

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a _____ year-old female, who currently attends a DCPS middle school. Student's most recent IEP identifies her primary disability as specific learning disability ("SLD") and requires her to receive 20 hours per week of specialized instruction outside of general education and 45 minutes per week of behavioral support services.

On February 18, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS failed to implement Student's IEP at her current school, place Student in an appropriate school that could or would implement her IEP, and develop an appropriate IEP or ensure an appropriate school that provides full-time services out of general education. As relief for these alleged denials of a free appropriate public education ("FAPE"), Petitioner requested a full-time IEP or an Order requiring DCPS to develop one; and an Order requiring DCPS to begin fully implementing Student's IEP within one school day and provide written evidence of same or fund and provide transportation for a different school, fund placement and provide transportation to one of several specified nonpublic full-time special education schools, convene an MDT meeting within 10 days, and award appropriate compensatory education.

On February 28, 2011, DCPS filed its Response to the Complaint. In its Response, DCPS conceded that Student had received some of her specialized instruction in a general education

STUDENT HEARING OFFICE
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setting and some outside general education for a portion of the year, but asserted that Student is now receiving all of her specialized instruction outside of general education. DCPS further asserted that Student's poor attendance during the current school year has impeded her ability to access the curriculum, and DCPS denied that there has been a denial of FAPE.

On March 25, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. The hearing officer issued the Prehearing Order on March 28, 2011.

By their respective disclosure letters dated March 31, 2011, Petitioner disclosed thirty documents (Petitioner's Exhibits 1 – 30), and DCPS disclosed DCPS-1 through DCPS-5.

The hearing officer convened the due process hearing on April 7, 2011.¹ All disclosed documents were admitted without objection. 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 fail to implement Student's current IEP?
2. Did DCPS fail to provide an appropriate location of services for Student to the extent that the current location either cannot or will not implement the IEP?
3. Did DCPS fail to provide an appropriate IEP and school because a full-time out of general education IEP and school are needed?

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 she attends grade at a DCPS public school.²

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

² Testimony of Student.

2. Student has been receiving special education services since 2nd grade, and she has been in DCPS the entire time.³
3. Student's current IEP is dated February 14, 2011. The IEP identifies Student's primary disability as SLD, and it requires Student to receive 20 hours per week of specialized instruction outside general education and 60 minutes per week of behavioral support services outside general education.⁴
4. Student's previous IEP, dated July 7, 2010, listed SLD as Student's primary disability and required Student to receive 20 hours per week of specialized instruction outside general education and 120 minutes per month of behavioral support services outside general education.⁵
5. Student's June 1, 2009 IEP identified Student's primary disability as ED and required Student to receive 20 hours per week of specialized instruction outside general education and 45 minutes per week of behavioral support services outside general education.⁶
6. Student's January 22, 2008 IEP identified her primary disability as LD (writing, reading, mathematics) and required Student to receive 15 hours specialized instruction per week with a special education teacher. While receiving services under that IEP during the first quarter of SY 2008/09, Student received the following grades: an F in English due to excessive absences and non-completion of assignments; a C in Mathematics due to poor behavior and non-completion of class assignments; a C- in Art due to excessive absences; an F in World History and Geography/The Ancient World due to poor behavior and non-completion of assignments.⁷
7. Student's scores on an updated comprehensive educational evaluation administered on May 7, 2009 suggested that she has global deficiencies in all areas of academic achievement, including reading, mathematics, written language, and oral language. Similarly, Student's scores on a psychological evaluation administered on April 20, 2009 were in the Very Low Range for overall intellectual ability and intentional cognitive processing, and in the Low Average range for automatic cognitive processing. Based on Student's test scores, the evaluator who prepared Student's June 2, 2009 clinical evaluation determined that Student "meets diagnostic criteria for Learning Disorder NOS, as she evidences academic problems in mathematics, Reading, Written Language, and Oral language that together, significantly impact her ability to learn in a general education classroom. Her compromised abilities require the use of a full time special education curriculum."⁸

³ Testimony of Parent.

