

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

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

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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARINGS OFFICE  
2012 JUL 27 AM 9:19

**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**

Student is a \_\_\_\_\_ year old male, who attended a DCPS senior high school for school year 2011/12.

On May 16, 2012, Petitioner filed a Complaint against DCPS, alleging that DCPS denied Student a free appropriate public education ("FAPE") by failing to comply with Parent's request under 34 C.F.R. § 300.502(b) for an independent vocational evaluation. As relief for this alleged denial of FAPE, Petitioner requested a finding in its favor, funding for an independent vocational level II evaluation, and an MDT meeting upon receipt of the completed evaluation report.

On May 24, 2012, DCPS filed its Response, which asserted (1) that Petitioner's April 11, 2012 request for an independent vocational assessment was premature, as it was filed after Petitioner's March 5, 2011 Complaint and before the issuance of the May 11, 2012 HOD for that Complaint, and (2) that the issue was resolved in the May 11, 2012 HOD because DCPS's transition assessment was not deemed inappropriate.

On May 25, 2012, Petitioner filed another Complaint against DCPS, this time alleging that DCPS denied Student a FAPE by failing to provide an appropriate placement/location of services and failing to follow proper procedures in determining Student's educational placement/location of services. As relief for these alleged denials of FAPE, Petitioner requested findings in its favor, placement at a specified full-time private school, a meeting to review Student's progress 30 days into his tenure at the specified private school, and compensatory education.

Upon receipt of the Second Complaint, the hearing officer inquired whether Petitioner intended to seek consolidation of the two Complaints, and Petitioner's counsel indicated that Petitioner planned to file a motion to consolidate.

On June 1, 2012, DCPS filed its Response to the Second Complaint, asserting that DCPS was in the process of determining a location of services for Student for SY 2012/13.

The parties concluded the Resolution Meeting process for the Second Complaint by participating in a resolution session on June 1, 2012. No agreement was reached, but the parties agreed to continue to attempt to resolve the Complaint throughout the 30-day resolution period.

On June 19, 2012, DCPS filed a Motion to Continue the scheduled hearing for the Second Complaint, on the ground that DCPS counsel had developed a conflict for that date.

On June 20, 2012, Petitioner filed a Motion to Consolidate the two Complaints, asserting that both Complaints involved substantially the same witnesses, facts, parties and dates, and the interest of judicial economy dictated consolidation.

The parties concluded the Resolution Meeting process for the First Complaint by participating in a resolution session on June 21, 2012. No agreement was ultimately reached, but the parties initially believed that they were going to settle the case through DCPS's issuance of an independent educational evaluation ("IEE") letter for a vocational assessment.

On June 22, 2012, the hearing officer convened a prehearing conference for both cases and led the parties through a discussion of the issues, relief requested, and other relevant topics. Petitioner's counsel represented that the First Complaint would be settled, Petitioner indicated it would withdraw its motion to consolidate, and the hearing officer determined to move the hearing on the Second Complaint to July 11, 2012 and deny DCPS's motion to continue as moot.

However, on June 25, 2012, Petitioner's counsel advised the hearing officer that the parties were unable to reach agreement on the First Complaint, so Petitioner wished to revive its motion to consolidate. On June 26, 2012, the hearing officer issued Orders that granted Petitioner's Motion to Consolidate and denied DCPS's Motion to Continue. The hearing officer also issued a Prehearing Order on June 26, 2012.

As a result of the hearing officer's Order granting Petitioner's Motion to Consolidate, the 45-day timeline for both consolidated cases began on June 16, 2012 and will end on July 30, 2012, which is the HOD due date.

On June 27, 2012, DCPS filed a Motion to Dismiss the First Complaint, asserting therein that the issues in the Complaint had been rendered moot when DCPS offered a settlement for the independent vocational II evaluation requested therein and issued an IEE letter. On June 29, 2012, Petitioner filed its Opposition to DCPS's Motion to Dismiss, arguing that the Complaint requested more than an IEE, that Petitioner was not obligated to accept DCPS's settlement offer, and that the matter of whether there had been a denial of FAPE remained to be determined

because of Petitioner's potential right to an award of compensatory education. On July 5, 2012, the hearing officer issued an Order denying the Motion to Dismiss, essentially on the grounds asserted by Petitioner.

On July 5, 2012, the hearing officer issued a DPH Notice/Order confirming that the due process hearing would move forward on the tentatively rescheduled date of July 11, 2012.

By letter dated July 3, 2012, Petitioner disclosed fourteen documents (Petitioner's Exhibits 1-14). By letter dated July 5, 2012, DCPS disclosed three documents (Respondent's Exhibits 1 - 3).

