

**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
May 02, 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 [REDACTED] year old male, who currently receives instructional services from a private provider selected by Parent. On February 21, 2013, Petitioner filed a Complaint against DCPS, alleging that DCPS failed to provide an appropriate placement, failed to provide an appropriate annual IEP, and failed to reevaluate.¹ As relief for these alleged denials of FAPE, Petitioner requested findings in Petitioner's favor, funding and placement at a specified private school, with transportation, retroactive to Student's date of enrollment, as well as funding for independent evaluations, the independent drafting of an IEP, and the independent provision of compensatory instruction/services.

On February 21, 2013, Petitioner filed a Motion for Expedited Hearing. DCPS filed an Opposition to the motion on February 25, 2013, and Petitioner filed a Reply to the opposition on February 26, 2013. On February 27, 2013, the hearing officer granted the Motion for Expedited Hearing.

The parties concluded the Resolution Meeting process by participating in a resolution session on March 1, 2013. No agreement was reached, but the parties agreed not to shorten the 30-day

¹ Petitioner initially filed its Complaint with the Student Hearing Office on February 14, 2013, but did not serve the Complaint on DCPS until February 21, 2013. Accordingly, by Order dated March 1, 2013, the hearing officer granted DCPS's February 28, 2013 Motion to reset the filing date to February 21, 2013.

resolution period. Therefore, the 45-day timeline began on March 24, 2013 and will end on May 7, 2013, which is the HOD deadline.

On March 5, 2013, DCPS filed its Response, which asserted the following: (i) A 10/17/10 Prior Written Notice identified Private School A as Student's location of services and an 8/20/09 IEP was created that identified Student as having multiple disabilities and needing a full-time outside of general education placement; (ii) Petitioner filed a 9/13/10 Complaint for reimbursement and prospective funding for a unilateral placement; an 11/10/10 HOD found against Petitioner; and Petitioner appealed but did not move to stay the HOD's Order, which required DCPS to convene an IEP meeting, so DCPS attempted to move forward with the IEP meeting; (iii) DCPS made numerous attempts after 11/23/10 to obtain parental participation in a meeting and eventually moved forward on 6/15/11 without Parent; (iv) The IEP team carried over Student's goals from the previous IEP and once again identified Private School A as the location of services; (v) At no point from 11/10/10 to 2/21/13 did Petitioner notify DCPS that she was seeking FAPE for Student, or that she was seeking funding for the unilateral placement for the remainder of SY 10/11, SY 11/12, or SY 12/13; (vi) The US District Court ordered reimbursement for the private placement for 10/11, but found that prospective funding was not appropriate and recommended that the MDT/IEP team determine placement for SY 12/13; and (vii) It was only with the filing of the instant Complaint that Petitioner provided notification that she wants DCPS to provide a FAPE to this parentally placed private student. DCPS also denied the claims asserted, maintained the relief requested was unwarranted, and asserted that the Complaint should be dismissed with prejudice.

On March 7, 2013, 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 March 11, 2013.

By letter dated March 3, 2013, which was actually submitted on April 3, 2013, Petitioner disclosed six documents (Petitioner's Exhibits 1-6), and by letter dated April 3, 2013, DCPS disclosed eleven documents (Respondent's Exhibits 1-11).

Also on April 3, 2013, Petitioner filed a brief regarding the statute of limitations and whether it bars Petitioner's claim for reimbursement for SY 2010/11. DCPS filed its Reply Brief on April 8, 2013. The hearing officer received further argument from the parties regarding the potential bar of the statute of limitations at the hearing, and Petitioner conceded that IDEA's two-year statute of limitations precludes it from pursuing its IEP and reevaluation claims for the period preceding February 21, 2011, because Petitioner's federal court appeal did not relate to those issues.

On April 5, 2013, Petitioner filed its objections to DCPS's disclosures. On April 8, 2013, DCPS filed its objections to Petitioner's disclosures.