⁴ DCPS-2.

⁵ DCPS-1.

⁶ Petitioner's Exhibit 3.

⁷ See Petitioner's Exhibit 4.

⁸ Petitioner's Exhibit 4.

8. Based on the results of Student's May 7, 2009 clinical evaluation, the evaluator also determined that Student meets the criteria for Depressive Disorder Not Otherwise Specified, Attention Deficit/Hyperactivity Disorder ("ADHD"), Combined Type, and Oppositional Defiant Disorder. The evaluator found clear evidence that the ADHD and Oppositional Defiant Disorder symptoms cause clinically significant impairment in Student's educational/academic and social functioning.⁹
9. At the end of SY 2008/09, Student received final grades of D in ELA (English/Language Arts?), Math, Art 7, and Science, and a final grade of B in Computer Applications.¹⁰
10. Student's performance on a September 2, 2009 speech/language evaluation suggested that Student has poor mastery of word meanings in spoken language and revealed significant deficits in the ability to make inferences and use the process of deduction to determine the meaning of words within a context. These deficits could interfere with Student's ability to mentally generalize and think abstractly, understand analogies, use complex forms of language inclusive of metaphors and sarcasm, and reason flexibly and verbally through complex problems. Student's performance on the evaluation also suggested below average skills in the acquisition and storage of vocabulary and limited world knowledge, but a strength in the area of pragmatics. Overall, Student's scores suggested deficits that could negatively impact her oral language, written language, and reading skills.¹¹
11. Student's performance on a September 8, 2009 administration of the Vineland-II assessment revealed that Student does not meet the criteria for mental retardation.¹²
12. Student floundered in middle school until 8th grade during SY 2009/10, when she was placed in a self-contained special education class on a full-time basis. She stayed in the same classroom all day, except during physical education, with the same 7 to 8 students each day. Student liked her teacher in the self-contained class because he would assist her whenever she raised her hand and said she did not understand. In fact, the teacher would come to her right away before he went back to the board to continue teaching. By contrast, Student's social studies and math teachers during the current year do not provide her with help when she raises her hand. Moreover, before Student's schedule changed in February, her previous teachers weren't giving her the help she needed either. During SY 2009/10, Student's teacher in the self-contained classroom was a good fit for her because she received full attention, more help, and all of the details she needed. Student would like to have a situation like that again because she needs more attention and more staying in one class where things are explained to her. Most of her teachers this year won't come to her when she raises her hand, won't repeat the instruction when she raises her hand and/or won't give her the full details she needs.¹³

⁹ *Id.*

¹⁰ See Petitioner's Exhibit 11.

¹¹ Petitioner's Exhibit 11.

¹² Petitioner's Exhibit 12.

¹³ Testimony of Parent; testimony of Student.

