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

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

OSSE STUDENT HEARING OFFICE 2011 MAY -3 AM 10:01

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is an year-old male, who is currently attending a private school in the District of Columbia via the DC Scholarship Opportunity Fund. Student's most recent IEP is an outdated initial IEP that was developed on February 12, 2004.

On January 6, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS denied Student a FAPE by (1) failing to provide an appropriate IEP, or indeed, any IEP at all, and (2) failing to provide Student with any educational and related services at all, as well as any location of services. As relief for these alleged denials of a free appropriate public education ("FAPE"), Petitioner requested an interim placement at Student's current private school; an IEP to be developed with input from the current private school that includes a full-time educational program, related counseling services, and appropriate goals; a meeting to review evaluations, develop a transition plan and BIP, and discuss additional compensatory education once Student's vocational evaluation and FBA are received; and compensatory education.

On February 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 requested permission to amend to reflect that Student was the Petitioner, as opposed to Parent, and the hearing officer granted the request to amend. The hearing officer issued the Prehearing Order on February 22, 2011.

On February 16, 2011, Petitioner filed its Motion to File an Amended Complaint, together with its Amended Complaint listing Student as Petitioner. On February 17, 2011, the hearing officer issued an Order Granting Petitioner's Motion to Amend.

On March 1, 2011, DCPS filed its Response to the Complaint. In the Response, DCPS primarily asserted that it has been attempting to reschedule a meeting to review the IEP and remains at the ready to do so, and that the allegation of an inappropriate location of service cannot be determined because the IEP drives location of service.

By their respective disclosure letters dated March 22, 2011, Petitioner disclosed twenty-five documents (Petitioner's Exhibits 1 – 25), and DCPS disclosed DCPS-1 through DCPS-8.

The hearing officer convened the due process hearing on March 29, 2011.[1] Petitioner's Exhibits numbered 1-13, 17, and 19-25 were admitted without objection. Petitioner's Exhibit 14 was excluded on DCPS's objection because the document was too outdated to be of use, Petitioner's Exhibit 15 was admitted over DCPS's objection, Petitioner's Exhibit 16 was excluded by Petitioner's agreement on DCPS's objection that counsel was creating evidence via the document, and Exhibit 18 was admitted over DCPS's objection as a correspondence created during the normal course of business. DCPS-1 through DCPS-7 were admitted without objection. DCPS-8, a resume, as well as the testimony of the person described in the resume, were excluded on Petitioner's objection due to DCPS's failure to timely disclose the document and the witness. Thereafter, the hearing officer received opening statements, testimonial evidence, and closing statements before 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 ("IDEIA"), 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 deny Student a FAPE by failing to provide Student with an appropriate IEP, or indeed, any current IEP at all?

2. Did DCPS deny Student a FAPE by failing to provide any educational and related services at all, as well as any location of services?

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

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 years old and he currently attends grade at a private school in the District, where he was parentally placed with the help of the DC Scholarship Opportunity Fund. The majority of the students at Student's current school are funded through the District's scholarship assistance program. However, the school also offers specialized instruction to students with one or more disabilities who are funded by DCPS, and the school generally provides those students with a full-time out of general education setting with self-contained classes that are staffed by special education teachers.[2]

2. Student attended a public charter school from 1st through 6th grades. During Student's 6th grade year in SY 2003/4, Student was evaluated and determined eligible for special education and related services. An IEP was developed on February 12, 2004 that required Student to receive 1.5 hours per week of specialized instruction and 30 minutes per week of psychological counseling.[3]

3. The following year for 7th grade, Parent placed Student at his current private school because she felt the class sizes at the charter school were too big with 18 students per class, as opposed to the 6-7 students per class at the private school. There is no indication that Student received special education services from 7th grade forward, as his most recent IEP continues to be the initial IEP developed for him at the charter school on February 12, 2004.[4]

4. From SY 2006/7 through SY 2009/10, Student received grades of Cs, Ds, and Fs in his academic subjects. At the end of SY 2008/9, Student was retained in the 11th grade.[5]

5. In or about May 2010, near the end of SY 2009/10, Parent requested special education evaluations for Student.[6]

6. At the start of SY 2010/11, the current private school placed Student in a self-contained, full-time out of general education setting, where Student has been receiving assistance with the general curriculum but no accommodations or modifications. Moreover, Student has not been provided with transition or related services during the current school year because he does not have an IEP. Although the private school does not offer behavioral support services to non-disabled students, Student was allowed to meet with the clinical staff person from time to time until that person left the school.[7]

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[2] Testimony of Parent; testimony of advocate; testimony of private school Assistant Principal.
[3] Petitioner's Exhibits 2 and 15; DCPS-3.
[4] Petitioner's Exhibit 1; DCPS-6; testimony of Parent.
[5] Petitioner's Exhibit 22.
[6] *See* Petitioner's Exhibit 17.
[7] Testimony of Assistant Principal.