The hearing officer convened the due process hearing on April 10, 2013.² The hearing officer overruled the parties' objections to each other's disclosures and admitted all disclosed documents into the record. During argument on the statute of limitations issue, Petitioner conceded that

² Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

IDEA's statute of limitations precludes consideration of Student's IEP and reevaluation claims beyond the two-year limitations period, because Petitioner's pending appeal had no effect on those issues. Petitioner also indicated that it did not wish to pursue its IEP claim for any year other than SY 2012/13. Thereafter, both parties waived the right to make an opening statement, the hearing officer received testimonial evidence from Petitioner and DCPS rested on the record. After receiving closing arguments from both parties, the hearing officer concluded 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 issues to be determined are as follows:

1. Did DCPS fail to provide an appropriate school placement for Student by failing to provide any placement at all after October 2010?
2. Did DCPS fail to provide an appropriate annual IEP for Student for SY 2012/13?
3. Did DCPS fail to reevaluate Student since February 2011?

FINDINGS OF FACT³

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 ████████ years old. He currently receives instructional services from a private provider selected by Parent.⁴
2. Student suffers from multiple disabilities, including a non-verbal learning disability, cerebral palsy, impaired motor skills, and an adjustment disorder.⁵
3. Student's August 20, 2009 IEP indicated that Student has multiple disabilities and required Student to receive the following special education and related services each week: 26 hours of specialized instruction; 60 minutes of adapted physical education; 120 minutes of behavioral support services; 60 minutes of occupational therapy; 90

³ 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.

⁴ Testimony of Parent.

⁵ Petitioner's Exhibit 2 at 3, ¶ 2.

- minutes of speech-language pathology; and 27.5 hours of school health and school nursing, with all services to have been provided outside general education. The IEP also required Student to receive 30 minutes per day of occupational therapy consultation services and 45 minutes per day of speech/language consultation services.⁶
4. Student has not been evaluated by DCPS since 2009.⁷
 5. On May 28, 2010, Petitioner filed a Complaint against DCPS, alleging, *inter alia*, that DCPS had failed to provide an appropriate placement for Student for SY 2010/11. Thereafter, Petitioner enrolled Student as a non-attending student at his neighborhood DCPS school on August 17, 2010, and Petitioner enrolled Student at the private school of her choice on September 6, 2010.⁸
 6. On September 13, 2010, Petitioner filed another Complaint against DCPS. At the time, DCPS was 23 days late in preparing a new IEP for Student.⁹
 7. On October 17, 2010, DCPS issued a Prior Written Notice (“PWN”) that assigned Student to attend Private School A.¹⁰
 8. The hearing officer assigned to determine Petitioner’s September 13, 2010 complaint denied Petitioner’s requests for relief, noting, *inter alia*, that a location of services had been identified prior to the due process hearing, even though the private placement by Parent was appropriate.¹¹ The hearing officer ordered DCPS to convene an IEP team meeting for student within 30 days after the issuance of November 10, 2010 hearing officer decision.¹²
 9. Petitioner appealed to the U.S. District Court for the District of Columbia, arguing, *inter alia*, that DCPS had a duty to provide an appropriate placement and school for Student to attend for SY 2010/11. The Court ultimately ruled that DCPS denied Student a FAPE by failing to timely update Student’s IEP and by placing Student at Private School A without input from Petitioner. On August 24, 2012, the Court issued a Memorandum and Order that remanded the matter to the hearing officer to determine whether the amount of tuition Petitioner sought as reimbursement for Student to attend her private school of choice was appropriate and reasonable, but the Court denied Petitioner’s request for prospective funding for the private school on the ground that the prospective placement for Student for SY 2012/13 should be addressed by the MDT/IEP team.¹³

⁶ Petitioner’s Exhibit 1.

⁷ Testimony of Parent; *see also* testimony of special education advocate.

⁸ Petitioner’s Exhibit 2 at 4, ¶¶ 9, 10, 12.

⁹ Petitioner’s Exhibit 2 at 4, ¶ 14.

¹⁰ DCPS Response at ¶ 2; Complaint at ¶ 4; Petitioner’s Exhibit 2 at 5, ¶ 15.

¹¹ *See* Petitioner’s Exhibit 2 at 5-6.

¹² Petitioner’s Exhibit 2 at 19.

¹³ Petitioner’s Exhibit 2.