13. DCPS's records show that between the start of SY 2010/11 on August 16, 2010 through March 25, 2011, Student was absent for 26 of the 129 school days. Parent acknowledges that Student was absent for two weeks due to a rash called Fifth disease. Other than that, however, Parent reports that she sent Student to school every day with a bus pass. It was only recently that Parent learned that Student sometimes does not go to school either because of arguments with peers or because she does not understand what's going on in school, but the school has never sent any notes home about Student's absences, and DCPS did not mention the absences at Student's most recent IEP meeting. Student admits that she sometimes skips classes by either wandering the halls at school or going to a friend's house instead of going to school.¹⁴
14. Prior to Student's February 14, 2011 MDT meeting, Student's daily class schedule consisted of the following classes: Reading 180 (a combined reading and writing class with 6 special education students); Math (a non-special education class); Lunch; Math again; and Science (non-special education class). Hence, Student was receiving approximately 7.5 hours of specialized instruction per week in her Reading 180 class. During Student's February 14, 2011 MDT meeting, Parent learned for the first time that DCPS was not providing Student with the specialized instruction and behavioral support services she is entitled to receive under her IEP. Subsequent to the February 14, 2011 MDT meeting, Student's class schedule was changed. Now, on Mondays, Wednesdays, Thursdays and Fridays, Student takes English (special education class), Science/Reading (special education class), Social Studies (non-special education), Lunch, back to Social Studies, and Math/Algebra (special education class). On Tuesdays, Student takes General Education English, General Education Science, General Education Social Studies, Lunch and Algebra (a non-special education class with only special education students). Student's new schedule is a modified inclusion schedule. The Tuesday general education classes are necessary so that Student and her classmates can receive Carnegie Units toward graduation, because the special education teacher who teaches the students on Monday and Wednesday through Friday is not content-area certified. With the new schedule, Student is now receiving 18 hours per week of specialized instruction outside of general education.¹⁵
15. Student did not receive any counseling services at the beginning of SY 2010/11. Subsequent to the February 14, 2011 MDT meeting, Student went to see the school counselor approximately every other day, but the visits took place at Student's initiative only because the counselor never went to pick up Student for counseling. In any event, the counselor left after Student had been going to see her for approximately two weeks.¹⁶
16. Student has been accepted to attend a private full-time special education school located outside of the District of Columbia. The school services 112 students in 1 building. The students in the upper school primarily have an ED classification, but some of the students have LD, OHI, SLI and multiple disability classifications. The school offers a cafeteria, 4 computer labs, a library, a gymnasium, and a large area outside with, *inter alia*, a

¹⁴ DCPS-3; testimony of Parent; testimony of Student.

¹⁵ Testimony of Parent; testimony of Student; testimony of special education teacher; *see* Petitioner's Exhibit 25.

¹⁶ Testimony of Student;

playground and basketball courts. Staff members at the school include 1 nurse, 8 clinical psychologists and 1 psychiatrist. The upper school also has 6 behavior counselors and 1 behavior counseling center. The school offers the District of Columbia curriculum to children from the District, with an option to obtain either a diploma or a certificate. The school has a Certificate to Operate from OSSE, and OSSE has approved the school's rates of approximately _____ per day for 183 days of instruction per year. All students in the school have a behavior management plan, students must be in the correct room at all times, behavior counselors patrol the hallways, and all students are escorted from one room to another as the students are not allowed to be in the hall by themselves. If students are truant, the school makes contact with parents, gives incentives for attendance, and even calls students in the mornings or sometimes goes to pick students up and bring them to school. Each classroom in the upper school has a lead teacher and at least one teaching assistant. All head teachers are certified to teach special education and some are certified in their content areas as well. All of the students at the school are disabled. Parent thinks the school would be a good place for Student because most of the students there are LD, so the school will know how to deal with Student and Student will feel more comfortable there. Moreover, Student would get the extra attention she needs, Student could stay there until she graduates, and the school has a fashion program, which is something Student would really enjoy and would provide Student with incentive to attend school. Student wants to go to the school as well, because they understand her there. Student believes she will do better and not skip classes at the school.¹⁷

17. On March 1, 2011, DCPS provided Petitioner with written authorization for 40 hours of independent tutoring services for Student as compensatory education intended to either compensate or partially compensate for DCPS's failure to fully implement Student's IEP during SY 2010/11. Parent has decided to access the tutoring for Student during summer 2011.¹⁸

18. Petitioner is requesting an additional 144 hours of tutoring services, which represents 4 hours of tutoring per week for one full school year (36 weeks), as compensatory education for DCPS's failure to implement Student's IEP from the start of SY 2010/11 through the date of the February 2011 MDT meeting. Petitioner's educational advocate is of the opinion that Student needs intensive recovery tutoring after failing first semester, but Parent has not received any report cards or progress reports for Student during SY 2010/11 and is unsure of Student's grades.¹⁹

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:

¹⁷ Testimony of private school assistant educational director, testimony of Parent, testimony of Student.