The hearing officer convened the due process hearing on July 11, 2012, as scheduled.<sup>1</sup> As an initial matter, the parties indicated that the First Complaint had been settled through DCPS's issuance of an IEE letter for a vocational evaluation outside the context of settlement, and Petitioner withdrew the First Complaint. The hearing officer also realized that she was personally acquainted with Petitioner and disclosed that fact as well as the circumstances of the acquaintance on the record. The hearing officer allowed DCPS counsel an opportunity to consult with her supervisor to determine whether to proceed with the hearing or seek reassignment of the case to another hearing officer. Ultimately, DCPS determined to proceed with the hearing as scheduled.

Thereafter, Petitioner's Exhibits 1-14 were admitted without objection. Petitioner objected to the admission of DCPS's documents on the ground that they were not timely disclosed five business days prior to the hearing. Petitioner withdrew its first exhibit because it pertained to the First Complaint, which had been settled; the hearing officer declared the objection to DCPS's second document moot because the document was also included in Petitioner's disclosures; and the hearing officer excluded DCPS's third exhibit pursuant to 34 C.F.R. § 300.512(a)(3) on Petitioner's objection.

Moving forward, the hearing officer received opening statements, the parties presented their testimonial evidence, and the hearing officer received closing statements. The hearing officer then 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)**

The issues to be determined are as follows:

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

1. Did DCPS deny Student a FAPE by failing to provide an appropriate placement/location of services, because DCPS decided to leave Student at his current school where he cannot earn ESY credits during the normal school year and during summer 2012?
2. Did DCPS deny Student a FAPE by failing to follow proper procedures in determining Student's placement/location of services, because DCPS unilaterally determined to keep Student at his current school with no parental involvement in the decision?

### FINDINGS OF FACT<sup>2</sup>

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 a \_\_\_\_\_ year old male.<sup>3</sup>
2. Student's current IEP is dated May 18, 2012. The IEP identifies Student's primary disability as Emotional Disturbance ("ED"), and it requires Student to receive 26.5 hours per week of specialized instruction and 1 hour per week of behavioral support services. All special education and related services are to be provided outside general education, and the IEP indicates that Student requires a small academic setting to reduce external stimuli and a small therapeutic setting to address his academic and social-emotional needs.<sup>4</sup>
3. A therapeutic setting is a school with a therapeutic milieu, one that has a program-/school-wide emphasis on behavior modification, psychotherapy, and therapeutic support with appropriate personnel who have expertise working with psychological challenges in working with ED students, such as behavior technicians, maybe a clinical psychologist/therapist, and even instructional staff with such experience working with ED students.<sup>5</sup>
4. On May 11, 2012, an Independent Hearing Officer issued a Hearing Officer Determination ("HOD"), which determined, *inter alia*, that DCPS "failed to propose an IEP reasonably calculated to enable the Student to be involved in and progress in the general education curriculum [because] the IEP proposed . . . had the Student on a 'certificate' track as opposed to the diploma track."<sup>6</sup>
5. The May 11, 2012 HOD required DCPS to, *inter alia*, convene an IEP team meeting on or before May 31, 2012 to revise Student's IEP "to reflect that Student will, upon

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<sup>2</sup> 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.

<sup>3</sup> See Complaints at Petitioner's Exhibits 1-2.

<sup>4</sup> Petitioner's Exhibit 12.

<sup>5</sup> Testimony of advocate.

<sup>6</sup> Petitioner's Exhibit 5 at 19.

successful completion of secondary credits, obtain a regular diploma. The Student must be provided with instruction to enable him to successfully complete secondary credits in his current educational placement, or whichever placement the IEP team next determines appropriate for Student.”<sup>7</sup>

6. The May 11, 2012 HOD further provided as follows:

“ . . . the Student will be provided extended school year (ESY) services during the summer of 2012 and 2013. ESY services will consist of instruction in credits the Student is lacking but should have been provided access to since November 21, 2010. The ESY services will include all the supports required by the IEP, including the support of the school psychologist or social worker . . . The IEP team will determine how the ESY services are delivered (e.g. through classes[,] tutoring, public, or contracted providers, etc.). . . ”<sup>8</sup>

7. DCPS convened an IEP team meeting for Student on May 18, 2012. During the meeting, DCPS placed Student back on the diploma track but declined to determine Student’s location of services for SY 2012/13 on the ground that it would be premature. DCPS acknowledged that Student’s then current location of services could not implement the revised IEP for the remainder of SY 2011/12, but DCPS indicated that it was unsure whether the school would be able to implement the IEP for SY 2012/13 because it did not yet know what programming would be offered at the school during the coming school year. Petitioner’s advocate identified two private schools and asked that DCPS consider those schools for Student for SY 2012/13. With respect to ESY, the team confirmed that Student would receive ESY during summer 2012, but the team did not identify a location for ESY during the meeting. Parent wanted a determination of new schools for ESY 2012 and SY 2012/13 during the meeting, but DCPS declined to assign new schools for Student at that time. Hence, by default, Student was to remain at the school he was then attending.<sup>9</sup>
8. Both Parent and the advocate were involved in the location of services discussion at the May 18, 2012 meeting. However, subsequent to the meeting, neither the Parent nor the advocate ever heard anything back from DCPS regarding locations for Student for SY 2012/13.<sup>10</sup>
9. Approximately two and one-half weeks before ESY started, Parent received a letter informing her that Student would be attending a different DCPS senior high school for ESY. For ESY, the school is offering Student one class with a teacher and an assistant teacher for three hours per day. Student would not be able to earn Carnegie units in the ESY program. Student has chosen not to attend the ESY program at the assigned DCPS school.<sup>11</sup>

