IEP so that it is reasonably calculated to provide Student with educational benefit, taking into account the results of his most recent psychoeducational and other assessments, and (ii) identify an appropriate educational setting/location of services for Student for SY 2013/14.

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: 7/10/2013

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