

**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 16, 2014

Petitioner

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**¹

On November 11, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public School (“DCPS”). On November 29, 2013, DCPS filed its Response to the Complaint.

On February 14, 2014, the hearing officer issued a Final Order Granting DCPS’s Motion for Reconsideration of its Motion to Dismiss, which dismissed the matter without prejudice on mootness grounds, based on the hearing officer’s understanding that Student was being detained by DYRS with no set release date.

On April 25, 2014, the U.S. District Court for the District of Columbia issued an Order remanding the matter for a hearing to address (1) Petitioner’s claim for declaratory relief in the form of a full-time IEP; (2) Petitioner’s claim for compensatory education; and (3) Petitioner’s claim for a proper step-down placement for Student when he is released from DYRS detention.

For purposes of five-day disclosures, Petitioner disclosed thirty-one documents (Petitioner’s Exhibits 1-31), and DCPS disclosed six documents (Respondent’s Exhibits 6-11) but subsequently indicated an intent to also rely upon the first five documents it disclosed when the matter previously was before the hearing officer.

The hearing officer convened the due process hearing on May 8, 2014, as scheduled.² As a preliminary matter, DCPS advised the hearing officer that prior to the hearing, DCPS had agreed to provide Student with a full-time IEP with 27.5 hours of service, as well as a placement at a

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

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

newly-assigned private school. DCPS maintained that there are DCPS schools that can implement a full-time IEP; nevertheless, DCPS agreed to provide the IEP and private school as indicated, and the hearing officer agreed to order DCPS to comply with its agreement to provide Student the full-time IEP and the placement at the newly-assigned private school for school year 2014/15.³

Thereafter, Petitioner's Exhibits 1-26 and 28-30 were admitted into the record without objection, Petitioner's Exhibits 27 and 31/page 59 through 31/page 77 were admitted over objection, and Petitioner's Exhibit 31/page 1 through 31/page 58 were withdrawn at DCPS's objection. Respondent's Exhibits 6-11 were admitted into the record without objection, and Respondent's Exhibits 1-5 were admitted over DCPS's objection based on the chief hearing officer's Supplemental Disclosure Order, which required the parties to either rely wholly on previously disclosed documents or resubmit all documents to be relied upon, primarily on the ground that Petitioner actually received all documents prior to the current 5-day disclosure deadline. The hearing officer also admitted as Respondent's Exhibit 12, over Petitioner's objection, DCPS's documents memorializing its offer of the full-time IEP and private school placement for SY 2014/15, on the ground that the remanding court ordered a 10-day hearing timeline and 7-day decision timeline, in addition to ordering the hearing officer to consider events that have transpired since the Complaint was filed, with the result that the normal rules concerning a 5-day timeline during a 45-day hearing period would not be applied.

The hearing officer then received opening statements, 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. Petitioner's claim for declaratory relief in the form of a full-time IEP;
2. Petitioner's claim for compensatory education; and
3. Petitioner's claim for a proper step-down placement for Student when he is released from DYRS detention.

³ DCPS initially indicated that it was assigning the private school for the remainder of Student's duration with DCPS; however, DCPS later clarified that the assignment was for the remainder of SY 2013/14 and for SY 2014/15. Petitioner then asked that the hearing officer only order the placement for SY 2014/15, because Petitioner wished to have Student pursue credit recovery for the remainder of SY 2013/14 instead of attending the private school.

FINDINGS OF FACT^{4,5}

1. Student was being detained by the D.C. Department of Youth Rehabilitation Services (“DYRS”) at the time of the due process hearing in this case. His scheduled release date was the date of the hearing.⁶
2. Student’s involvement with the juvenile justice system predates the events at issue in this case. Indeed, Student was already on probation during SY 2012/13 because he lost his spot at a public charter school in SY 2012/13 after he was detained by DYRS at his probation officer’s direction for his failure to attend school. When that period of DYRS detention ended, Student went to a group home, and then he was released and sent to his neighborhood school, where he received a criminal charge within one week and was detained again. DYRS then placed Student in an out-of-state residential treatment facility.⁷
3. At the start of the current school year, SY 2013/14, Student was still attending the residential treatment facility. The facility provided Student with education in a general education classroom with 4 students, as well as special education support from a special education teacher. There was also 1 behavior staff person in the room and 1 behavior staff person outside the room at all times. However, Student did not receive full-time services at the residential facility’s school because the facility does not offer full-time services. Student was very oppositional when he first began attending the school and the biggest challenge was getting Student to go to and stay in school. Student did not propose behavioral issues in class other than wanting to leave class.
4. Student can receive educational benefit at a public school, but only with a significant amount of extra support to help keep him motivated, focused and in class.⁹
5.