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<sup>7</sup> Petitioner’s Exhibit 5 at 20, ¶ 2.

<sup>8</sup> Petitioner’s Exhibit 5 at 20, ¶ 3.

<sup>9</sup> Petitioner’s Exhibit 13; testimony of advocate.

<sup>10</sup> Testimony of advocate; testimony of Parent.

<sup>11</sup> Testimony of Parent.

10. The DCPS assigned school for ESY 2012 fails to comply with the requirements of the May 11, 2012 HOD that awarded Student the ESY as compensatory education, because the school cannot provide Student with Carnegie units during ESY.
11. At the due process hearing for this case on July 11, 2012, DCPS advised Parent for the first time that Student had been assigned to attend a third DCPS senior high school for SY 2012/13. This school has approximately 500 students, which means that it cannot be classified as small, even though Student would have only up to approximately 8 students in each of his classes. The school offers an ED program, which includes small classroom sizes, a small student-teacher ratio, and behavioral and academic supports. The students in the ED program are able to earn Carnegie units. However, the school is not a therapeutic school. Moreover, the school can only offer the core academic classes of math, social studies, science and English in an out of general education setting. Student would interact with non-disabled students at the school in the cafeteria and in non-academic classes such as art, music and physical education, where he would receive services through an inclusion model.<sup>12</sup>
12. The DCPS senior high school DCPS has assigned Student to attend for SY 2012/13 cannot implement Student's IEP because the school cannot offer 26.5 hours per week of instruction in an outside of general education setting, and the school does not offer the small therapeutic setting Student requires.
13. By letter dated June 1, 2012, Student was accepted for admission for 2012 ESY and SY 2012/13 into a private therapeutic day school. The school is located outside of the District of Columbia. It is a full-time therapeutic day program with educational, behavioral and emotional support. It offers a low student-teacher ratio, multisensory instruction, and a clinical psychologist and other staff for counseling. All students at the school are on a behavior management plan, which is a school-wide system that includes 7 full-time behavior counselors who man the behavior center and walk the halls. There is a psychiatrist on board for medication management. The school services ED students, as well as students with various other disabilities, and all students at the school are disabled. The school offers ESY, and students can earn Carnegie units during the regular school year as well as in ESY. The school has a current Certificate of Occupancy from OSSE, and District of Columbia Students who have earned the needed credits can earn a DCPS diploma at the school. The OSSE approved rates for the school are \$293.09/day for instruction and \$157.26/per hour for counseling. The school offers 183 days of instruction during the normal school year and 29 days of ESY.<sup>13</sup>
14. The private therapeutic day school that has accepted Student for admission can implement Student's IEP and provide him with the required small therapeutic setting.

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<sup>12</sup> Testimony of DCPS special education specialist.

<sup>13</sup> Petitioner's Exhibit 14; testimony of assistant educational director of private school.

## 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:

### Placement/Location of Services

Under IDEA, a public agency must 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 preschool, elementary school or secondary school education and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17. Where, as here, there is no contention that the student's IEP is inappropriate, the determination of whether the current location of services is appropriate turns on whether the school can implement the student's IEP. *See Hinson v. Merritt Educational Ctr.*, 579 F.Supp.2d 89, 104 (D.D.C. 2008) (to show placement is inappropriate, plaintiff must show school is unable to implement the IEP as written); *T.T. v. District of Columbia*, 2007 U.S. District Lexis (D.D.C. July 23, 2007) (plaintiffs' challenge to public schools selected by DCPS was rejected where plaintiffs could not prove public schools were unable to implement the student's IEP).

In the instant case, Petitioner argues that the DCPS assigned school for ESY 2012 is inappropriate because Student cannot earn Carnegie units there. Prior to the due process hearing, Petitioner also argued that DCPS failed to provide Student with an appropriate location of services during his May 18, 2012 MDT meeting because the existing location of services could not provide Student with Carnegie units and DCPS failed to assign Student a new location of services. However, once DCPS indicated its school assignment for Student for SY 2012/13 at the due process hearing, Petitioner argued that said school was inappropriate because it cannot implement Student's IEP. On the other hand, DCPS maintains that the assigned DCPS school for SY 2012/13 is appropriate and can implement Student's IEP.

