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

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Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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# HEARING OFFICER DETERMINATION

## BACKGROUND AND PROCEDURAL HISTORY

Student is a year-old adult male student, who is currently attending a full-time private school as a unilateral placement.

On May 16, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS denied Student a free appropriate public education ("FAPE") by failing to provide Student with an appropriate placement. As relief for this alleged denial of FAPE, Petitioner requested reimbursement for Student's unilateral placement, as well as funding for and transportation to the unilateral placement for, at a minimum, SY 2011/12.

On May 26, 2011, DCPS filed its Response to the Complaint. In the Response, DCPS asserted that it provided Student with a FAPE at all times, that Petitioner failed to give proper notice of the unilateral placement, and that tuition reimbursement is not warranted. DCPS further asserted that it provided Student with a FAPE at a specified private school until April 5, 2011, but Student only went to school for 14 days between October 2010 and April 2011 despite DCPS's efforts to encourage attendance, so DCPS determined that the private school was no longer an appropriate location and placed Student at his neighborhood DCPS school.

On June 16, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Petitioner acknowledged that it failed to provide a 10-day notice of Student's unilateral placement but asserted that DCPS had notice at least by the date of the Complaint. Petitioner also disputed DCPS's position that Student's neighborhood DCPS school can provide him with the full-time

specialized instruction his IEP requires. The hearing officer issued the Prehearing Order on June 16, 2011.

By their respective disclosure letters dated July 7, 2011, Petitioner disclosed eighteen documents (Petitioner's Exhibits 1 – 18), and DCPS disclosed six documents (Respondent's Exhibits 1 – 6).

The hearing officer convened the due process hearing on July 14, 2011.[1] Respondent's Exhibits and Petitioner's Exhibits 1-5, 9, 12 and 15-18 were admitted into the record without objection. Petitioner's Exhibits 6, 10-11 and 14 were admitted over DCPS's relevance objection. Petitioner's Exhibits 7-8 and 13 were voluntarily withdrawn by Petitioner after DCPS objected to the documents on relevance grounds.

The hearing officer received opening statements and Petitioner's testimonial evidence, then DCPS made a motion for a directed finding. After receiving argument for and against the motion, the hearing officer denied the motion based upon the documentary evidence. Thereafter, the hearing officer received DCPS's testimonial evidence and closing statements from both parties prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

## ISSUE(S)

The issue to be determined is as follows:

1. Did DCPS fail to provide an appropriate location of services for Student from April of 2011 moving forward?

## FINDINGS OF FACT

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 Student is a year-old adult male student. During the initial portion of SY 2010/11, Student attended one private full-time special education school at DCPS's expense. Then Student asked to be transferred to another private school, and pursuant to an October 20, 2010 Prior to Action Notice, Student began attending a second private full-time special education school at DCPS's expense in November 2010. Thereafter, between November 16, 2010 and April 5, 2011, Student accrued 64

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

unexcused absences and 4 excused absences from the second private school, for a total of 68 absences.[2]

2. Student has attended grade twice and will be in the grade for the third time during SY 2011/12. Student presently resides with his mother and has joint custody of his 19-year old son.[3]

3. Student's current IEP is dated April 5, 2011. The IEP identifies Student's primarily disability as specific learning disability ("SLD") and requires Student to receive 26.5 hours per week of specialized instruction outside general education and .75 minutes per day of behavioral support services outside general education.[4]

4. On April 5, 2011, DCPS convened an MDT meeting for Student. At the meeting, the team noted that Student had accumulated 68 absences from school, that all rights under IDEA had transferred to Student when he turned 18, that Student was over 18 and electing not to attend school, that Student had also elected not to attend the MDT meeting although he had been notified through 3 modalities, and that DCPS had made weekly attempts to get Student to attend school. The LEA determined to assign Student to assign his home school and instructed the private school Student had been attending to stop billing DCPS and discharge Student immediately. DCPS indicated that when Student decided he wanted to begin attending school, he could attend his home school and DCPS would conduct a 30-day review. However, DCPS did not provide any details concerning the special education program at, or any other aspects of, the neighborhood school, as there was no discussion about the neighborhood school and what it could offer.[5]

5. Student acknowledges that the LEA Progress Monitor for the second private school he attended at DCPS's expense during SY 2010/11 called him frequently during his tenure at that school. According to Student, he and the Progress Monitor primarily talked about Student's transportation and how he was doing in school.[6]

