

**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  
March 31, 2014

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Petitioner

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondent.

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**REVISED HEARING OFFICER DETERMINATION<sup>1</sup>**

**BACKGROUND AND  
PROCEDURAL HISTORY<sup>2</sup>**

Student o presently attends a DCPS senior high school. On December 24, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public School (“DCPS”). On January 8, 2014, DCPS filed its Response to the Complaint.

The parties concluded the Resolution Meeting process by participating in a Resolution Session Meeting on February 7, 2014. There was no agreement, but the parties determined not to prematurely end the thirty day resolution period. The resolution period ended on January 23, 2014. Hence, the 45-day timeline for this case started on January 24, 2014 and will end on March 9, 2014, which was the HOD due date. However, pursuant to a Continuance Order issued on March 5, 2014, the HOD due date was extended to March 28, 2014.

On February 12, 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 timely reconvene Student’s MDT meeting within 25 business days as required by a May 21, 2012 Settlement Agreement; (2) Alleged failure to timely complete Student’s reevaluation consisting of occupational therapy (“OT”) and assistive technology (“AT”) assessments; (3) Alleged failure to provide Student an IEP reasonably calculated to provide educational benefit; (4) Alleged failure to provide an

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<sup>1</sup> This Hearing Officer Determination has been revised to correct clerical errors in the attached Order, which initially failed to indicate (1) the timeline for DCPS to conduct AT and OT assessments and an observation of Student, as well as a subsequent meeting, and (2) the precise time periods for which DCPS shall fund Student’s placement at the relevant nonpublic school.

<sup>2</sup> This section sets forth only the basic procedural history. Other events, including motions practice, may have taken place that are not listed here.

appropriate educational placement; and (5) Alleged failure to conduct a formal classroom observation to determine Student's possible need for a dedicated aide.

**Respondent's Defenses:** (i) Petitioner did not submit the independent evaluations that triggered the start of the 25-day period until October 25, 2012; thereafter, Petitioner's unavailability and/or deficiencies in the independent evaluations delayed the meeting date. The meeting ultimately was held on March 28, 2013, at which point Student was determined eligible due to traumatic brain injury ("TBI"). Hence, DCPS complied with the settlement agreement. (ii) The IEP is reasonably calculated to provide educational benefit based on teacher reports and evaluative data, and the IEP is rife with references to Student's TBI and takes his unique situation into account. (iii) Petitioner is making significant progress at his current placement (Woodson SHS), but DCPS is willing to screen for dedicated aide eligibility if Student desires. (iv) The OT and AT assessments were not requested until September 25, 2013, and the reasonableness standard applies with respect to the timeline. In any event, DCPS is willing to conduct the assessments.

**Relief Requested:** (i) A finding in Petitioner's favor; (ii) Fund or complete OT and AT assessments for Student, as well as an observation; (iii) Fund Student's placement at Kingsbury Day School; (iv) Conduct an MDT meeting within 10 days of the completion of the assessment and observation to review the assessments and observation and review and revise Student's IEP as appropriate; and (v) compensatory education.

By their respective letters dated February 18, 2014, Petitioner disclosed forty-two documents (Petitioner's Exhibits 1-42), and DCPS disclosed six documents (Respondent's Exhibits 1-6).

The hearing officer convened the due process hearing on February 25, 2014.<sup>3</sup> At the outset, DCPS counsel represented that DCPS is willing to conduct OT and AT assessments, as well as the review for the dedicated aide, but Petitioner's counsel raised a concern about the timeline for completion of the assessments and observation since DCPS initially promised to conduct them by September 20, 2013 but failed to do so. At Petitioner's request for the hearing officer's intervention with respect to the timeline, the hearing officer agreed to order DCPS to complete the assessments and observation within 30 calendar days of the hearing and to convene a meeting to review the assessment and observation reports within 15 days of receiving same. As a result, issues number two and five were eliminated from consideration at the hearing.

Thereafter, the hearing officer took under advisement DCPS's Objections to Petitioners' Disclosures, filed on February 19, 2014, and Petitioner's Reply to DCPS's Objections to the Petitioners' Five-Day Disclosures and Petitioners' Objections to the Respondent's Disclosures. During discussions regarding the pleadings, DCPS withdrew its objection to Petitioner's Exhibit 42, Petitioner withdrew its assertion that DCPS's disclosures were untimely, and the hearing officer sustained DCPS's objection to Petitioner's Exhibit 30 and excluded that document. The hearing officer overruled all remaining objections and admitted all remaining documents into the record.