¹⁸ Petitioner's Exhibits 22 and 25; DCPS-4; testimony of advocate.

¹⁹ Testimony of advocate; testimony of Parent.

Implementation of 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). Hence, IDEA defines a FAPE as special education and related services that, *inter alia*, are provided in conformity with an IEP. 34 C.F.R. § 300.17. Moreover, IDEA requires each public agency to have an IEP in effect at the beginning of each school year for each disabled child within its jurisdiction, and to ensure that the child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other services provider who is responsibility for implementation of the IEP. 34 C.F.R. § 300.323(a) & (d).

In the instant case, DCPS concedes that Student's IEP was not fully implemented from the start of SY 2010/11 in August 2010 through mid-February of 2011, and the evidence proves that Student received only 7 hours of specialized instruction outside of general education during that time period. Hence, for more than half of 2010/11, DCPS failed to provide Student with 13 of the 20 hours per week of specialized instruction outside of general education required by her IEP. The evidence further proves that from mid-February 2011 moving forward, DCPS provided Student with only 18 of the 20 hours per week of specialized instruction outside of general education required by her IEP. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS denied Student a FAPE by failing to fully implement her IEP during SY 2010/11.

Inappropriate Location of Services due to Failure to Implement IEP

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. Hence, IDEA defines a FAPE as special education and related services that, *inter alia*, include an appropriate preschool, elementary or secondary school in the State involved and are provided in conformity with an IEP. 34 C.F.R. § 300.17.

In the instant case, Petitioner argues that the current school is an inappropriate location of services due to its inability and/or unwillingness to implement Student's IEP. A review of the evidence supports Petitioner's position, as the evidence shows that the current DCPS school provided Student with less than half of the specialized instruction required under her IEP for the first 6 months of the current school year, and thereafter, once the school began making a serious effort to implement Student's IEP, the school has still only managed to provide Student with 18 of the 20 hours of specialized instruction outside of general education called for by her IEP. Moreover, in attempting to implement Student's IEP from mid-February moving forward, the school has required Student to participate in a modified inclusion program that is not contemplated by her IEP. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of demonstrating that the current location of services is an inappropriate location of services for Student.

Inappropriate IEP and Location due to Failure to Provide More Services

As noted above, the FAPE required by IDEA is tailored to the unique needs of a disabled child by means of an IEP, and each 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 *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982); 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. Hence, IDEA defines a FAPE as special education and related services that, *inter alia*, include an appropriate preschool, elementary or secondary school in the State involved and are provided in conformity with an IEP. 34 C.F.R. § 300.17. However, each public agency must ensure that to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114.

In the instant case, Petitioner argues that Student's current IEP and location of services are inappropriate because Student requires a full-time out of general education IEP and school. On the other hand, DCPS asserts that the fact that Student performed well in her 8th grade class in a DCPS school is evidence that the current IEP represents the least restrictive environment for Student. An examination of the evidence confirms that Student performed well during SY 2009/10 in her 8th grade class, but said 8th grade class was a self-contained special education class where Student received instruction for all of her classes other than physical education. The evidence further reveals that Student floundered in middle school before she was placed in the self-contained class, she was unable to fully access the curriculum during the first 6 months of the current year when she was placed in mostly general education classes, and even now Student continues to feel that she is not receiving the level of help she needs to succeed at the current school, especially compared to last year when her teacher from the self-contained class always assisted her when she didn't understand the lesson. This is not surprising when one considers that the most recent educational assessment administered to Student indicates that she has global deficiencies in all areas of academic achievement, including reading, mathematics, written language, and oral language, her overall intellectual ability is in the very low range. Based on this evidence, the hearing officer concludes that the least restrictive environment for Student is a self-contained special education class where Student can receive instruction in all academic subjects. Hence, Petitioner has met its burden of demonstrating that Student's current IEP, which only provides for 20 hours per week of specialized instruction outside general education, is inappropriate. Moreover, as the evidence in this case proves that the current school has been unable to fully implement Student's current IEP, which provides for much less specialized instruction than Student would receive in the self-contained special education class she requires to access a FAPE, the hearing officer concludes that Petitioner has also met its burden of demonstrating that the current DCPS school is an inappropriate location of services for Student.