10. On November 30, 2010, DCPS began inquiring in emails to Petitioner's counsel whether Petitioner intended to enroll Student at Private School A. Petitioner's counsel initially responded that Parent had spoken with the school and was waiting for confirmation that Student could attend. DCPS indicated that its PWN was confirmation of Student's ability to attend the school. Following a December inquiry by DCPS regarding Student's enrollment at Private School A, Petitioner's counsel advised that Parent had visited the school and found there was no class available for Student. Counsel also asked for authorization to place Student at Parent's private school of choice, but DCPS did not agree to the request. Ultimately, Petitioner never enrolled Student at Private School A.¹⁴
11. On November 23, 2010, DCPS emailed Petitioner's counsel to propose dates and times for an MDT meeting for Student. Petitioner's counsel indicated that Petitioner would participate if DCPS could provide a "real teleconference," as opposed to several different speakerphones. Ultimately, however, the meeting did not go forward and the parties began attempting to reschedule for February 2011. In the end, Petitioner's counsel suggested that Student's private providers prepare a draft IEP that could be sent to DCPS for approval. On February 23, 2011, Petitioner's counsel suggested postponing or forgoing the MDT meeting and stated that Petitioner was waiving the meeting timeline to allow the outside providers to draft the IEP, which Petitioner would then send to DCPS and if DCPS found the IEP acceptable, there would be no need for a meeting and Petitioner would waive the meeting entirely.¹⁵
12. On March 24, 2011, DCPS inquired of Petitioner's counsel by email whether counsel had obtained IEP goals for Student from the private providers. Then in May, DCPS once again proposed dates for an MDT meeting. Petitioner's counsel failed to respond; DCPS contacted Parent directly, but Parent instructed DCPS to communicate through Petitioner's counsel. Ultimately, DCPS indicated to Petitioner's counsel on June 13, 2011 that the meeting would be held on 6/15/11 unless counsel responded the following day.¹⁶
13. Parent knew DCPS was trying to schedule an MDT meeting for Student, because a DCPS representative called Parent and Parent directed DCPS to contact her attorney.¹⁷
14. On June 15, 2011, DCPS convened an MDT meeting for Student. Parent did not attend the meeting, but DCPS called her and left a message. The team determined not to make any changes to Student's IEP because he had not attended a DCPS school, charter school or non-public school since SY 2008/9. The team noted that DCPS had made attempts to contact Parent and her attorney but had not heard anything from the

¹⁴ See Petitioner's Exhibit 3.

¹⁵ See Petitioner's Exhibit 3; see Respondent's Exhibits 10-11.

¹⁶ See Petitioner's Exhibit 3; see Respondent's Exhibits 10-11.

¹⁷ Testimony of Parent.

attorney since March 29, 2011, and that DCPS offered to place and fund Student at Private School A but that offer was rejected by Parent and the attorney.¹⁸

15. DCPS issued an IEP for Student on June 15, 2011. As with Student's August 20, 2009 IEP, this IEP also required Student to receive the following special education and related services each week: 26 hours of specialized instruction; 60 minutes of adapted physical education; 120 minutes of behavioral support services; 60 minutes of occupational therapy; 90 minutes of speech-language pathology; and 27.5 hours of school health and school nursing, with all services to have been provided outside general education. The IEP also required Student to receive 30 minutes per day of occupational therapy consultation services and 45 minutes per day of speech/language consultation services.¹⁹
16. Parent has not received any invitations to an MDT meeting since the June 2011 meeting.²⁰
17. Parent did not enroll Student in any DCPS school for SY 2011/12.²¹
18. Parent kept Student at home for SY 2011/12 and paid for online classes, home-schooled Student, and relied upon other resources to educate Student. Student also received services from his cognitive skills coach, his speech/language pathologist, and his vision and conceptual development specialist, which are paid for via medical benefits.²²
19. On October 31, 2012, Parent attempted to register Student in the autism program at a DCPS high school outside of her boundary area. Parent's intent was to move into the boundary area for the school, but the school's SEC advised Parent that Student could not be registered as a non-attending student, Student would have to attend regular education classes for 30 days before a determination of whether to move him to special education could be made, and the IEP Parent's educational advocate prepared could not be implemented at the school.²³
20. In November 2012, a hearing officer conducted a hearing on remand to determine the amount of reimbursement to be awarded to Petitioner in connection with the September 2010 Complaint.²⁴
21. Parent did not attempt to register Student at the neighborhood DCPS school for SY 2012/13. However, after the hearing officer awarded Parent reimbursement on remand for Student's private school fees for SY 2010/11 and the private school

¹⁸ Respondent's Exhibit 5.