Next, the hearing officer took under advisement DCPS's Partial Motion in Limine and Petitioners' Reply and Opposition thereto. The hearing officer ultimately denied the Motion on

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<sup>3</sup> Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

the ground that res judicata and collateral estoppel bar claims, not evidence, and there was no assertion that Petitioners' claims previously had been adjudicated.

The hearing officer then allowed Petitioners to present one witness who had limited availability. withdrew its objection to All disclosed documents were admitted into the administrative record without objection. Thereafter, the hearing officer received opening statements, Petitioners' remaining testimonial evidence, and the testimony of one of DCPS's witnesses. As there was insufficient time remaining to allow DCPS to present the rest of its testimonial evidence, the hearing officer and both parties agreed to adjourn the hearing to either March 18<sup>th</sup> or 19<sup>th</sup>, and the parties agreed to file a Consent Motion for Continuance.

The hearing officer reconvened the hearing on March 18, 2014. The hearing officer received testimonial evidence from DCPS's remaining witnesses and closing statements from both parties, then the hearing officer concluded 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 timely reconvene Student's MDT meeting within 25 business days as required by a May 21, 2012 Settlement Agreement providing an inappropriate IEP and placement for SY 2013/14?
2. Did DCPS deny Student a FAPE by failing to provide Student an IEP reasonably calculated to provide educational benefit?
3. Did DCPS deny Student a FAPE by failing to provide Student an appropriate educational placement?

### **FINDINGS OF FACT**<sup>4,5</sup>

1. Student currently attends a DCPS senior high school.<sup>6</sup>

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<sup>4</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>5</sup> When citing an exhibit that has been submitted by both parties, the hearing officer may only cite to one party's exhibit.

<sup>6</sup> See Complaint at 2; testimony of Student.

2. Student has a history of Attention Deficit Hyperactivity Disorder (“ADHD”) and Oppositional Defiant Disorder (“ODD”), and his academic history includes retention in both kindergarten and 5<sup>th</sup> grade due to learning difficulties and attentional issues.<sup>7</sup>
3. A January 2007 psychoeducational evaluation revealed that Student’s cognitive abilities fell in the Average range (Full Scale IQ = 96), with generally consistent scores across all indices (Verbal Comprehension Index = 93; Perceptual Reasoning Index = 98; Working Memory Index = 107; and Processing Speed Index = 91). Student’s visual-motor integration abilities were also in the Average range (standard score = 103), and his academic skills were generally in the Average range as well (reading fluency, comprehension and decoding = Average; math calculation and visual math skills = Average; spelling and simple sentence writing skills = Average, but ability to generate paragraphs and complex writing skills = Below Average).<sup>8</sup>
4. On April 20, 2010, Student was on his way to the store when he was hit by a sports utility vehicle (“SUV”). As a result of this incident, Student suffered a traumatic brain injury (“TBI”) that was severe enough to cause a coma which lasted for a month.<sup>9</sup>
5. Since the April 2010 automobile accident, Student has struggled with inattention, slow processing speed, poor motor planning, and memory deficits. Student also has a significant limp and is visually impaired in his right eye.<sup>10</sup>
6. A September 2010 neuropsychological evaluation, conducted subsequent to the automobile accident, revealed that Student’s cognitive abilities had declined. Hence, his verbal reasoning abilities, nonverbal reasoning abilities, and working memory skills were in the Borderline range (VCI = 79; PRI = 73; WMI = 74), and his processing speed was in the Extremely Low range (PSI = 50). Similarly, Student’s visual-motor drawing skills had dropped to the Extremely Low Average range, and his academic abilities had declined in virtually every area: Letter-Word Identification standard score (“SS”) = 103 in 2008 / 87 in 2010; Passage Comprehension SS = 91 in 2008 / 78 in 2010; Spelling SS = 94 in 2008 / 80 in 2010; Reading Fluency SS = 93 in 2008 / 72 in 2010; Calculation SS = 94 in 2008 / 78 in 2010; Applied Problems SS = 88 in 2008 / 60 in 2010; Writing Samples SS = 84 in 2008; 84 in 2010; and Writing Fluency SS = 90 in 2008 / 46 in 2010.<sup>11</sup>
7. In June of 2012, Student was somewhat confused and indecisive at the start of his psychological evaluation. Student was also unable to tell the evaluator the name of his then current school and kept making reference instead to the type of school he had previously attended when asked the name of his school. This evaluator determined, *inter alia*, that Student meets the criteria for Cognitive Disorder Not Otherwise Specified,

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<sup>7</sup> Petitioner’s Exhibit 12 at 2.