6. On April 5, 2011, DCPS issued a Prior Written Notice indicating that the private school Student was attending at the time was no longer appropriate because Student was not making himself available to benefit from the special educational services being provided. Also on April 5, 2011, DCPS issued a Prior to Action Notice changing Student's location of service to his neighborhood DCPS school.[7]

7. The DCPS Progress Monitor for Student's second private school during SY 2010/11 issued the Prior Written Notice for Student's neighborhood DCPS school after speaking with the SEC at the neighborhood school about Student's IEP. The SEC advised the Progress Monitor that the school could implement the IEP. The neighborhood high

[2] Testimony of Student; testimony of DCPS Progress Monitor; Petitioner's Exhibit 3; Respondent's Exhibit 5.
[3] Testimony of Student.
[4] Respondent's Exhibit 1.
[5] Respondent's Exhibit 2; testimony of advocate.
[6] Testimony of Student.
[7] Respondent's Exhibit 4.

school serves ED and LD students, and it offers all the required courses a student needs to earn a DCPS diploma. However, the Progress Monitor is not sure whether Student would have been placed in a self-contained class at the neighborhood school, or a serlf-contained class with some inclusion. Moreover, the Progress Monitor believes Student would have had lunch, recess, and his electives with non-disabled peers. The SEC told the Progress Monitor that there would be 8 to 13 students in Student's class, and that there would be a 30-day review meeting to determine whether Student continued to require the amount of behavioral services listed on his IEP.[8]

8. Prior to issuing the Prior Written Notice to Student's neighborhood school, the DCPS Progress Monitor referred Student to an alternative program that Student could have attended for an additional year to earn a Certificate of Attendance and on-the-job training, even though the Progress Monitor was aware that Student is on the diploma track.[9]

9. Petitioner's educational advocate contacted a former colleague, who works as an educational aide at Student's neighborhood DCPS high school, and told the aide of Student's background. The aide informed the advocate that LD students can obtain a diploma from the neighborhood school if they go to regular education courses for core content because they need to earn Carnegie units, which led the advocate to conclude that the neighborhood school would provide Student with a combination of inclusion services and resource classes. The aide informed the advocate that there is no self-contained LD program at the neighborhood school, and one of the advocate's current colleagues from her office also advised the advocate of the lack of a self-contained program at the neighborhood school. However, the advocate never contacted the SEC at the neighborhood school to inquire about possible implementation of Student's program, nor did the advocate ask the LEA Progress Monitor who had worked with Student at his last private school about whether the neighborhood school could implement Student's IEP. As a result, the advocate has never officially learned whether the neighborhood school has a program that can meet Student's needs because she has not talked to any of the officials at or for the school.[10]

10. Student believes that because of his LD, it takes him a while to understand things. He feels that he cannot learn when there are a lot of people around, because he gets distracted or frustrated. Hence, Student always tries to get in a small setting. Student does not believe his neighborhood DCPS high school is a good school for him because he feels the school is too violent, has too many offenders, is too large, and is too populated.[11]

11. Subsequent to Student's April 5, 2011 MDT meeting, Parent found Student's current unilateral placement, and the advocate learned from Parent on or about May 26, 2011 that Student had begun attending the unilateral placement. On May 26, 2011, Petitioner's educational advocate sent an email to the Progress Monitor for Student's second private school during SY 2010/11. The email inquired to whom Student's case had been

[8] Testimony of DCPS Progress Monitor.
[9] Testimony of DCPS Progress Monitor.
[10] Testimony of advocate.
[11] Testimony of Student.

assigned and indicated that the advocate needed to set up a placement meeting for Student because he had begun attending another school. The email did not indicate what school Student was attending. Between the April 5, 2011 MDT meeting and the advocate's May 26, 2011 email, the advocate never contacted DCPS to discuss placement or placement options for Student.[12]

12. The staff at the unilateral placement conducted an interview of Student in mid-April 2011 and later sent an acceptance letter to Parent and the educational advocate. Student began attending the unilateral placement in May, approximately 2-3 weeks after the interview. Hence, Student attended the unilateral placement for approximately 1½ months at the end of SY 2010/11. The Director of Admissions at the unilateral placement told the DCPS Progress Monitor assigned to the unilateral placement that Student had been accepted to the program, but the Director of Admissions does not recall exactly when he shared this information with the Progress Monitor. Moreover, the Director of Admissions never sent a copy of Student's acceptance letter to DCPS or the DCPS Progress Monitor.[13]

13. Student and/or his representatives did not provide DCPS with 10-day notice of his intent to begin attending the unilateral placement.