Although Petitioner’s counsel contacted DCPS to request that a DCPS representative attend the meeting, DCPS did not attend the meeting. The only attendees were a DYRS representative, Parent and Student’s case manager from the residential

⁴ 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.

⁵ When citing an exhibit that has been submitted by both parties, the hearing officer may only cite to one party’s exhibit.

⁶ Testimony of Parent; testimony of paralegal.

⁷ Testimony of Parent.

⁸ Testimony of Parent; testimony of case manager.

⁹ See testimony of case manager; Petitioner’s Exhibit 22 at 2.

facility, who recommended a special school, as opposed to a regular school, as a step down placement for Student.¹⁰

6. DCPS convened a second discharge-related meeting for Student on October 28, 2013. The attendees at this meeting were the DYRS representative, Parent, a paralegal from Petitioner's counsel's office, Student, the case manager from the residential facility, and the DCPS LEA representative ("progress monitor"). Prior to the meeting, the progress monitor had advised the relevant meeting participants that Student would be attending a non-public day school upon his release from the residential facility. As a result, the first half of the meeting was spent discussing a particular non-public school (which is also the "newly-assigned nonpublic school), and the other half of the meeting was focused on the IEP. The progress monitor stated that Student's IEP hours would be increased by 2 hours each in reading, writing, and math, based on her discussions with the school staff at the residential facility, so that Student's amended IEP would provide him with 16 hours of specialized instruction in an inclusion setting instead of the then existing 10 hours of inclusion services.¹¹
7. By email dated November 1, 2013, DCPS provided Petitioner's counsel with a copy of Student's amended IEP.¹²
8. Through a series of emails dated November 4, 2013, Petitioner's counsel's paralegal advised the DCPS progress monitor that she had advised Parent not to sign the amended IEP because the following items needed to be changed: (i) the Present Levels of Performance needed to be amended to reflect information from the residential facility's 5/30/13 IEP; and (ii) the hours of special education instruction needed to be changed to full-time in light of the full-time special education school Student was slated to attend. The DCPS progress monitor responded that the IEP was amended to add 6 hours of specialized instruction based on grades, teachers' input and the progress report, and that a Prior Written Notice ("PWN") to the nonpublic school had not yet been issued because the progress monitor had not yet received an acceptance letter from the nonpublic school. The progress monitor then sent an email to Petitioner's counsel enclosing a rejection letter from the nonpublic school, which was based on the lack of a full-time IEP. Petitioner's counsel asked the progress monitor to increase the IEP to full-time hours and inquire whether the nonpublic school would accept him then, but the progress monitor responded that an IEP could not be changed because it did not fit the program, and placement is determined by the IEP team based on the student's needs. The progress monitor further asserted that the team had determined at Student's October 28th meeting that Student required only 16 hours of specialized instruction and DCPS would identify a location of services that could implement that IEP. That location of services would, in turn, conduct a 30-day review meeting where any necessary changes to the IEP could be made.¹³

¹⁰ Testimony of paralegal; testimony of case manager; *See* Petitioner's Exhibit 2 at 1-7.

¹¹ Testimony of paralegal; testimony of case manager; Petitioner's Exhibit 2 at 27 and 30-31; Petitioner's Exhibit 19;

¹² Petitioner's Exhibit 2 at 66; testimony of paralegal.

¹³ Testimony of paralegal; Petitioner's Exhibit 2 at 80-82; *see* Petitioner's Exhibit 20.