<sup>8</sup> Petitioner’s Exhibit 12 at 2.

<sup>9</sup> Testimony of Parent; stipulation of DCPS; *see* Petitioner’s Exhibit 12 at 1-2; Petitioner’s Exhibit 14 at 2.

<sup>10</sup> Petitioner’s Exhibit 12 at 2; Petitioner’s Exhibit 14 at 3.

<sup>11</sup> Petitioner’s Exhibit 12.

which is characterized by cognitive dysfunction. Student's symptomatology includes deficits in attention, memory, and higher order thinking and reasoning.<sup>12</sup>

8. During Student's June 2012 neuropsychological evaluation, Student's affect appeared inappropriate to the situation, as he often smiled and laughed although the situation did not call for it. Compared to the results of his 2010 testing, Student's verbal reasoning skills had improved from Borderline to Low Average. However, his perceptual reasoning and working memory remained in the Borderline range, and his processing speed remained in the Extremely Low range. Student's Academic Fluency was at a 3<sup>rd</sup> grade level, his Broad Reading skills were at the 5<sup>th</sup> grade level, and his math skills were at a 2<sup>nd</sup>-3<sup>rd</sup> grade level. Overall, the evaluation revealed "notable impairments" in Student's cognitive and neuropsychological functioning, including, *inter alia*, significantly impaired executive functioning, impaired attention and concentration abilities, and notably deficient working memory abilities. In addition to Axis I diagnoses of ADHD, Predominantly Inattentive Type; Disorder of Written Expression; and Mathematics Disorder, this evaluator also rendered an Axis I diagnosis of Amnesic Disorder Due to Head Trauma, which is characterized by memory impairment as manifested by impairment in the ability to learn new information and memory disturbance which causes significant impairment in social or occupational functioning and represents significant decline from the previous level of functioning. The evaluator noted that Student has experienced a remarkable decline in his memory and cognitive functioning since the automobile accident. Moreover, Student's family members provided corroborating evidence of confusion, disorientation, and behavioral changes, noting that Student's functioning is comparable to that of a much younger individual.<sup>13</sup>
9. Given Student's academic deficiencies and his significant impairments in memory, attention and across various cognitive domains, Student will struggle in a large school environment without one-on-one supports. Hence, a full-time special education setting with small class sizes and a low student to teacher ratio is recommended for Student.<sup>14</sup> However, may be able to progress in a less restrictive environment so long as he is provided with small class sizes and appropriate support such as one-on-one interventions.<sup>15</sup>
10. Student is just re-learning how to write his name in cursive, which is something he no longer could do after the automobile accident.

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<sup>12</sup> Petitioner's Exhibit 14.

<sup>13</sup> Petitioner's Exhibit 15.

<sup>14</sup> Testimony of clinical psychologist; testimony of licensed psychologist; Petitioner's Exhibit 14 at 14; Petitioner's Exhibit 15 at 18.

<sup>15</sup> Testimony of clinical psychologist.

<sup>16</sup> Testimony of Parent.