The evidence in this case confirms Petitioner's assertions that the DCPS assigned school for Student for ESY 2012 is inappropriate because Student cannot earn Carnegie units during ESY, that Student's previous school was inappropriate at the time of Student's May 18, 2012 MDT meeting because it could not implement Student's revised IEP by providing Carnegie units, and that the new DCPS assigned school for SY 2012/13 is inappropriate due to its inability to implement Student's IEP because the school cannot offer 26.5 hours per week of instruction in an outside of general education setting and the school does not offer the small therapeutic setting Student requires. *See* Findings of Fact 7, 10 and 12, *supra*. As a result, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to provide him with an appropriate location of services.

"Where a public school system has defaulted on its obligations under the IDEA, a private school placement is proper under the Act if the education by said school is 'reasonably calculated to enable the child to receive educational benefits.'" *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 37 (D.D.C. 2008) (quoting *Wirta v. District of Columbia*, 859 F. Supp. 1, 5 (D.D.C. 1994)

(quoting *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 456 U.S. 176, 207)). “Courts have identified a set of considerations relevant to determining whether a particular placement is appropriate for a particular student, including the nature and severity of the student's disability, the student's specialized educational needs, the link between those needs and the services offered by the school, the placement's cost, and the extent to which the placement represents the least restrictive environment.” *Id.*, 556 F.Supp.2d at 37 (quoting *Branham v. District of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005) (citing *Board of Education v. Rowley*, *supra*, 456 U.S. 176, 202)).

Upon consideration of the evidence in this case, which reveals that the private school that has accepted Student for admission services ED students, will allow Student an opportunity to earn Carnegie units, is a full-time therapeutic day program with educational, behavioral and emotional support, offers a low student-teacher ratio, charges OSSE approved rates and can implement Student's IEP by providing at least 26.5 hours per week of specialized instruction and 1 hour per week of behavioral support services in an outside of general education environment, the hearing officer concludes that the private school is reasonably calculated to enable Student to receive educational benefit. Therefore, the hearing officer will award Petitioner funding for Student's placement at, and transportation to and from, the private school for SY 2012/13.

#### **Procedures Followed in Determining Placement/Location of Services**

IDEA provides that in determining the educational placement of a child with a disability, a public agency must ensure that the placement decision is made by a group of persons, *including the parents*, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 C.F.R. § 300.116(a)(1) (emphasis added). In this regard, however, the meaning of the term “placement” falls somewhere between the physical school attended by a child and the abstract goals of a child's IEP. *See Laster v. District of Columbia*, 439 F. Supp. 2d 60 (D.D.C. 2005) (internal quotations and citations omitted); *see also, Roher v. District of Columbia*, 1989 WL 330800, \*3 (D.D.C. 1989) (placement refers to the overall educational program offered, not the mere location of the program).

Moreover, in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefit. 34 C.F.R. § 300.512(a)(2)(i)-(iii).

In the instant case, Petitioner argues that DCPS excluded Parent from the process of determining a placement for Student by unilaterally deciding to keep Student at his then existing placement during Student's May 18, 2012 MDT meeting, and by failing to involve Parent in the process from May 18, 2012 forward and not advising Parent of the new DCPS assigned school for SY 2012/13 until the date of the due process hearing. By contrast, DCPS argues that both Parent and her advocate were involved in the May 18, 2012 meeting where Student's placement was determined by means of the revision of his IEP, and that Parent fully participated in the location of services discussion and even gave DCPS several options to consider.



A review of the evidence in this case confirms DCPS's position that Parent participated in the discussion during Student's May 18, 2012 meeting that determined Student's "placement" – that is, Student's overall educational program as reflected by the revisions to his IEP. Parent also participated in the discussion about Student's location of services and provided DCPS with several private school options for consideration. Although DCPS ultimately did not involve Parent in the administrative process of selecting the final locations of services for Student, and it did not ultimately select one of the options proposed by Parent, the evidence is clear that Parent was allowed an opportunity to participate in the placement/location of services decision making process for Student. As a result, the hearing officer concludes that Petitioner has failed to meet its burden of proof on this claim. See *Shaw v. District of Columbia*, 238 F. Supp. 2d 127 (D.D.C. 2002) (citing *Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) (although IDEA guarantees a free appropriate public education, it does not provide that this education will be designed according to the parent's desires)).

### **ORDER**

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

1. For the duration of SY 2012/13, DCPS shall place Student at the private therapeutic day school that has accepted him for admission. DCPS shall provide funding in the amount of \$293.09/day for instruction and \$157.26/per hour for counseling for Student to attend the private school during SY 2012/13, and DCPS shall also provide Student with transportation to and from the private school for SY 2012/13.

### **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: 7/26/2012

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