**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
October 21, 2013

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Petitioners,

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Room No.: 2005

Respondent.

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# HEARING OFFICER DETERMINATION

## BACKGROUND AND PROCEDURAL HISTORY[1]

Student is a seventeen year-old young male, who presently attends a DCPS senior high school. On July 29, 2013, Petitioners filed a Complaint against Respondent District of Columbia Public Schools. On August 6, 2013, DCPS filed its Response to the Complaint.

The parties participated in a Resolution Meeting on August 23, 2013. There was no agreement, but the parties agreed not to prematurely end the resolution period. Therefore, the 45-day timeline began on September 6, 2013 and will end on October 20, 2013, which is the HOD deadline.

On September 12, 2013, the hearing officer conducted a prehearing conference and determined, in a September 17, 2013 Prehearing Order, that the claims to be adjudicated, defenses asserted, and relief requested were as follows: ***Petitioners' Claims:*** (i) Alleged failure to develop and implement a new IEP at the beginning of SY 2012/13 (Petitioner contends that as a new student with an IEP from a different LEA, student should have received a new IEP that was developed by DCPS, and that 34 C.F.R. § 300.323(a) governs with respect to having an IEP in effect at the beginning of the school year for every disabled child within the jurisdiction); and (ii) Alleged failure to develop an appropriate IEP (because on November 15th, 2012 DCPS reduced Students IEP hours from 26 hours outside general education to 21.67 hours, eliminated ESY, and opted for Metro fare instead of the bus transportation previously provided, thereby tailoring the IEP to fit the program offered at the current DCPS high school). ***DCPS Defenses:*** (i) DCPS denies all allegations of the complaint; (ii) DCPS had no involvement with Student in SY 2011/12 and was not involved in the previous LEA's determination that Student required a residential placement; (iii) When Student enrolled at the current DCPS high school at the start of SY 2012/13, 34 C.F.R. § 300.323(e) governed, which required DCPS to provide Student with "services comparable to those in his IEP" until either adopting that IEP or developing and adopting its own; (iv) Petitioner attended the November 15, 2012 IEP meeting and fully agreed with the new IEP, and indeed Petitioner requested that Student's transportation be changed to Metro cards

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[1] This section sets forth only the basic procedural history. Other events, including motions practice, may have taken place that are not listed here.

instead of the bus because Student was attending the neighborhood school; and (v) Student's truancy began long before he ever enrolled at DCPS, as he previously was missing up to eighty nine percent (89%) of his classes. ***Relief Requested:*** (i) DCPS to convene an IEP meeting within 10 days to review annual goals and progress and to determine an appropriate placement, including possible residential placement; (ii) a full educational assessment; and (3) compensatory education.

By their respective letters dated October 2, 2013, Petitioners disclosed eighteen documents (Petitioner's Exhibits 1-18) and DCPS disclosed eight documents (Respondent's Exhibits 1-8).

The hearing officer convened the due process hearing on October 4, 2013, as scheduled.[2] All documents disclosed by DCPS were admitted into the record without objection. Petitioner's Exhibits 1-15 and 18 were admitted without objection; Petitioner's Exhibit 16 was admitted over objection; and Petitioner's Exhibit 17 was excluded on relevance grounds.

Next, the hearing officer took under advisement Petitioners' Motion Requesting the Hearing Officer's Intervention and Motion to Exclude in Limine. After hearing oral arguments for and against the Motion, the hearing officer granted the Motion in part to the extent of agreeing to (1) to consider what weight would be accorded to Petitioners' statements, agreements, etc. extracted outside of Petitioner's counsel's presence because of potential inequities in allowing sophisticated DCPS professionals to obtain such statements from untrained laypersons; and (2) include in any Order issued a requirement that DCPS act through Petitioner's counsel and not directly with Petitioner. Otherwise, the hearing officer denied the Motion.

Petitioner then requested that the hearing officer include in the hearing three additional claims that were not asserted in the Complaint. The hearing officer declined the request, noting that pursuant to 34 C.F.R. § 300.511(d), the hearing officer could not consider matters that were not raised in the Complaint without the agreement of the opposing party, and DCPS promptly indicated its lack of agreement.