11. Student's schedule at his DCPS school consists of the following classes for the current school year: English II, Geometry, U.S. History/Geography: Industrial to the Present; Generating Clean Electrons; Transition Study Skills II, Biology I, and Computer Applications II.<sup>17</sup>
12. In Student's \_\_\_\_\_ class, the students rotate between three groups/panels: a clean electrons panel, a sustainable conservation panel, and an electronics panel. The students wire connections, analyze and evaluate different types of insulation and light bulbs, and make basic electronic connections. There is arithmetic in the class, as the students are required to add battery voltage, figure out what voltage is coming in, and similar tasks. Student's group was also tasked with connecting a wind turbine to test dysfunctionality. The teacher in this class is a general education teacher, not a special education teacher, and there is no additional teacher in the class. Moreover, the teacher has seen Student's IEP, but the teacher does not consult the IEP.<sup>18</sup>
13. The subject matter of, and concepts taught in, Student's \_\_\_\_\_ class are too advanced and difficult for Student, who has significant cognitive deficits, to understand. The testimony to the contrary provided by the teacher of that class was not credible.
14. Student's English teacher is a special education teacher who also serves as Student's special education case manager.<sup>19</sup> The documentary and testimonial evidence presented by the parties in this case leaves it unclear whether Student is receiving any other specialized instruction at the current DCPS senior high school.
15. The current DCPS senior high school is not a good fit for Student. The classes are moving too fast and the other students are too rowdy. Student currently has problems in school because he cannot remember the work. Math is not currently going well for Student because he struggles with everything and it is hard for him to remember the work. Student knows simple math, but he does not know the answer to "3A x 1A." Nevertheless, the students are doing geometry in Student's math class. Student doesn't understand geometry. Although Student likes his "clean electronics" class because it is more hands-on, Student has problems remembering what he is supposed to do in that class. Student's math teacher comes over to see if Student understands the work, but none of his other teachers do that. Student does not get any extra help in the current DCPS senior high school."<sup>20</sup>
16. Although Student's Report Card for the term ending January 24, 2014 includes Bs and Cs for the first two terms, as well as Ds, the work samples presented at Student's October 2013 MDT meeting indicate Student is a young man who is struggling academically.<sup>21</sup>

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<sup>17</sup> Respondent's Exhibit 32.

<sup>18</sup> Testimony of teacher; testimony of Student.

<sup>19</sup> Testimony of special education teacher.

<sup>20</sup> Testimony of Student.

<sup>21</sup> Testimony of special education teacher; *see* Respondent's Exhibit 1; *see* Petitioner's Exhibit 34.

17. Student sometimes misses classes at his current DCPS school because he forgets to go to the classes or forgets where he is or what class he has to go to. Student has sometimes taken two lunch periods because got confused about where his classes were or where he was supposed to be. Student will often go to his case manager's class when he forgets where to go, and his case manager will tell him where to go. To date, no one at the current DCPS school has attempted to develop a system to help Student remember his classes or where to go.<sup>22</sup>
18. In January 2014, a licensed independent clinical social worker prepared a report for the Probate Division of the D.C. Superior Court, which stated that Student is an incapacitated adult who would benefit from the appointment of a guardian.<sup>23</sup>
19. In February 2014, the Probate Division issued Letters of Guardianship granting Petitioners, Student's parents, Permanent General Guardianship of the person of Student, who is described as "an incapacitated individual."<sup>24</sup>
20. On May 21, 2012, the parties to this action entered into a Settlement Agreement ("SA") which required DCPS to convene an MDT meeting to review completed evaluations and determine eligibility within 25 business days of receipt of Student's independent comprehensive psychological, speech and language, Vocational Level II, and neuropsychological evaluations.<sup>25</sup>
21. Petitioner sent Student's independent comprehensive psychological, neuropsychological and speech and language assessment reports to DCPS in July and August of 2012. However, despite various emails from DCPS in August and September inquiring about the evaluations and inquiring whether Parents needed help with the evaluations, it was not until October 11, 2012 that Petitioner provided DCPS with all of the evaluations referenced in the SA.<sup>26</sup>
22. Beginning on October 31, 2012, DCPS began attempting to schedule an MDT meeting for Student and suggested November 9, 13 and 14 as potential dates, all of which were within the 25-business day timeline required by the May 21, 2012 SA. Petitioner countered with November 16, 19 and 21, each and every one of which was beyond the 25-business day timeline. On November 9, 2012, DCPS initially confirmed the meeting for November 21, 2012, but within two hours notified Petitioner that DCPS wished to proceed on November 19 instead. However, on November 15, Petitioner's counsel advised that he was not available on November 19 and asked for additional dates. Petitioner's counsel subsequently offered November 26, 29 and 30 as potential meeting dates. DCPS confirmed the meeting for November 30, but that meeting did not go forward for reasons that are not made clear in the administrative record. Thereafter, there

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<sup>22</sup> Testimony of Student; testimony of Parent.