9. On November 5, 2013, DCPS convened another meeting for Student. When Petitioner's counsel questioned why the progress monitor did not know that Student would not be accepted at a full-time nonpublic special education school without a full-time IEP, the progress monitor stated that it was an oversight on her part. The progress monitor stated repeatedly that she needed justification for a full-time IEP and repeatedly asked justification and/or data (such as grades, work samples, FBA, BIP, evaluations, etc.) to support a full-time IEP and the removal of Student from the general education population. The residential facility case manager went over Student's point sheets and stated that Student had been tardy 51 times out of 100 days of school; she also stated that Student had been provided with a small class and extensive support at the residential facility and would not do well in public school without additional support. The case manager also indicated that Student gets good grades when he does his work, but he needs a lot of 1:1 support to keep him motivated and focused. Ultimately, however, the progress monitor determined that there was not a justification supporting an increase to a full-time IEP, so Student would have to return to his neighborhood school, where evaluations and a 30-day meeting would be requested.¹⁴
10. Student was released to a group home and returned to his neighborhood school.¹⁵
11. On November 11, 2013, Petitioner filed the Complaint in the instant case.
12. Student lasted only one to two weeks at the group home and the neighborhood school before he was detained by DYRS again for violating his probation by walking out of the neighborhood school twice and walking out of the group home once. DYRS sent Student to a residential facility in Maryland, where Student did not receive any IEP services because he did not have a full-time IEP. Moreover, Student did not attend the local public school in Maryland to receive his part-time IEP services.¹⁶
13. When Student thought he was going to attend the nonpublic school in or about November 2013, Student was excited about the school. Now that Student was not able to go to the school, he is lacking in motivation with respect to school. Nevertheless, Student still wants to graduate and wants to earn the credits he needs to do so.¹⁷
14. On February 14, 2014, the hearing officer dismissed Petitioner's November 2013 Complaint without prejudice on mootness grounds, based on the hearing officer's understanding that Student was being detained by DYRS with no set release date. On April 25, 2014, the U.S. District Court for the District of Columbia issued an Order remanding the matter for a hearing.

¹⁴ Petitioner's Exhibits 22 and 23; Respondent's Exhibit 2; testimony of case manager; testimony of paralegal; testimony of progress monitor.

¹⁵ Testimony of Parent.

¹⁶ Testimony of Parent; testimony of paralegal; Petitioner's Exhibit 31 at 69; Respondent's Exhibits 7-8.

¹⁷ Testimony of Parent.

15. Through a series of emails on April 10, 2014, DCPS advised Petitioner's counsel that an IEP meeting had been scheduled for Student for April 17, 2014, and Parent had agreed to attend. Petitioner's counsel then advised DCPS that neither Parent nor the attorney would be available on April 17th and requested three possible meeting dates. DCPS asked Petitioner's counsel to provide dates and times of availability for Parent, and Petitioner's counsel agreed to do so.¹⁸
16. Thereafter, DCPS repeatedly inquired of Petitioner's counsel about potential meeting dates, but Petitioner's counsel failed to provide any. By email dated April 21, DCPS advised Petitioner's counsel of its intent to transition Student into a nonpublic setting while comprehensive evaluations were being completed to determine Student's level of service. Ultimately, however, by email dated April 28th, Petitioner's counsel advised DCPS that its calendar was full for the next two weeks, and Petitioner's counsel further stated that DCPs was trying to moot out the case prior to hearing.¹⁹
17. On May 6, 2014, DCPS convened an IEP meeting for Student. Neither Parent nor Petitioner's counsel attended the meeting, although the team attempted to call them both. The team revised Student's IEP to provide full-time services at 27.5 hours per week of specialized instruction and 240 minutes per month of behavioral support service, although the team did not revise Student's present levels of performance or the IEP goals. The team also authorized 2 hours of credit recovery as compensatory education for Student and issued a PWN assigning Student to attend the newly-assigned nonpublic school for the remainder of SY 2013/14.²⁰
18. At the due process hearing in this case, DCPS agreed to provide Student with an IEP that contains 27.5 hours of specialized instruction per week, and to place Student at the newly-assigned public school for the remainder of SY 2013/14 and for the SY 2014/15.
19. Petitioner has requested the following forms and amounts of compensatory education: funding for credit recovery courses that can provide Student with 5 credits towards a high school diploma and 50 hours of tutoring for each credit recovery course, both to be provided at a specified location, to compensate Student for the harm of essentially losing an entire year of school; transportation to and from the specified location for Student to attend and complete his credit recovery courses; 75 hours of mentoring from an independent service provider of Parent's choice to address the harm to Student's self-esteem as a result of being prevented from going to school and to help Student learn to model appropriate behaviors in and outside of school; and a laptop computer or tablet that is loaded with word processing software and at least one age- and achievement-level appropriate educational program to assist Student with homework and school work.²¹
20. The location specified in Petitioner's compensatory education plan can implement the credit recovery and associated tutoring portions of the plan during the remainder of SY

¹⁸ Respondent's Exhibit 8 at 4-5.

¹⁹ Respondent's Exhibit 8 at 1-3.

²⁰ Respondent's Exhibit 12.

²¹ Petitioner's Exhibit 1; testimony of senior educational advocate.