Thereafter, the hearing officer received Petitioner's opening statements, DCPS reserved its opening statement to the start of its case, and Petitioner presented its testimonial evidence. DCPS then declined to present a case, so the hearing officer received closing statements and brought the hearing to a close.

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 deny Student a FAPE by failing to develop and implement a new IEP at the beginning of SY 12/13?

2. Did DCPS's fail to develop an appropriate IEP on November 15, 2012?

## FINDINGS OF FACT[3]

1. Student is seventeen years old, and he is currently attending DCPS high school 2.

2. During SY 2012/13, Student attended DCPS high school 1.

3. Prior to his recent attendance at DCPS, Student attended a charter school. However, the charter school placed Student at a nonpublic school.[4] Hence, during SY 11/12, the charter school was Student's LEA while he attended a nonpublic school.

4. On December 5, 2011, the nonpublic school convened an IEP meeting with the charter school's representative in attendance. The team determined that Student was functioning on the following academic levels: math – 9 years old; reading – 8 to 10 years old; and written expression – 4th to 5th grade. The team determined to classify Student as a student with multiple disabilities consisting of Emotional Disturbance ("ED") and Specific Learning Disability ("SLD"). The team developed an IEP for Student that provided him with 26 hours per week of specialized instruction outside general education and 1.5 hours per week of behavioral support services outside general education. The IEP indicated that Student required the services of a dedicated aide to meet his needs and benefit from education, and also that he required ESY services.[5]

5. On April 23, 2012, the nonpublic school issued a Prior Written Notice stating that Student had been referred to OSSE for placement in a more restrictive nonpublic school in the form of a residential treatment program.[6]

6. Ultimately, the nonpublic school advised Parents that Student could go to his neighborhood DCPS school.[7]

7. On the first day of SY 12/13, Mother attempted to enroll Student in DCPS high school 2, but the school refused to accept Student and advised Mother to take Student to DCPS high school 1. Mother advised DCPS high school 2 that Student was a special education student and provided the school with Student's records.[8]

8. On September 4, 2012, Mother enrolled Student at DCPS high school 1.[9]

9. At DCPS high school 1 during SY 12/13, Student's schedule consisted of the following five classes: World History and Geography 1, English 1, Algebra 1, Academic Support HS, and Vocabulary Development. Hence, while Student was placed in some special education classes, some of his classes were not special education classes. Student would get frustrated with the work at DCPS high school 1, and he did not feel that he received sufficient help there.[10]

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[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 nonpublic former program director; testimony of Student.
[5] Testimony of nonpublic former program director; Petitioner's Exhibit 1; Respondent's Exhibit 2.
[6] Testimony of nonpublic former program director; Petitioner's Exhibit 2.
[7] Testimony of Mother.
[8] Testimony of Mother; testimony of Father.
[9] Testimony of Father; Petitioners' Exhibit 5.
[10] Testimony of Student; Respondent's Exhibit 2; Petitioner's Exhibit 12.

10. Student's September 27, 2012 Progress Report indicates that he had excessive absences, wasn't completing class assignments, and was failing the majority of his classes.[11]

11. On November 15, 2012, DCPS high school 1 developed an IEP for Student that required Student to receive 1300 minutes per week of specialized instruction in general education and 90 minutes per week of behavioral support services outside general education. The IEP indicates that Student also required the support of a dedicated aide, but that he did not require ESY.[12]

12. Student's class schedule at DCPS high school remained the same after the development of his November 15, 2012 IEP.[13]

13. Student's attendance at DCPS high school 1 was so poor during SY 11/12 that he only attended school ten days. By the middle of the school year, Student stopped attending school altogether.[14]

14. For the current school year, SY 2013/14, Student has been enrolled at DCPS high school 2.[15]

15. Petitioner is requesting compensatory education consisting of "approximately 100-175 hours" of intensive tutoring, as well as a laptop with two specified software programs. This "estimate considers both the amount of FAPE that was missed as well as the compensatory education time it would take for [Student] to achieve the progress he would have achieved in these areas had specialized services been provided in full during 2011-12." The plan was developed after an examination of Student's 2011/12 and 2012/13 IEPs, and the facts alleged in the current Complaint.[16]

