

**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 29, 2014

Petitioner

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**¹

Student presently attends his neighborhood DCPS elementary school. On March 14, 2014, Petitioner filed a Complaint against Respondent District of Columbia Public School (“DCPS”). On March 24, 2014, DCPS filed its Response to the Complaint.

The parties concluded the Resolution Meeting process, by participating in a resolution session meeting on March 31, 2014. No agreement was reached, but the parties agreed not to prematurely shorten the 30-day resolution period. The 45-day timeline began on April 14, 2014 and will end on May 28, 2014, which is the HOD deadline.

On April 25, 2014, the hearing officer conducted a prehearing conference and determined, that the claims to be adjudicated, defenses asserted, and relief requested were as follows:

Petitioner’s Claims: (i) Alleged failure to develop an IEP reasonably calculated to provide educational benefit; and (ii) Alleged inappropriate school program/setting.

Respondent’s Defenses: (i) Student returned to DCPS in SY 2013/2014 from a state in the South. Initially, the neighborhood DCPS elementary school could handle Student, but DCPS has since determined that Student has significant behavioral issues that require more services and a different location of services. DCPS is proposing to convene a meeting next week to increase specialized instruction hours and determine another location of services.

Relief Requested: (i) An order that DCPS shall place and fund Student to attend an appropriate school placement such as the specified private school. (ii) An order that DCPS

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

shall amend Student's IEP to significantly increase the amount of special education services provided to Student.

By their letters dated May 2, 2014 and May 7, 2014, respectively, Petitioner disclosed five documents (Petitioner's Exhibits 1-5), and DCPS disclosed seven documents (Respondent's Exhibits 1-7).

The hearing officer convened the due process hearing on May 4, 2014, as scheduled.² All disclosed documents were admitted without objection. As a preliminary matter, Petitioner asserted that DCPS developed a full-time out of general education IEP for Student on May 7, 2014, thereby conceding that a full-time IEP is needed for Student. DCPS agreed that the May 7, 2014 IEP is an acknowledgment that Student needs a full-time out of general education setting; however, DCPS was not prepared to determine location of service at the May 7, 2014 IEP meeting.

Thereafter, the hearing officer received opening statements, the parties' testimonial evidence, and closing statements prior to concluding the hearing.

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

ISSUE(S)

1. Did DCPS deny Student a FAPE by failing to develop an IEP reasonably calculated to provide educational benefit on January 29, 2014?
2. Did DCPS deny Student a FAPE by providing Student with an inappropriate school program/setting?

FINDINGS OF FACT^{3,4}

1.

Student's current

disability classification is Other Health Impairment due to Attention Deficit Hyperactivity Disorder.⁵

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

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 When citing an exhibit that has been submitted by both parties, the hearing officer may only cite to one party's exhibit.

⁵ Testimony of Parent; Petitioner's Exhibit 2 at 1.

2. When Student arrived at the current DCPS school at the start of SY 2013/14, Parent presented DCPS with Student's IEP from another state. However, although Student attended school in another state during SY 2012/13, he attended DCPS schools for the entirety of SY 2011/12. In fact, Student attended his current neighborhood DCPS elementary school for the first half of SY 2011/12.⁶
3. At the beginning of the current school year, SY 2013/14, Parent told the staff at the current DCPS school that Student presented with significant behavior concerns. Nevertheless, in the fall of 2013, DCPS developed an IEP that essentially tracked Student's out-of-state IEP. Parent is not challenging the Fall 2013 IEP.⁷
4. At the beginning of SY 2013/14, DCPS told parent that Student was not demonstrating the undesirable behaviors Parent warned them about. Student was suspended a couple of times prior to Winter Break, but after Winter Break Student's behavior escalated dramatically in that he hit teachers, pushed teachers, and climbed the service ladder inside the school building to go to the roof. Student also began walking the halls and refusing to go to class. The school principal began calling the police on Student, stating that Student's refusal to go to class is unsafe behavior. Indeed, the principal has called the police on Student so many times that the police have begun to question why they are being called so often.⁸
5. On January 29, 2014, DCPS convened another IEP meeting for Student. However, even though the DCPS school principal had called the police on Student twice by the time of the meeting, DCPS continued to insist that Student was not presenting negative behaviors and DCPS declined to make any major changes to Student's IEP. As a result, Student's January 29, 2014 IEP requires Student to receive 2 hours per week of specialized instruction in reading outside general education, one hour per week of specialized instruction in written expression in general education, one hour per week of specialized instruction in mathematics in general education, and 120 minutes per month of behavioral support services outside general education.⁹
6. Since the January 29, 2014 IEP meeting, the DCPS school staff have called the police on Student 5-6 more times and Student was suspended for a fighting incident that took place on April 29th.¹⁰
7. Altogether, both on and off the record, Student has been suspended a total of 14 days; however, on the record Student has only been suspended a total of 8 days.¹¹