2013/14 and during summer 2014, and the location has had success with students who have been out of school for a while and/or in residential facilities.²²

CONCLUSIONS OF LAW

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

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this regard, IDEA does not require a departure from the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. *See id.*; *Ridley School District v. M.R.*, 680 F.3d 260, 269 (3rd Cir. 2012); *L.E. v. Ramsey Board of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006). Now, for a consideration of Petitioner's claims.

A disabled child's IEP must be reasonably calculated to enable the child to receive educational benefit. *Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). In this regard, 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 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). Moreover, 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 v. Rowley, supra.*

Under IDEIA, a public agency also 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 secondary school and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17.

Under the theory of compensatory education, courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005). In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Id.*

In the instant case, the U.S. District Court has directed the hearing officer to adjudicate Petitioner's claim for declaratory relief in the form of a full-time IEP, Petitioner's claim for a

²² Testimony of owner/founder.

proper step-down placement for Student when he is released from DYRS detention, and Petitioner's claim for compensatory education. However, as Respondent DCPS has already agreed to provide Student with both a full-time IEP and a step-down placement in a specified nonpublic school for the remainder of SY 2013/14 and SY 2014/15, the hearing officer will merely order DCPS to comply with its agreement with respect to the IEP and with respect to the nonpublic school placement for SY 2014/15.

Nevertheless, the hearing officer must determine, for purposes of compensatory education, whether DCPS denied Student a FAPE by failing to provide him with an appropriate IEP in October and November of 2013 and by failing to provide an appropriate placement/ location of services in and after November 5, 2013.²³ Upon a review of the evidence in this case, the hearing officer concludes with respect to Student's IEP that (1) the evidence in this case does not demonstrate that Student requires full-time special education services, but (2) because the evidence demonstrates that Student requires an extensive amount of behavioral support to stay in school and motivated and on task, and the IEP DCPS developed in October and November of 2013 does not provide such support, Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to provide him with an appropriate IEP.

With respect to placement/location of services in and after November 2013, the hearing officer's review of the evidence reveals that (1) Student can receive educational benefit at a public school, but only with a significant amount of extra support to help keep him motivated, focused and in class, but (2) the public school placement DCPS provided Student did not offer him the level of extra support he needed upon release from the residential facility to stay motivated, focused, and in class, and therefore, receive educational benefit. As a result, Petitioner has also met its burden of proving that DCPS denied Student a FAPE by failing to provide him with an appropriate location of services.

The hearing officer further concludes that as a result of the denials of FAPE found herein, Student suffered educational harm in that he essentially missed an entire year of school and did not receive any credits toward graduation during SY 2013/14, and Student's self-esteem, motivation and attitude towards school was significantly damaged. To remedy this harm and place Student in the position he would have occupied but for the denials of FAPE, the hearing officer will award Petitioner the following forms and amounts of compensatory education for Student: 5 credits of credit recovery courses, 250 hours of tutoring for the credit recovery courses and associated transportation services, to be provided in the location specified in Petitioner's compensatory education plan, and 75 hours of mentoring from an independent service provider of Parent's choice. Petitioner has requested that Student be allowed to start credit recovery immediately instead of attending the nonpublic school for the remainder of SY 2013/14, because Student potentially can earn one-half credit by the end of the school year in credit recovery, whereas he would not be able to earn any credit by spending only the last few weeks of the school year in the nonpublic school. The hearing officer agrees that it would be more beneficial for Student to attempt to earn credit in credit recovery than to merely mark time

²³ As noted in the hearing officer's December 16, 2013 Prehearing Order, Petitioner's Complaint actually challenged DCPS's alleged refusal to provide an appropriate IEP on October 28, 2013 and November 5, 2013, and DCPS's alleged refusal to provide an appropriate school placement and location of services following the November 5, 2013 meeting.

in the nonpublic school for the remainder of SY 2013/14; therefore, the hearing officer will grant Petitioner's request in this regard.

ORDER

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

1. DCPS shall comply with its agreement prior to the due process hearing for this case to provide Student with a full-time IEP that requires Student to receive 27.5 hours per week of special education services, as well as a placement at the newly-assigned private school for school year 2014/15.
2. DCPS shall provide funding for Student to receive the following forms and amounts of compensatory education beginning no later than 11 days after the issuance of this Order: 5 credits of credit recovery courses, 250 hours of tutoring for the credit recovery courses and associated transportation services to and from the location specified in Petitioner's compensatory education plan, as well as 75 hours of mentoring from an independent service provider of Parent's choice.
3. Within 10 calendar days of the issuance of this Order, DCPS shall provide the necessary approval for the specified location to provide Student with credit recovery courses using curriculum that has already been approved by DCPS.

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: 5/15/14

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