Based upon these conclusions and the evidence in this case, the hearing officer will order DCPS to convene an MDT meeting for Student within 10 school days to (1) revise Student's IEP to provide for specialized instruction in a self-contained special education class where Student receives instruction in all academic subjects, (2) discuss and determine whether Student requires

speech and language services in light of her most recent speech language evaluation which identified significant deficits that could be negatively impacting Student's oral language, written language, and reading skills, (3) discuss and determine whether the current level of behavioral support services Student receives is sufficient, and if not, increase said services to an appropriate level, and (4) issue a Prior Written Notice of Placement assigning Student to a school that can provide her with a self-contained special education class where she can receive instruction in all academic areas beginning at the start of SY 2011/12.

As the current school year is rapidly nearing its end, the hearing officer believes that it would be unproductive, and possibly more disruptive than helpful, to change Student's location of services at this late date. However, as Student's IEP is not being and has not been fully implemented at the current DCPS school during SY 2010/11, the hearing officer has determined that an award of compensatory education is required to provide Student with the educational benefits she likely would have received from the special education services she was entitled to pursuant to her IEP this school year. *See Reid v. District of Columbia*, 401 F.3d 516, 518 (D.C. 2005)

(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). Therefore, the hearing officer will award Student the following forms and amounts of compensatory education: (1) extended school year or summer school services, at Parent's option, during Summer 2011 in a self-contained special education class to be assigned by DCPS²⁰; (2) 12 hours of independent tutoring, to be provided at the rate of 2 hours per week beginning the week of May 9, 2011 and continuing through the end of SY 2010/11, and (3) an additional 40 hours of independent tutoring to be provided at the rate of no less than 2 hours per week beginning at the start of SY 2011/12.²¹

ORDER

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

1. Within 10 school days of the issuance of this Order, DCPS shall convene an IEP/MDT meeting for Student to (1) revise Student's IEP to provide for specialized instruction in a self-contained special education class where Student receives instruction in all academic subjects, (2) discuss and determine whether Student requires speech and language services in light of her most recent speech language evaluation which identified significant deficits that could be negatively impacting Student's oral language, written language, and reading skills, (3) discuss and determine whether the current level of behavioral support services Student receives is sufficient, and if not, increase said services to an appropriate level, and (4) issue a Prior Written Notice of Placement

²⁰ In awarding ESY or summer school services, it is the hearing officer's intent to provide Student with another opportunity to acquire credits that she may not have been able to earn during the current school year due to DCPS's failure to fully implement her IEP.

²¹ In directing that the independent tutoring services be delivered in the manner specified above, the hearing officer has taken into account the 40 hours of tutoring DCPS has already awarded Student and the advocate's representation that Parent plans to use those 40 hours of tutoring for Student during Summer 2011.

assigning Student to a school that can provide her with a self-contained special education class where she can receive instruction in all academic areas beginning at the start of SY 2011/12.

2. DCPS shall provide Student with either extended school year services or summer school services, at Parent's option, during Summer 2011 in a self-contained special education class, with transportation if necessary.
3. DCPS shall fund 52 hours of independent tutoring for Student at the established DCPS rates. Petitioner shall use said 52 hours of independent tutoring as follows: 12 hours of tutoring are to be provided to Student at the rate of 2 hours per week beginning the week of May 9, 2011 and continuing through the end of SY 2010/11, and the remaining 40 hours of independent tutoring shall be provided to Student at a rate of no less than 2 hours per week beginning at the start of SY 2011/12 and continuing until the services awarded have been exhausted.

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: 5/4/2011

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