## 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.

### Failure to Develop an IEP at the Start of SY 2012/13

In general, at the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP. 34 C.F.R. § 300.323(a). However, if a child with a disability who had an IEP that was in effect in a previous public agency in the same

[11] Petitioner's Exhibit 7.
[12] Petitioner's Exhibit 13.
[13] *See* Respondent's Exhibit 4.
[14] Testimony of Student; Respondent's Exhibit 4.
[15] *See* Complaint at ¶ 1.
[16] Petitioner's Exhibit 15.

state transfers to a new public agency in the same state, and enrolls in a new school within the same school year, the new public agency must provide FAPE to the child including services comparable to those described in the child's IEP from the previous public agency, until the new public agency either adopts the child's IEP from the previous public agency, or develops, adopts and implements a new IEP for the child. 34 C.F.R. § 300.323(e). District of Columbia law is consistent with this mandate. Hence, District of Columbia law provides as follows:

> Pursuant to 34 C.F.R. §300.323(e), if a child with an IEP in effect transfers between an LEA Charter, a District Charter, or DCPS, the receiving LEA shall be responsible upon enrollment for ensuring that the child receives special education and related services according to the IEP, either by adopting the existing IEP or by developing a new IEP for the child in accordance with the requirements of IDEA.

5 D.C.M.R. § 3019.5(d).

Each charter school in the District of Columbia that elects to be an independent local educational agency ("LEA Charter") is responsible for compliance with all requirements applicable to an LEA under the IDEA and its implementing regulations, 34 C.F.R. Part 300, as well as local laws, regulations, and policies. 5 D.C.M.R. § 3019.3. Hence, if a child is enrolled in an LEA charter and the child's placement is changed to a nonpublic school, the child shall remain enrolled in and is the responsibility of the LEA Charter, unless and until his or her parent re-enrolls the child into another LEA (whether another LEA Charter, a District Charter, or DCPS). 5 D.C.M.R. § 3019.9.

If an LEA Charter anticipates that it may be unable to meet its obligation to provide a FAPE to a child with a disability currently enrolled in its school, the LEA Charter shall contact the OSSE for technical assistance regarding the provision of FAPE to the child within the LEA Charter. 5 D.C.M.R. § 3019.8(b)(1). If the child's IEP team makes a placement decision that cannot be implemented within the LEA Charter, the OSSE shall make a location assignment for the placement of the child and, after providing an opportunity for input from the child's parents, the OSSE shall be responsible for making the final decision regarding the location assignment. 5 D.C.M.R. § 3019.8(5)-(7).

In the instant case, Petitioners seek to charge DCPS with a violation of 34 C.F.R. § 300.323(a), alleging that DCPS denied Student a FAPE because it did not provide an IEP as soon as it knew it had a disabled student residing within its jurisdiction, which Petitioners allege occurred when Mother tried to enroll Student in DCPS high school 2 as a special education student and was turned away. In fact, Petitioners argue that Mother's attempt to enroll Student at DCPS high school 2 on the first day of SY 12/13 was a *de facto* request for an IEP, and DCPS should have developed an IEP for Student within the first week or two weeks after the attempted enrollment. In connection with this argument, Petitioners argue that DCPS had a responsibility to ensure the provision of FAPE to Student once his nonpublic school determined that he required a residential treatment facility because DCPS is the State educational agency ("SEA") for LEA Charters.

DCPS disagrees with Petitioner's position, arguing instead that at all times when Student attended the nonpublic school, his previous LEA Charter remained the LEA for Student, and DCPS had no knowledge of Student or the recommendation for him to attend a residential treatment facility. As support for this argument, DCPS points to evidence demonstrating that the nonpublic school notified the LEA Charter and OSSE upon determining that Student required a different placement, not DCPS. DCPS argues that it did not become the LEA for Student until

he presented himself at the beginning of the school year and enrolled in DCPS high school 1, or at most on the first day of SY 2012/13 when Mother arrived at DCPS high school 2 with Student's records. As a result, according to DCPS, its obligations to Student at the start of SY 12/13 were governed by 34 C.F.R. § 300.323(e), which required the provision of comparable services to Student until DCPS either adopted his previous IEP or developed and adopted its own.