¹⁹ Respondent's Exhibit 6.

²⁰ Testimony of Parent.

²¹ Testimony of Parent.

²² Testimony of Parent.

²³ Testimony of Parent.

²⁴ Testimony of Parent.

- received payment, Parent was able to re-enroll Student in the private school and Student began receiving services on February 12, 2013.²⁵
22. At the March 1, 2013 resolution session for the instant case, Parent signed a Consent form for a reevaluation of Student. However, as of the date of the due process hearing, no assessments had been scheduled.²⁶
 23. Student's current private provider is the same private provider who provided services to Student during SY 2010/11, the program is essentially the same online program that allows children to proceed at their own rate, and if awarded full-time funding Student would be able to receive the same amount of specialized instruction he received during SY 2010/11 – namely, 15 to 18 hours per week.²⁷
 24. Student is currently receiving only part-time services through the private provider due to Petitioner's inability to provide funding for full-time services. Nevertheless, Student is doing very well with the material the private provider is teaching him. Student is earning high 90s on his quizzes on average, and he has gone from not remembering basic math concepts to working on pre-Algebra.²⁸
 25. Student's current private placement is reasonably calculated to allow Student to receive educational benefits.
 26. As of the date of the due process hearing in this case, Parent owed the private provider \$1,785.00.²⁹
 27. As compensatory education for Student, Petitioner has requested the following: (i) to compensate for 5 months missed/awarded, 150 hours of online instruction through the WECA Electrician Trainee Program, which includes an apprenticeship, to be begun at Student's discretion when appropriate after obtaining an academic foundation; (ii) to compensate for the next 3 months missed/awarded, computer hardware and software consisting of a laptop of Student's choosing up to \$1,500, printing/scanning hardware up to \$500, and an 8 months subscription to Brain Pro Autism software for \$4,200; and (iii) to compensate for any more months missed/awarded, tutoring and coaching with a focus on vocational and life skills, to be provided by independent tutor(s) and coach(es) of the choosing of parent or Student at a rate of up to \$100/hour, in the amount of 30 hours for each month missed/awarded.³⁰
 28. Petitioner's compensatory education plan is based on the services Student would have received had he been in an appropriate school program, which includes vocational training that Student became eligible to receive beginning at age 16. Moreover, as

²⁵ Testimony of Parent.

²⁶ Testimony of Parent; Respondent's Exhibit 4.

²⁷ Testimony of educational consultant.

²⁸ Testimony of educational consultant.

²⁹ Testimony of educational consultant.

³⁰ Petitioner's Exhibit 4; *see* testimony of special education advocate.

Student has cerebral palsy, nonverbal learning disabilities, and impaired motor skills, he cannot carry a lot of books and needs compact devices such as a laptop computer and a small printer that he can carry around with him.³¹

29. Petitioner's proposed compensatory education plan is designed to place Student in the same position he would have occupied but for any violations of IDEA by DCPS.

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. Statute of Limitations Regarding SY 2010/11

Under IDEA, a due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint. 34 C.F.R. § 300.507(a)(2); *see also* 34 C.F.R. § 300.511(e). However, this two-year timeline does not apply if the parent was prevented from filing a due process complaint due to specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint, or the LEA's withholding of information from the parent that was required to be provided to the parent. 34 C.F.R. § 300.511(f).

IDEA also permits any party aggrieved by a hearing officer's decision on a due process complaint to file a civil action with respect to the complaint in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within 90 days of the date of the hearing officer's decision. *See* 34 C.F.R. § 300.516(a)-(b).

In the instant case, Petitioner argues that IDEA's two-year statute of limitations does not preclude Petitioner from pursuing her placement/location of services claim for SY 2010/11 because Petitioner appealed the hearing officer's November 2010 decision that DCPS had not failed to provide an appropriate placement for Student to a federal court, which did not issue a decision on the case until November 21, 2012, thereby precluding Petitioner from pursuing the claim before that time.

Not surprisingly, DCPS disagrees with Petitioner and argues that an appeal of a hearing officer's decision does not toll the two-year limitations period, and it does not stay further proceedings unless such a request is expressly made to the Court, which Petitioner failed to do in this case.