⁶ Testimony of Parent.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*; Petitioner's Exhibit 1; *Compare* Petitioner's Exhibit 2 at 1. .

¹⁰ Testimony of Parent.

¹¹ *Id.*

8. Student's has made limited academic progress in all areas during the current school year. Student is performing at a second grade level in reading and mathematics although he is in 5th grade, and Student received grades of 1 (Below Basic) in reading, writing/language and math for the first and second terms of SY 2013/14.¹²
9. By letter dated April 8, 2014, Student was accepted to attend the specified private school.¹³
10. On May 7, 2014, DCPS convened another IEP meeting for Student and developed a full-time out of general education IEP that requires Student to receive 26.5 hours per week of specialized instruction outside general education and 240 minutes per week of behavioral support services outside general education. Although DCPS revised Student's behavioral goals, DCPS did not change any of Student's academic goals on the ground that Student had not made any progress on the goals. With respect to location of services, Parent stated that Student had been accepted at the specified private school and requested a placement there, but DCPS stated that it did not have location information for Student at that time.¹⁴
11. DCPS developed the May 7, 2014 IEP for Student because of changes in Student's behavior that required additional support. The team determined that Student requires a self-contained classroom where he can be educated with behavioral support throughout the day. The team further determined that although the current DCPS school can provide the academic support Student needs, the school has not been able to manage Student's behaviors to allow him to make the necessary academic progress.¹⁵
12. DCPS developed a functional behavior analysis for Student on May 6, 2014, and DCPS developed a behavior intervention plan for Student on May 7, 2014.¹⁶
13. The specified private school is a primary/middle school with a total population of approximately 34 students and an average class size of 8-10 students. There are two primary classrooms and two middle school classrooms – one LD (learning disabled) class and one ED (emotional disturbance) class for each level. The school only services students who require 100% special education services. The school offers a behavioral modification systems where students are either earning points or not from the moment they walk in the door each day, as well as intensive corrective reading and math programs that include biweekly testing to determine instruction needed to meet common core standards. The school implements BIPs, which are individualized for each particular child to teach the students how to identify frustration levels and regulate their own emotional functioning. The staff are trained behaviorally and use therapeutic aggression control techniques, so there is processing in and out of class, as well as individual and

¹² Petitioner's Exhibit 2 at 6; Petitioner's Exhibit 1 at 3-4; Petitioner's Exhibit 3; testimony of SEC/LEA representative.

¹³ Petitioner's Exhibit 4.

¹⁴ Testimony of Parent; Respondent's Exhibit 4.

¹⁵ Testimony of SEC/LEA representative.

¹⁶ Respondent's Exhibits 5-6.

group therapy. The school can provide Student with 26.5 hours of specialized instruction outside general education and 240 minutes per month of behavioral support services outside general education. Student displays issues similar to those presented by other students at the school who have made progress, so the staff believes Student could make similar progress. Tuition at the school ranges from \$30,000 per year to \$35,000 per year, depending upon the related services a child needs.¹⁷

14. DCPS offers a behavioral and emotional support (“BES”) program, which is a self-contained program for students with emotional and behavioral disabilities and/or any behavior challenges that impact academic achievement. For SY 2013/14, the program had 49 classrooms serving kindergarten through 12th grade in 21 buildings. The types of disabilities addressed include oppositional defiance, noncompliance, verbal and physical aggression, ED behaviors, and attentional difficulties. The program allows a maximum of 10 students per class with a special education teacher, a behavior technician and an instruction paraprofessional. There are also behavior coaches who support the classroom staff through professional development. Related services are provided on either a push-in or pullout basis. Most BES students are in a self-contained setting at first, but the students can transition out of the self-contained setting when the IEP team so determines. The BES program can provide the services required on Student’s May 2014 IEP.¹⁸

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

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 claim.