7. Student performed quite well during 1st quarter of SY 2010/11, earning primarily As and Bs with one D. Student did not sustain his performance during 2nd quarter of SY 2010/11, when his grades dropped to all Fs. Student's poor grades during second quarter were greatly affected by his increasing absences/tardiness. The absences are primarily due to Parent's illness, which causes anxiety for Student with the result that he either does not want to leave Parent's side when she's sick, or if he does go to school, he is not tuned in. During the second quarter, Student was absent approximately 1-2 times per two-week period and he did not make up the missed work. Hence, upwards of 90% of Student's failing grades are due to his failure to make up missed work. Moreover, Student is not on track to complete the graduation requirements he needs this year.[8]

8. On October 8, 2010, DCPS and Petitioner entered into a Settlement Agreement, which authorized Petitioner to obtain an independent comprehensive psychological evaluation, to be obtained within 60 calendar days, and required DCPS to conduct a meeting within 30 days of the evaluation report to review the evaluation, review and revise the IEP, as necessary, and discuss compensatory education services, if warranted.[9]

9. On November 5, 2010, an independent evaluator issued a report concerning Student's October 21 and 23, 2010 comprehensive psychological evaluation. The report revealed that on the Wechsler Adult Intelligence Scale-Fourth Edition, Student received borderline scores the Processing Speed Index, the General Ability Index, and the Full Scale IQ (actual score = 74), an extremely low score on the perceptual reasoning index, and low average scores on the verbal comprehension index and the working memory index. On the Woodcock-Johnson Tests of Achievement – Third Edition, Student scored at the 6.8 grade level on the Broad Reading Composite, the 5.7 grade level on the Math Calculation Composite, the 5.9 grade level on the Written Expression Composite, the 8.6 grade level for overall Academic Skills and the 4.9 grade level in overall Academic Fluency. Instruments designed to assess Student's emotional/personality functioning revealed, *inter alia*, that beneath the surface of Student's cooperative and affable demeanor are underlying feelings of personal insecurity and low self-esteem, that Student has disdain for school which stems from his poor academic achievement, and that Student is experiencing significant academic, psychological, and emotional difficulties.

   Ultimately, the evaluator rendered the following diagnoses on Axis I: Learning Disorder, Not Otherwise Specified; Attention Deficit/Hyperactivity Disorder, Predominately Inattentive Type; and Dysthymic Disorder (based upon longstanding depressive symptomatology). The evaluator concluded that Student "continues to be eligible for full-time special education services" as a multiply disabled student with LD, OHI and ED, and the evaluator opined that "[i]n light of [Student's] sustained academic deficits or limited progress in his academic skills over the past several years, the MDT should review the results of this evaluation to modify his educational services. The evaluator also recommended school-based counseling for Student.[10]

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[8] Testimony of private school Assistant Principal; testimony of Parent; Petitioner's Exhibits 23 and 24.
[9] Petitioner's Exhibits 2 and 15; DCPS-3.
[10] Petitioner's Exhibit 2; DCPS-3.

10. Student's perceptual reasoning and processing speed deficits would most likely impact his academics because he would struggle with time pressured assignments. Moreover, Student's low Full Scale IQ score indicates that he would likely have problems managing stress in his environment, adapting to change, problem solving, and being able to navigate day to day challenges.[11]

11. On November 16, 2010, Petitioner provided DCPS with a copy of Student's independent comprehensive psychological evaluation report.[12]

12. On December 9, 2010, DCPS convened an MDT meeting for Student. The team agreed with the advocate's suggestion of a disability classification for Student of multiply disabled with LD as the primary disability and also OHI due to ADHD. The team determined that the Assistant Principal at the current private school would complete Student's eligibility paperwork and propose meeting dates to reconvene to develop an IEP for Student. The team also agreed to table the discussion of compensatory education until the next meeting. Parent requested the current private school as a location of services for Student, but DCPS did not make an offer of a location of services during the meeting.[13]

13. Subsequent to the December 9, 2010 eligibility meeting, DCPS failed to grant the Assistant Principal access to DCPS's electronic eligibility/IEP program, SEDS, so the Assistant Principal was unable to process the eligibility paperwork for Student and create a draft IEP, and the follow-up IEP meeting for Student was delayed. The initial intent was to have Student's IEP completed prior to Winter Break, but that was not possible due to the Assistant Principal's lack of access to SEDS.[14]