Upon consideration of the record, the hearing officer has determined that Petitioner's claim for an inappropriate placement for SY 2010/11 is barred by the doctrine of *res judicata*, because both the federal court and the hearing officer have already rendered decisions on the merits with respect to that claim. In this regard, the federal court specifically noted that "Plaintiff argues that DCPS had a duty to provide appropriate placement, including a school for [Student] to attend,

³¹ *See* testimony of special education advocate.

for the 2010-11 school year,” and the court specifically held that “DCPS unilaterally updated [Student’s] IEP **for the 2010-11 school year** when it proposed [the private school] as the location for [Student’s] IEP to be implemented.” Petitioner’s Exhibit 2 at 8 and 15 (emphasis added). As a result, this claim has already been fully litigated, and Petitioner is precluded from relitigating the claim in the instant action. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citation omitted) (a final judgment on the merits of an action precludes relitigating issues that were raised in that action). Under these circumstances, the hearing officer finds it unnecessary to decide whether the claim is barred by IDEA’s statute of limitations.

2. School Placement

Under IDEA, a public agency must provide an appropriate educational placement for each child with a disability, so that the child’s needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of special education and related services that, *inter alia*, include an appropriate secondary school and are provided in conformity with the Student’s IEP. *See* 34 C.F.R. § 300.17.

In determining a disabled child’s educational placement, the LEA must ensure that the placement decision is, *inter alia*, made by a group of persons that includes the parents and is made in conformity with IDEA’s least restrictive environment regulations. 34 C.F.R. § 300.116(a)(1). Moreover, the disabled child’s placement must be determined at least annually. *See* 34 C.F.R. § 300.116(b)(1).

Although IDEA guarantees a free appropriate education, it does not, provide that this education will be designed according to the parent’s desires. *Shaw v. District of Columbia*, 238 F.Supp. 2d 127 (D.D.C. 2002)(citation omitted). Accordingly, the primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child’s needs, was left by IDEA to state and local educational agencies in cooperation with the parents or guardian of the child. *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176, 207 (1982). In addition, an IEP team meeting may be conducted without a parent in attendance if the LEA is unable to convince a parent to participate. 34 C.F.R. § 300.322(d).

In the instant case, Petitioner argues that DCPS denied Student a FAPE by failing to make any placement at since October 2010. As the hearing officer has already determined that Petitioner’s claim for SY 2010/11 is barred by *res judicata*, the hearing officer will restrict the instant analysis to SY 2011/12 and SY 2012/13.

A review of the record in this case reveals that on October 17, 2010, DCPS issued a PWN that assigned Student to attend Private School A for SY 2010/11. Thereafter, a November 10, 2010 HOD upheld the PWN, but ordered DCPS to convene a meeting within 30 days of the issuance of the HOD. Beginning November 23, 2010 DCPS began emailing Petitioner’s counsel to propose dates for the required MDT meeting. Petitioner’s counsel eventually suggested that Petitioner could have Student’s private providers prepare a draft IEP, and Petitioner waived the timeline for the meeting with a suggestion that it might ultimately waive the meeting altogether. When Petitioner’s counsel failed to produce the agreed upon independent IEP, DCPS again

began proposing dates for the meeting. When Petitioner's counsel failed to respond and DCPS contacted Petitioner directly, Petitioner advised DCPS to communicate directly with Petitioner's counsel. When Petitioner's counsel continued to be unresponsive, DCPS scheduled the IEP meeting for June 15, 2011 and proceeded with the meeting as scheduled. Even then, however, DCPS called Parent on June 15, 2011 to give her an opportunity to participate in the meeting and left her a message. At the meeting, which Parent and her counsel failed to attend, DCPS determined not to make any changes to Student's IEP since he had not attended a DCPS school, charter school or non-public school since SY 2008/9, and DCPS restated its offer to place and fund Student at Private School A but noted the offer had been rejected by Parent and her counsel.