A review of the evidence in this case reveals that the LEA Charter remained Student's LEA while Student attended the nonpublic school, and that OSSE was the SEA which received notification when Student's IEP team's determined that he required a more restrictive residential placement. *See also* 5 D.C.M.R. §§ 3019.9 and 3019.8, *supra*. Hence, pursuant to 5 D.C.M.R. § 3019.5(d), DCPS's obligations to Student began when he transferred into DCPS, at which time DCPS was obligated to ensure Student received special education and related services according to his IEP, either by adopting the existing IEP or developing a new IEP for Student.[17]

The evidence in this case reveals that upon Student's enrollment in DCPS high school 1 with an IEP requiring that he receive 26 hours of specialized instruction outside general education, DCPS placed Student in general education social studies, English and math classes and only provided him with two classes where he received specialized instruction outside general education. Moreover, although Student enrolled at DCPS high school 1 on September 4, 2013, and DCPS was not implementing the IEP that Student arrived with, DCPS did not develop its own IEP for Student until more than two months later, on November 15, 2012. Even then, DCPS did not change Student's class schedule in accordance with his new IEP, which changed both the amount of specialized instruction Student was to receive and the setting in which it was to be provided. Based on this evidence, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE after he enrolled in DCPS high school 1 by failing to either implement Student's existing IEP or develop and implement one of its own.

**Appropriateness of the November 15, 2012 IEP**

The FAPE required by IDEA is tailored to the unique needs of a disabled child by means of the IEP. *See Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, 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.

In developing a Student's IEP, the IEP team must consider, *inter alia*, the child's strengths, the child's initial or most recent evaluations, the academic, developmental and functional needs of the child, and in the case of a child whose behavior impedes the learning of the child or others, the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a).

In determining whether a Student's IEP is appropriate, the hearing officer must determine (1) whether the LEA has complied with the procedures set forth in IDEA, and (2) whether the IEP developed through IDEA's procedures was reasonably calculated to provide Student with

[17] The hearing officer acknowledges that 5 D.C.M.R. § 3019.5(d) references 34 C.F.R, § 300.323(e), which speaks to disabled students who transfer from one LEA to another within the same state "within the same school year." However, in the absence of other federal or District regulations governing a disabled student's transfer from one LEA to another at the start of a given school year, the hearing officer will rely upon these regulations, which are most closely analogous, as it would be unreasonable to charge DCPS with providing an IEP at the start of the school year for a Student of whom it did not become aware until the start of the school year.

educational benefits. *See Rowley, supra*. In turn, 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 asserted that DCPS provided Student with an inappropriate IEP on November 12, 2013 by reducing Student's IEP hours from 26 hours outside general education to 21.67 hours in general education, eliminating ESY, and opting for Metro fare instead of bus transportation, thereby tailoring Student's IEP to fit the program offered at DCPS high school 1. However, as DCPS pointed out in its closing statement, Petitioner failed to present any witnesses who attended the November 12, 2013 IEP meeting and could provide testimony that the IEP was tailored to meet the program at DCPS high school 1. The hearing officer also notes that no Meeting Notes from the IEP meeting were included in the administrative record. Moreover, although Petitioner presented testimony from the educational advocate that DCPS high school 1 could not implement a full-time IEP, the basis of the advocate's testimony – namely, a conversation with the school's principal regarding a different student, was much too tenuous and unreliable for this hearing officer to assign any probative value to the testimony.

With respect to whether DCPS complied with the procedures set forth in IDEA and developed an IEP that was reasonably calculated to provide Student with educational benefits, absent testimony from one or more witnesses who attended and remembered and/or understood what took place at the IEP meeting, and absent any Meeting Notes regarding the IEP meeting, the hearing officer has no way of determining whether DCPS complied with IDEA's procedures in developing the IEP.