14. Based on the way SEDS has been set up, an IEP cannot be drafted until a student's eligibility has been finalized in SEDS. There simply is no way to move forward with any portion of the IEP until eligibility has been finalized, and at least 24 hours are required to input eligibility information into SEDS before an IEP can be started. Hence, DCPS can no longer determine eligibility and develop an IEP all in one meeting. DCPS is usually the only LEA with access to SEDS. However, in this instance, the current private school has been given access to SEDS to input eligibility information for Student. DCPS is the party responsible for granting access to SEDs, and without such access, there was no way the Assistant Principal could enter the necessary information for Student.[15]

15. Through a series of emails exchanged between various DCPS employees from December 28, 2010 through January 3, 2011, DCPS determined that it bore responsibility for developing an IEP for Student and that such responsibility could not be delegated to Student's current private school. This information was transmitted to Parent's

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[11] Testimony of independent licensed clinical psychologist.
[12] Petitioner's Exhibit 3.
[13] DCPS-7; Petitioner's Exhibits 5 and 25; testimony of Compliance Case Manager.
[14] Testimony of Assistant Principal; testimony of advocate; testimony of Parent; testimony of Compliance Case manager.
[15] Testimony of SEC at neighborhood school.

representatives and the representatives of the current private school by emails dated January 5, 2011.[16]

16. The DCPS Placement Monitor for Student's current private school has been unable to provide any technical assistance to the Assistant Principal with respect to SEDS because she can only act within the system upon receipt of a Prior Written Notice and there has been no such Notice issued placing Student at the private school. However, the Placement Monitor attempted to refer the Assistant Principal, as well as Petitioner's counsel, to the appropriate personnel in DCPS.[17]

17. On February 23, 2011, DCPS convened an IEP team meeting for Student at his neighborhood DCPS high school and the parties discussed whether the neighborhood school or the current private school would be granted access to SEDS. No IEP had been drafted at that point and no location of services was assigned for Student, even though Parent once again requested the current private school as the location of services.[18]

18. In or near the week of March 14, 2011, DCPS granted the Assistant Principal to the current private school access to SEDS. As of the date of the due process hearing in this case, the Assistant Principal was developing Student's eligibility documents online in preparation for developing a draft IEP for Student.[19]

19. The whole process of going back and forth between which school would be granted access to SEDS to process Student's eligibility information and develop a draft IEP delayed the follow-up IEP meeting for Student, with the result that by the date of the due process hearing for this case, which was more than 3½ months after Student's December 9, 2010 eligibility meeting, Student still did not have an IEP or an assigned location of services.

20. Petitioner's March 18, 2011 compensatory education plan requests 80 hours of independent tutoring for Student, 40 hours of independent counseling for Student, and 20 hours of mentoring for Student to compensate Student for the delay in developing an IEP, assigning services, and providing Student with an appropriate setting. The plan was developed by the educational advocate, who indicated that "the independent services are intended to work in tandem with the services that are being provided through the development and implementation of an IEP . . . [to] bridge the gap created by a full school year of no Special Education services being provided."[20]

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[16] Petitioner's Exhibits 9 and 10.
[17] Testimony of Placement Monitor.
[18] Testimony of advocate.
[19] Testimony of Assistant Principal.
[20] Petitioner's Exhibit 21.

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:

IEP

The FAPE required by IDEA is tailored to the unique needs of a disabled child by means of an IEP. Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). An IEP is a written statement for each disabled child that includes the child's present levels of academic achievement and functional performance, a statement of measurable annual goals, including academic and functional goals, and a statement of the special education and related services and supplementary aids and services that will be provided for the child. *See* 34 C.F.R. § 300.320(a). Moreover, beginning not later than the first IEP to be in effect when the child turns 16, the IEP must include appropriate measurable postsecondary goals based upon age appropriate transition assessments and the transition services needed to assist the child in reaching those goals. 34 C.F.R. § 300.320(b). IDEA places upon the public agency the responsibility for ensuring that each disabled child has an IEP in effect. *See e.g.*, 34 C.F. R. § 300.323.

In this case, Petitioner has alleged that DCPS failed to provide an appropriate IEP, or indeed any IEP at all, for Student. DCPS does not deny that Student has not been provided with an IEP. Instead, DCPS asserts that it has been attempting to reschedule the meeting required to develop an IEP for Student, and that the Assistant Principal at Student's current private school bears responsibility for manipulating the system and the people involved in an attempt to have DCPS pay for the Student to stay at the current private school.

The undisputed evidence in this case confirms that as of the date of the due process hearing, DCPS had failed to provide Student with any IEP at all, primarily due to DCPS's failure to provide access to SEDS to the person initially charged with developing Student's IEP, and thereafter because DCPS personnel were unable to determine exactly who should be charged with the task of developing an initial draft IEP for Student. As a result, Student has yet to begin receiving the special education and related services he requires, even though his eligibility determination was made on December 9, 2010.