Based on the evidence outlined above, the hearing officer concludes that DCPS did not fail to offer any educational placement at all for Student for SY 2011/12, because the June 15, 2011 IEP and offer of educational placement were in place for SY 2011/12 through June 15, 2012, and the untimeliness of the June 15, 2011 meeting was due in large part to the failure of Petitioner and her counsel to participate in the scheduling of the meeting. *See* 34 C.F.R. § 300.116(b)(2) (placement must be determined at least annually); 34 C.F.R. § 300.324(b)(1)(i) (IEP must be reviewed at least annually); 34 C.F.R. § 300.322(d) (IEP team meeting may be conducted without parent if LEA is unable to convince parent to participate). Hence, Petitioner has failed to meet its burden on this claim with respect to SY 2011/12. *See Schaffer v. Weast*, 546 U.D. 49 (2005) (burden of proof in administrative hearing is on party seeking relief).

With respect to SY 2012/13, the evidence in this case shows that although the federal court issued a remand Order concerning Student in August 2012 and a hearing officer conducted a hearing on remand in November 2012, DCPS failed to convene an MDT meeting for Student on or about June 15, 2012 or at any point afterwards. DCPS argues that Parent was required to give notice of her desire for a FAPE for Student in SY 2012/13, which would have then triggered DCPS's obligations to provide a FAPE. However, IDEA requires DCPS to make FAPE available to all children residing in the District of Columbia between the ages of 3 and 21, including disabled children who have been suspended or expelled from school. 34 C.F.R. § 300.101(a); *see also D.S. v. District of Columbia*, 699 F. Supp.2d 229 (D.D.C. 2010) (residency in the District, not enrollment in school, is what triggers the obligation to make FAPE available to disabled children in the District). As there is no dispute that (1) Student is a resident of the District of Columbia, and (2) DCPS failed to assign Student an educational placement for SY 2012/13, the hearing officer concludes that Petitioner has met its burden of proof on this claim with respect to SY 2012/13. Accordingly, the hearing officer will order DCPS to convene an MDT meeting for Student within 15 days of the issuance of this decision to assign Student an educational placement where his IEP can be implemented for SY 2013/14 and Summer 2013 if appropriate, and the hearing officer will order DCPS to provide funding for Student's current private provider from Student's enrollment date of February 12, 2013 through the end of SY 2012/13. *See N.G. v. District of Columbia*, 556 F.Supp.2d 11 (D.D.C. 2008) (citations omitted) (if public school defaults on obligations under IDEA, private school placement proper if reasonably calculated to enable child to receive educational benefits).

3. Annual IEP

IDEA requires that each disabled child's IEP be reviewed periodically, but not less than annually, at least annually, to determine whether the child's annual goals are being achieved. 34 C.F.R. § 300.324(b)(1)(i). The IEP must also be revised as appropriate to address any lack of expected progress toward the annual goals and in the general curriculum, if appropriate, the results of any reevaluation, information about the child provided to or by the parents, the child's anticipated needs, or other matters. 34 C.F.R. § 300.324(b)(1)(ii).

In the instant case, Petitioner contends that DCPS denied Student a FAPE by failing to provide him with an appropriate annual IEP for SY 2012/13. The evidence in this case reveals that Student's most recent IEP is dated June 15, 2011. The hearing officer has already determined above that DCPS failed to convene an MDT meeting for Student on or about June 15, 2012 or at any point afterwards, and the hearing officer has already rejected DCPS's argument that Parent was required to give notice of her desire for a FAPE for Student in SY 2012/13, thereby triggering DCPS's obligations to provide a FAPE. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proof on this claim. *See Honig v. Doe*, 484 U.S. 305, 3011 (1988) (IEP is primary vehicle for implementing IDEA); *Alston v. District of Columbia*, 439 F.Supp.2d 86, 90 (D.D.C. 2006) (IEP is main tool for carrying out IDEA). Therefore, the hearing officer will order DCPS to review and revise, as appropriate, Student's IEP at the MDT meeting that is to be held for Student within 15 days of the issuance of this decision.³²

4. Reevaluation

IDEA requires that disabled children be reevaluated at least once every 3 years, unless the parent and the public agency agree otherwise. 34 C.F.R. § 300.303(b)(2).