14. Student likes his current unilateral placement, where he is learning auto mechanics that he intends to use to support his family. Student believes his attendance at the school has been good, except for on the two occasions when he was locked up. Student has learned to do a full tune-up and other helpful information in the auto mechanics program. Student is working on a high school diploma at the school, and he is scheduled to graduate at the end of SY 2011/12 because he has 14 credits.[14]

15. The most recent educational evaluation included in the record for Student is dated June 4, 2010, and was administered when Student was 18 years old. Student's performance on the Woodcock-Johnson III Tests of Achievement administered during the evaluation resulted in the following grade equivalencies ("GE"): Oral Language – 12.9 GE (Average range); Broad Reading – 3.0 GE (Very Low range); Broad Math – 6.9 GE (Low Average range); Broad Written Language – 2.7 GE (Very Low Average range); Academic Skills – 4.0 GE (Very Low range); Academic Fluency – 2.9 GE (Very Low range); and Academic Applications – 4.3 GE (Low range).[15]

16. The most recent comprehensive psychological evaluation included in the record for Student is dated December 30, 2009, and was administered when Student was 17 years old. The evaluation included intelligence testing, the Test of Variables of Attention, Conners' Continuous Performance Test, Mesulam's Verbal and Nonverbal Cancellations Test, Conners' Teacher Rating Scale, BASC-2 Teacher Rating Scale and Self-Report, Behavior Rating Inventory of Executive Function-teacher form, the Adolescent Psychopathology Scale, and the Rorschach Inkblot Test.

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[12] Petitioner's Exhibit 17; Testimony of advocate; testimony of Student.
[13] Testimony of Director of Admissions at the unilateral placement.
[14] Testimony of Student.
[15] Petitioner's Exhibit 5.

Student's performance on the Wechsler Adult Intelligence Scale III resulted in a Full Scale IQ of 72 (Borderline range), a Verbal IQ of 75 (Borderline range), and a Performance IQ of 73 (Borderline range). On the WISC-IV factors, Student obtained a Verbal Comprehension Index (82) and Perceptual Organization Index (78) scores in the Borderline range, a Working Memory Index score (61) in the Mentally Retarded range, and a Processing Speed Index score (81) in the Low Average range, which led the evaluator to opine that Student's true overall intellectual ability probably better estimated by his Verbal Comprehension score than his Full Scale IQ score.

Ultimately, the evaluator rendered the following diagnoses on Axis I: Learning Disorder Not Otherwise Specified; Attention Deficit Hyperactivity Disorder, predominantly inattentive type; and rule out Somatization Disorder.[16]

17. At the time of Student's previous MDT meeting on May 19, 2010, Student was attending the same full-time private special education school he attended at the start of SY 2010/11. The team members from that private school noted Student's attendance issues, and Student's clinical therapist stated that he had checked out and was not vested in the programming. Nevertheless, the team was of the opinion that Student continued to need a small therapeutic milieu with a small student to teacher ratio that could address his academic needs. DCPS took the position that Student could access the general education curriculum with his non-disabled peers and that Student no longer required a therapeutic setting to access the general education curriculum. In taking this position, DCPS noted Student's failure to take advantage of the programming that was being offered to him at the private school he was attending at DCPS's expense. The DCPS/LEA Progress Monitor wanted to reduce the IEP hours for Student based on her opinion that Student could access some of his classes with his non-disabled peers, but the rest of the team were not in agreement. In the end, Student agreed to go to school on time and attend all of his classes.[17]

18. On May 19, 2010, DCPS issued a Prior Written Notice indicating that Student's location of services was his neighborhood DCPS high school, which the Notice indicated was a placement in a combination and resource setting.[18]

## 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. Location of Services

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.