The “free appropriate public education” required by the Act is tailored to the unique needs of the handicapped child by means of an “individualized educational program.” Board of Education of the *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). 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.” *Id.* Hence, the IEP, and therefore the personalized instruction, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.*

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 educational benefits. *Board of Education of the Hendrick Hudson Central School District*,

¹⁷ Testimony of school program director.

¹⁸ Testimony of program manager.

Westchester County, et. al. v. Rowley, 458 U.S. 176 (1982) (“*Rowley*”). 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).

IDEIA also requires that a public agency provide an appropriate educational placement/location of services 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 the instant case, Petitioner contends that DCPS denied Student a FAPE by failing to provide Student with an IEP reasonably calculated to provide educational benefit on January 29, 2014, and by providing Student with an inappropriate school program/setting. Petitioner contends that Student required a full-time program because of significant academic and behavioral concerns and a more structured and therapeutic setting at the time of the January 29, 2014 IEP meeting. DCPS disagrees, arguing that Student’s behaviors did not begin to escalate until mid-February and DCPS acted appropriately by convening an IEP meeting in early May, making changes to Student’s IEP and providing an FBA and a BIP.

A review of the evidence in this case reveals that by the time of Student’s January 29, 2014 IEP meeting, Student’s behaviors had already escalated to the point that the staff at his DCPS school had called the police on Student twice, and Student was making limited academic progress as revealed by his March 2014 Report Card. Moreover, although Student was in the 5th grade, he was performing at a 2nd grade level in reading and math. Nevertheless, DCPS revised Student’s IEP to provide only 2 hours per week of specialized instruction outside general education, two hours per week of specialized instruction in general education, and 120 minutes per month of behavioral support services outside general education. DCPS also determined that Student’s location of services would continue to be his neighborhood DCPS school. Upon consideration of this evidence, the hearing officer has determined (1) that at the time the January 29, 2014 IEP was offered, it was not reasonably calculated to provide Student with educational benefit in light of his significant academic deficits and his escalating behavioral issues, and (2) that the neighborhood school was no longer an appropriate location of services for Student in light of its inability to manage Student’s escalating behavior by methods that did not include calling the police on him. Hence, Petitioner has met its burden of proving a denial of FAPE as alleged.

However, although the evidence is clear that Student ultimately required a full-time program because of his escalating behaviors, which DCPS provided to Student in May 2014, the evidence does not support the conclusion that Student’s behaviors had escalated to the point of requiring a full-time program on January 29, 2014. The evidence does reveal however, that DCPS failed to provide Student with a full-time location of services that could implement his full-time IEP in May 2014.

Under these circumstances, the hearing officer has determined that it would be inappropriate to award Student a placement at the specified private placement, unless DCPS fails to promptly provide Student with an appropriate location of services that can implement his IEP. The hearing officer has further determined that an award of compensatory education consisting of independent tutoring and behavioral services would be appropriate in this case to remediate the educational harm Student suffered as a result of the inappropriate IEP and placement provided on January 29, 2014. However, as Petitioner failed to provide any evidence that would support an award of compensatory education, the hearing officer will order DCPS to consider the issue in the first instance.

ORDER

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

1. Within 7 calendar days of the issuance of this Order, DCPS shall reconvene Student's IEP meeting to (1) designate a location of services that can implement Student's May 7, 2014 full-time out-of-general-education IEP, and (2) discuss and determine an appropriate award of compensatory education for Student based on the denial of FAPE as a result of the inappropriate IEP and placement DCPS provided to Student on January 29, 2014. However, with respect to the scheduling of the IEP meeting, DCPS shall be allowed 1 additional day for every day of delay caused by Petitioner and/or her agents.
2. In the event DCPS fails to timely comply with the requirements of Paragraph 1 above, DCPS shall fund Student's placement at the specified private school for SY 2014/15.

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: 5/28/14

/s/ Kimm Massey

Kimm Massey, Esq.
Hearing Officer