<sup>23</sup> Petitioner's Exhibit 5.

<sup>24</sup> Petitioner's Exhibit 4.

<sup>25</sup> Petitioner's Exhibit 6.

<sup>26</sup> Petitioner's Exhibit 41 at 1-16; testimony of educational advocate.

were numerous emails back and forth between the parties, and the initial MDT meeting for Student was held on or about January 15, 2013.<sup>27</sup>

23. On March 28, 2013, DCPS convened another MDT meeting for Student. The team reviewed Student's speech and language, comprehensive psychological and neuropsychological evaluations and determined Student eligible for special education and related services with a classification of TBI. However, DCPS stated that Student had to be enrolled in either DCPS or PRO (Private and Religious Office) to obtain a final eligibility determination and IEP or ISP.<sup>28</sup>
24. Student was enrolled at his current DCPS senior high on August 16, 2013.<sup>29</sup>
25. On September 20, 2013, DCPS convened another MDT meeting for Student. The team reviewed Student's independent comprehensive psychological evaluation and, once again, agreed on a TBI classification for Student. DCPS then provided dates to reconvene to develop an IEP and review Student's speech and language evaluation.<sup>30</sup>
26. On October 8, 2013, DCPS convened another MDT meeting for Student. At this meeting, DCPS prepared an IEP for Student that provided for 16 hours per week of specialized instruction outside of general education, 12 hours per week of specialized instruction in general education, and 4 hours per month of speech-language services outside general education. DCPS also determined that Student would remain at his current DCPS school. Parent her educational advocate did not make any comments about the IEP goals; however, Parent and the advocate disagreed with the IEP hours and location of services, stating that Student needs a full-time IEP and a smaller setting.<sup>31</sup>
27. By letter dated October 30, 2013, Student was accepted for admission for SY 2013/14 at a nonpublic, full-time special education school located in the District of Columbia. The school serves students with a range of disabilities, including, *inter alia*, Other Health Impairment, Specific Learning Disability, and several children with TBI. Class sizes at the school range from 8 to 10 students with 1 teacher and 1 part-time assistant teacher. The classes are very small, very highly structured, and customized to the learning strengths and weaknesses of the students. The school also offers all related services, which are provided in accordance with each student's IEP. Based on Student's profile, he would receive interventions for students with SLD to increase his basic math, reading and writing skills; he would also receive interventions to address his deficits in motor functioning, memory, and executive functioning. Annual tuition at the school is approximately \$39,140, plus the cost of related services. OSSE has approved the annual tuition rate.<sup>32</sup>

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<sup>27</sup> See Petitioner's Exhibit 41.

<sup>28</sup> Petitioner's Exhibit 37.

<sup>29</sup> Testimony of educational advocate.

<sup>30</sup> Respondent's Exhibit 4.

<sup>31</sup> Petitioner's Exhibits 33 and 39.

<sup>32</sup> Petitioner's Exhibit 28; testimony of associate head of nonpublic school.

28. The nonpublic school referenced in Paragraph 27 above is reasonably calculated to enable Student to receive educational benefit.
29. Petitioner has requested as compensatory education in this case 205 hours of service, to be provided as follows: 1 hour per week of individual tutoring in mathematics, 3 hours per week of individual tutoring in reading and written expression, and 1 per week hour of integrative academic skill building with a focus on compensatory strategies to offset Student's significant deficits in memory, processing and organization, for a total of 5 hours per week of individual tutoring to be provided for a period of 41 weeks.<sup>33</sup>

### **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. West*, 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 (3<sup>rd</sup> Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3<sup>rd</sup> Cir. 2006). Now, for a consideration of Petitioner's claims.

#### **Alleged Failure to Comply with the May 21, 2012 SA**

The evidence in this case reveals (1) that the SA required DCPS to convene an MDT meeting to determine Student's eligibility within 25 days of receipt of Student's completed evaluation reports; and (2) that DCPS did not reconvene Student's MDT meeting within the 25-day timeline. However, the evidence further proves that DCPS attempted to convene the meeting within the required timeline but Petitioners indicated they were not available within the timeline; and then DCPS confirmed a meeting date that was mere days beyond the timeline based on dates provided suggested by Petitioners but Petitioner's counsel indicated a few days before the meeting date that he would be unavailable on the confirmed meeting date.