[16] Petitioner's Exhibit 9.
[17] Petitioner's Exhibit 6.
[18] *Id.*

If an adult student with a disability, who previously received special education and related services under the authority of a public agency, enrolls in a private school without the consent of or referral by the public agency, a hearing officer may require the agency to reimburse the student for the cost of that enrollment if the hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and the private placement is appropriate. 34 C.F.R. § 300.148(c). However, such reimbursement may be reduced or denied if, *inter alia*, at least 10 business days prior to the removal of the student from public school the student did not give written notice to the public agency of his/her rejection of the placement proposed by the public agency and his/her intent to enroll in a private school, or upon a judicial finding of unreasonableness with respect to the actions taken by the student. *See* 34 C.F.R. § 300.148(d).

In the instant case, Petitioner asserts that DCPS provided Student with an inappropriate placement on April 5, 2011 because Student's neighborhood DCPS high school cannot provide the full-time services and therapeutic setting that Student requires. As an initial matter, the hearing officer notes that Student's current IEP does not require a therapeutic setting, although there is evidence in the form of previous Meeting Notes tending to establish that back in May of 2010 Student's MDT was of the opinion that he required a therapeutic setting. In any event, however, Petitioner failed to present evidence demonstrating whether or not Student's neighborhood DCPS high school currently can provide a therapeutic setting. Petitioner presented documentary evidence tending to demonstrate that back in May of 2010 the neighborhood school would have provided Student with a combination and resource setting because DCPS believed Student could access the curriculum without therapeutic supports, but the programs offered by particular DCPS schools can change over time, and Petitioner presented no evidence tending to establish whether or not the neighborhood school currently offers programming that would provide a therapeutic setting for Student.

Petitioner also failed to present reliable evidence proving that the neighborhood DCPS high school cannot provide the full-time out of general education services required by Student's current IEP. Petitioner's evidence on this issue consisted primarily of information provided to Petitioner's advocate by the advocate's former colleague who is employed as an educational aide at the neighborhood school and by the advocate's current colleagues who are also advocates. At best, this information is less than reliable, and the advocate candidly acknowledged at the due process hearing that she had never spoken with any DCPS official for or at the neighborhood school to determine whether the neighborhood school offers programming that can meet Student's needs. The only other evidence Petitioner presented on this issue is the evidence noted above concerning the type of programming the neighborhood school could offer back in May of 2010.

Although DCPS attempted to present testimony concerning the neighborhood school's ability to implement Student's IEP, it was clear to the hearing officer that the witness offered, the DCPS Progress Monitor for Student's second private school during SY 2010/11, had no first-hand knowledge of the programming offered by the neighborhood school and was attempting to relay the information she had previously gained from the SEC at the neighborhood school but was not exactly sure of all the details. In any event, DCPS does not bear the burden in this proceeding of

demonstrating the appropriateness of the programming at the neighborhood school, especially not where, as here, Petitioner has failed to present reliable and currently relevant evidence tending to prove the lack of appropriateness of the programming.

Based on the evidence and/or lack of evidence outlined above, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS provided Student with an inappropriate placement on April 5, 2011. Hence, the hearing officer will deny Petitioner's request for reimbursement for Student's unilateral placement, as well as Petitioner's request for funding for and transportation to the unilateral placement for, at a minimum, SY 2011/12. However, as some of the evidence in this case does tend to call into question whether Student's neighborhood DCPS high school currently can implement Student's IEP, the hearing officer will order DCPS to convene a meeting to discuss and determine whether the neighborhood school can implement Student's IEP, and if it cannot, then to discuss and determine an appropriate location of services for Student. DCPS will be required to produce, either in person or by telephone, representative(s) from the neighborhood school who can speak with certainty about the programs which are and are not available at the school. Moreover, Student will be required to attend the meeting, and if he fails to do so, then DCPS may but will not be required to move forward with the meeting until such time as Student makes himself available to participate.

## ORDER

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

1. Within 20 calendar days of the issuance of this Decision and Order, DCPS shall convene an MDT meeting to discuss and determine whether the neighborhood school can implement Student's IEP, and if it is determined that the neighborhood school cannot implement Student's IEP, then the team shall discuss and determine an appropriate location of services for Student. DCPS shall produce at the meeting, either in person or by telephone, at least one representative from the neighborhood school who can speak with certainty about the programs which are and are not available at the school. Moreover, Student shall attend the meeting, and if he fails to do so, then DCPS may but will not be required to move forward with the meeting until such time as Student makes himself available to participate.

2. All claims and requests for relief in Petitioner's May 16, 2011 Complaint are **DENIED AND DISMISSED WITH PREJUDICE**.

## 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: 7/28/2011

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