As to the content of the IEP, however, although Petitioner failed to provide testimony from any witness qualified to testify that the IEP was insufficient to meet Student's needs and/or what those needs were, the evidence in this case clearly demonstrates that by the end of September 2012, Student's academic performance was suffering as a result of his excessive absences and failure to complete class assignments, with the result that he was in danger of failing most of his classes. Notwithstanding Student's poor academic performance and attendance, on November 12, 2012, DCPS developed an IEP that reduced the amount of specialized instruction Student would receive, changed the setting of the specialized instruction from outside general education to inside general education, determined that Student no longer required ESY services, and did not include a BIP or goals or other interventions designed to address Student's severe attendance issues. Based on this evidence, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS failed to provide Student with an IEP that was reasonably calculated to provide Student with educational benefits at the time the IEP was provided on November 12, 2012.

**Relief to be Provided**

As relief in this matter, Petitioner has requested that DCPS be ordered to convene an IEP meeting to review Student's annual goals and progress and to determine an appropriate placement, including possible residential placement; to conduct a full educational assessment of Student; and to provide Student with compensatory education. However, Petitioner has failed to provide the hearing officer with even a scintilla of evidence regarding when Student's most recent assessments were conducted and what those assessments were. Therefore, the hearing officer will order DCPS to conduct a meeting to develop a Student Evaluation Plan setting forth what, if any, assessments Student requires, and then to conduct an IEP meeting after any required assessments have been conducted to review and revise Student's IEP and to discuss and

determine an appropriate educational placement for Student, including a residential placement if necessary.

With respect to the requested compensatory education, while the evidence in this case tends to demonstrate that Student may have missed an entire year of educational instruction as a result of DCPS's denials of FAPE in this case, Petitioner has failed to provide the hearing officer with any evidence of exactly what Student required during SY 12/13 in terms of programming, and as a result, what educational benefits Student likely would have received had DCPS supplied that programming. *See Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. 2005) (the compensatory education awarded 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). Moreover, the specific compensatory education requested is in the form of an overly broad range of hours of tutoring, i.e., 100-175 hours, and the request is based on missed services during SY 11/12, which is not the year at issue in this proceeding. *See Reid*, 401 F.3d at 518 (compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA). As a result, while the hearing officer normally would fashion a compensatory education award designed to redress the denials of FAPE found herein, in this case Petitioner has wholly failed to provide the hearing officer with the evidence necessary to conduct a fact-specific inquiry and develop an appropriate compensatory education award for Student. *See Reid*, 401 F.3d at 524 (in every case, the compensatory education inquiry must be fact-specific). Hence, the hearing officer is left with no choice but to deny Petitioner's request for an award of compensatory education.

## ORDER

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

1. Within 10 calendar days of the issuance of this Order, DCPS shall conduct a meeting to develop a Student Evaluation Plan setting forth what, if any, assessments should be administered to Student for his IEP team to have sufficient data to determine his special education and related services needs. Any such assessments shall then be conducted by DCPS within 15 calendar days of the development of the Student Evaluation Plan.

2. Within 10 calendar days of the completion of any assessments administered pursuant to Paragraph 1 above, DCPS shall convene an IEP meeting for Student to review and revise Student's IEP and to discuss and determine an appropriate educational placement for Student, including a residential placement if necessary. If it is determined that no additional assessment data is required for Student, then the IEP meeting shall be held within 10 calendar days of the meeting to develop the Student Evaluation Plan.

3. At least one of the Petitioners, i.e. either Mother or Father, shall participate in the meeting to develop a Student Evaluation Plan. However, if Petitioners fail to make themselves available after reasonable attempts by DCPS to secure their participation, DCPS may proceed without them.

4. Once the Student Evaluation Plan has been developed, Student shall promptly make himself available for any necessary assessments. Should Student fail to do so, the timeline set forth in Paragraph 1 for completion of the assessments shall be extended by one day for every day of delay caused by Student, so long as DCPS can present credible

documentary evidence of its attempts to obtain Student's cooperation with the assessments.

5. DCPS shall direct all communications regarding scheduling, assessments, and meetings required pursuant to this Order through Petitioner's counsel only and shall not directly contact Petitioners or Student for these purposes.

## 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: ____10/20/2013_____ ___/s/ *Kimm Massey*_____

Kimm Massey, Esq.
Hearing Officer