In the instant case, Petitioner asserts that DCPS denied Student a FAPE by failing to evaluate him since February 2011.³³ The evidence in this case shows that Student has not been evaluated since 2009, which is more than 3 years ago. Although Parent signed a Consent form for a reevaluation of Student by DCPS at the March 1, 2013 resolution session for this action, as of the date of the due process hearing no assessments had been scheduled. Based on this evidence, the hearing officer concludes that Parent has met its burden of proof on this claim. Therefore, the hearing officer will allow DCPS 30 days to complete Student's reevaluation, and will allow DCPS an additional 15 days to convene a meeting to review the evaluations, revise Student's IEP as appropriate, and discuss and determine the location of services for implementation of the IEP. However, should DCPS fail to timely complete Student's reevaluation, then DCPS will be required to provide funding for independent assessments for Student.

³² The hearing officer has considered but rejected Petitioner's request for funding for the independent drafting of an IEP by individuals identified by Petitioner's counsel, because IDEA charges the IEP team with the task of developing and revising a disabled child's IEP. *See* 34 C.F.R. § 300.324. Moreover, as Student has not spent a significant amount of time in any school over the past three years, the hearing officer finds no justification for withdrawing this task from the IEP team and assigning it to private individuals.

³³ Petitioner actually argued that the failure to evaluate dates back to the last evaluations in February 2009; however, since the statute of limitations bars consideration of claims beyond the 2-year limitations period, the hearing officer will only consider a denial of FAPE dating back to February 2011.

5. 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, the hearing officer has determined that DCPS denied Student a FAPE by failing to assign Student an educational placement for SY 2012/13, failing to provide Student with an appropriate annual IEP for SY 2012/13, and failing to reevaluate Student since February of 2011. Despite DCPS's failure to reevaluate Student since February 2011, Student's IEP for SY 11/12 entitled him to receive full-time special education and related services outside of general education, and it is not possible to determine whether or to what extent Student's IEP would have changed had the reevaluation been timely conducted. Therefore, the hearing officer has determined that any award of compensatory education for this violation would be premature until such time as the reevaluation as has been concluded.

With respect to DCPS's failure to provide Student with a school placement and an appropriate annual IEP for SY 2012/13, however, the evidence in this case reveals that Student went without receiving any specialized instruction at all from the start of SY 2012/13 through February 12, 2013, a total of approximately 6 months, and since February 12, 2013, Student has been receiving only part-time specialized instruction due to Parent's inability to afford full-time specialized instruction services consisting of 15-18 hours per week. Under these circumstances, which demonstrate that Student has missed practically an entire school year of specialized instruction due to DCPS's denials of FAPE, the hearing officer has determined to award Petitioner the following services to provide Student with the educational benefits that likely would have accrued from the special education services DCPS should have supplied in the first place: (i) 150 hours of online instruction through the WECA Electrician Trainee Program, which includes an apprenticeship, to be begun at Student's discretion when appropriate after obtaining an academic foundation; and (ii) computer hardware and software consisting of a laptop of Student's choosing up to \$1,500, printing/scanning hardware up to \$500, and an 8 months subscription to Brain Pro Autism software for \$4,200.

ORDER

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

1. DCPS shall convene an MDT meeting for Student within 15 days of the issuance of this Order to (i) review and revise, as appropriate, Student's IEP, and (ii) assign Student an educational placement where his IEP can be implemented for SY 2013/14 and for Summer 2013 ESY if appropriate.

2. DCPS shall provide funding for Student's receipt of specialized instruction through his current private provider for the period beginning on Student's enrollment date of February 12, 2013 and continuing through the end of SY 2012/13, by providing \$1,785 for the period from February 12 through April 10, 2013, and by providing funding at the same proportional rate from April 10, 2013 through the end of SY 2012/13.
3. DCPS shall complete Student's reevaluation within 30 days of the issuance of this Order, and within 15 days after the completion of the reevaluation, DCPS shall convene a meeting to review Student's assessments, revise Student's IEP as appropriate, and discuss and determine the location of services for implementation of the IEP. In the event DCPS fails to complete Student's reevaluation and related assessments within 30 days of the issuance of this Order, then DCPS shall provide funding for independent assessments for Student.
4. DCPS shall provide the following items to Petitioner as compensatory award: (i) 150 hours of online instruction through the WECA Electrician Trainee Program, which includes an apprenticeship, to be begun at Student's discretion when appropriate after obtaining an academic foundation; and (ii) computer hardware and software consisting of a laptop of Student's choosing up to \$1,500, printing/scanning hardware up to \$500, and an 8 months subscription to Brain Pro Autism software for \$4,200.

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: 5/1/2013

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