Based on this evidence, the hearing officer concludes that it would be inequitable to hold DCPS liable for failing to convene Student's MDT meeting within the timeline required by the SA because the conduct of Petitioners and/or their counsel was responsible for that failure. *See e.g.*, *J.J. et al. v. District of Columbia*, 768 F. Supp. 2d 214 (D.D.C. 2011) (District of Columbia did not deny FAPE to Student by failing to timely convene meeting to determine eligibility and placement where conduct by child's parent and her attorney caused much of the delay). As a result, the hearing officer concludes that Petitioners have failed to meet their burden of proving a denial of FAPE in connection with this claim. *See id.*

#### **Alleged Inappropriate IEP and Placement**

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<sup>33</sup> Petitioner's Exhibit 35.

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.*

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, 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 (10<sup>th</sup> 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 argues that Student’s IEP and placement (location of services) are inappropriate because, in light of his cognitive impairments and academic deficiencies, Student requires an IEP that provides full-time special education instruction outside of general education, as well as placement in a full-time special education program that is small and highly structured. DCPS disagrees, arguing that Student has made gains and the evidence shows that Student can make progress in general education with appropriate accommodations.

There is no contention by Petitioner that DCPS failed to comply with IDEA’s procedures in developing Student’s IEP; nor does Petitioner challenge the IEP goals that were developed for Student. Instead, Petitioner’s sole complaint with respect to the IEP is that the IEP fails to provide Student with full-time specialized instruction outside general education, which Petitioner contends Student requires as a result of his cognitive delays and academic deficiencies. However, the evidence in this case proves that although a full-time special education setting and program has been recommended for Student, Student may be able to make progress in a less restrictive environment so long as he is provided with appropriate supports. Based on this evidence, together with the evidence demonstrating that Student’s current IEP requires him to be provided with a total of 29 hours per week of specialized instruction and related services, the hearing officer concludes that Petitioner has failed to meet its burden of demonstrating that DCPS denied Student a FAPE by failing to provide him with an appropriate IEP.

On the other hand, the evidence in this case also proves that Student is not faring well at his current DCPS senior high school because, *inter alia*, his schedule is filled with general education

classes such as Geometry, Biology and Generating Clean Electronics, which cover concepts that are too advanced for Student to understand without appropriate support and interventions; Student is struggling academically but DCPS has not provided him with the intensive support and accommodations he requires to make progress in the current DCPS school under his existing IEP; and the current school is too large for Student to navigate alone given his cognitive and memory deficiencies, but DCPS has made no effort to provide accommodations and interventions to assist Student in this regard either. Based on this evidence, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS failed to provide Student with an appropriate placement/location of services. *See Hinson v. Merritt Educational Ctr.*, 579 F.Supp.2d 89, 104 (D.D.C. 2008) (placement may be found inappropriate where plaintiff shows school is unable to implement the IEP).

“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)).

Based on the evidence in this case, which demonstrates that the nonpublic school which has admitted Student is reasonably calculated to enable Student to receive educational benefit, the hearing officer will award Petitioners a placement at the nonpublic school for the remainder of SY 2013/14 and for the entirety of SY 2014/15. In light of this prospective private placement, which the hearing officer concludes will provide Student with all of the educational benefit he requires to receive a FAPE for the remainder of the current school year and the entirety of next school year, the hearing officer declines to award compensatory education in this case. *Compare Wheaton v. D.C.*, 55 IDELR 12 (D.D.C. 2010) (affirming denial of compensatory education where LEA funded private school placement).

### **ORDER**

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

1. DCPS shall conduct occupational therapy and assistive technology assessments, as well as an observation to determine whether Student requires a dedicated aide, within 30 calendar days of March 18, 2014, and convene a meeting to review the assessments and observation reports within 15 calendar days of receiving the completed reports.

2. DCPS shall fund Student's placement at, and transportation to and from, the nonpublic full-time special education school which has accepted Student for admission. Said funding shall be provided for the remainder of SY 2013/14, as well as for the entirety of SY 2014/15.
3. All remaining claims and requests for relief in Petitioner's December 24, 2013 Complaint are **DENIED AND DISMISSED WITH PREJUDICE**.

**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: 3/31/14

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