Although DCPS has attempted to place responsibility for the confusion concerning access to SEDS and the proper party to develop Student's IEP upon the Assistant Principal at the current private school, as noted above, IDEA's regulations place squarely upon the public agency the responsibility for ensuring that an IEP is in effect for each disabled child. In light of these regulations, as well as the evidence in this case, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS denied Student a FAPE by failing to provide Student with an IEP subsequent to his eligibility determination.

Services and 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. The public agency is also charged with ensuring that an IEP is developed for each disabled child, and then ensuring that special education and related services are made available to the child in accordance with the child's IEP. 34 C.F. R. § 300.323(c).

In this case, Petitioner has alleged that DCPS failed to provide any educational and related services at all, and any location of services, to Student. DCPS has countered that Petitioner's allegation of an inappropriate location of service cannot be determined because the IEP drives location of service.

Once again, the undisputed evidence in this case proves Petitioner's allegation. Hence, the evidence demonstrates that Student has not received any special educational or related services pursuant to an IEP, because he has no IEP. The evidence further proves that DCPS has failed to assign Student a location of services. As a result, Petitioner has yet to receive any special education and related services pursuant to an IEP in an appropriate location of services, even though his eligibility determination was made on December 9, 2010. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to provide Student with any educational and related services at all, as well as any location of services.

Relief Requested

As relief for DCPS's violations of IDEA in this case, Petitioner has requested an interim placement at Student's current private school for the remainder of SY 2011/12; an IEP to be developed with input from the current private school that includes a full-time educational program, related counseling services, and appropriate goals; a meeting to review evaluations, develop a transition plan and BIP, and discuss additional compensatory education once Student's vocational evaluation and FBA are received; and compensatory education.

In light of DCPS's violations of IDEA by failing to provide Student with an IEP and a location of services subsequent to the December 9, 2010 eligibility meeting, the hearing officer will grant Petitioner's requests for an interim placement at the current private school for the remainder of SY 2011/12, and for an Order requiring DCPS to convene another IEP meeting to develop an appropriate IEP for Student that includes appropriate goals, behavioral support services, and a transition plan, and to review any outstanding evaluations. Although the hearing officer will order DCPS to invite relevant personnel from the current private school to the IEP meeting and to take into account the opinions of the private school personnel should they choose to attend the meeting, the hearing officer will not order DCPS to consider input from the private school personnel because the hearing officer has no jurisdiction over the private school personnel and cannot compel them to attend the meeting. Moreover, although the hearing officer will order DCPS to consider the independent evaluator's recommendation of a full-time educational program for Student, the hearing officer will not order DCPS to provide Student with a full-time

program because (1) the evidence in this case, which clearly demonstrates that the IEP team deferred development of Student's IEP until a later meeting, does not prove that the IEP team agreed to a full-time program for Student or even had an opportunity to consider the evaluator's recommendation of a full-time program, and (2) while the evidence suggests that a full-time program would be helpful to Student, the evidence fell short of persuading the hearing officer that Student absolutely requires a full-time IEP. Finally, as the vocational evaluation, FBA and BIP were not at issue in this case, the hearing officer will not include those subjects in the Order for this HOD.

With respect to compensatory education, the hearing officer finds that although an award of compensatory education is in order in light of DCPS's violations of IDEA in this case, Petitioner has failed to prove how the amount of compensatory education requested will compensate Student for the harm suffered as a result of DCPS's violations. Therefore, the hearing officer will order DCPS to discuss and determine an appropriate form and amount of compensatory education for Student, using Petitioner's March 18, 2011 compensatory education plan as a starting point for the discussion and determination.

ORDER

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

1. Petitioner is hereby awarded an interim placement at Student's current private school for the remainder of SY 2011/12.

2. Within 10 calendar days of the issuance of this Order, DCPS shall convene an IEP meeting to develop an IEP for Student that includes appropriate goals, behavioral support services, and a transition plan, to review any outstanding evaluations, and to discuss and determine compensatory education. DCPS shall invite relevant personnel from Student's current private school to the IEP meeting and take into account the opinions of the private school personnel should they choose to attend the meeting. Moreover, in developing Student's new IEP, DCPS shall consider the independent evaluator's recommendation of a full-time educational program for Student. Finally, DCPS shall use Petitioner's March 18, 2011 compensatory education plan as a starting point for the discussion and determination of compensatory education for Student.

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 USC §1415(i).

Date: 5/2/2011 /s/ *Kimm Massey*

Kimm Massey, Esq.
Hearing Officer