

**District of Columbia**  
**Office of the State Superintendent of Education**  
Office of Review and Compliance  
Student Hearing Office

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STUDENT HEARING OFFICE  
GSSE  
2009 SEP -8 AM 9:00

**Confidential**

<p>STUDENT<sup>1</sup>, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>September 6, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Miguel Hull, Esq.</p> <p>Counsel for DCPS: Kendra Berner, Esq.</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</p>
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<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

## I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (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.").

## II. PROCEDURAL BACKGROUND

On June 18, 2009, Petitioner filed an Administrative Due Process Complaint Notice ("Complaint") against the District of Columbia Public Schools ("DCPS"), asserting the following claim against DCPS: "Inappropriate IEP." As relief, Petitioner primarily requested a finding that DCPS failed to develop an appropriate/full-time IEP and an Order requiring DCPS to convene an MDT meeting within 10 days to develop such an IEP.

On July 7, 2009, DCPS filed District of Columbia Public Schools' Response to Petitioner's Due Process Complaint, in which DCPS asserted that it had developed an IEP for Student on March 17, 2009, which IEP called for 26.5 hours per week of specialized instruction and 1 hour per week of behavior support services.

On August 11, 2009, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. When the hearing officer questioned the viability of Petitioner's claim in light of the hearing officer's previous HOD declining to issue the requested finding and Order for a meeting, Petitioner indicated an intent to file a Motion to Recuse, and DCPS indicated its intent to file a Motion to Dismiss. On August 14, 2009, the hearing officer issued a Pre-Hearing Order that summarized the proceedings at the prehearing conference.

On August 13, 2009, Petitioner filed its Motion to Recuse Hearing Officer. On August 14, 2009, DCPS filed its Motion to Dismiss. Petitioner then filed its Response to the Motion to Dismiss on August 18, 2009. The hearing officer issued an Order Denying Petitioner's Motion to Recuse Hearing Officer on August 17, 2009, and an Order Denying District of Columbia Public Schools' Motion to Dismiss on August 19, 2009. The SHO subsequently informed Petitioner of its position that recusal was not warranted in this case.

By their respective disclosure statements dated August 14, 2009, DCPS disclosed eight potential witnesses and two documents labeled DCPS-01 and DCPS-02, and Petitioner disclosed three potential witnesses and twenty-two documents (hereinafter Petitioner's Exhibits 1 – 22).

The hearing officer convened the due process hearing on August 21, 2009, as scheduled, and the parties' disclosed documents were admitted into evidence without objection. As Petitioner was unable to fully present its case in the time allotted, the hearing officer granted Petitioner's unopposed request for a continuance and rescheduled the hearing to August 27, 2009.

The hearing officer reconvened the hearing on August 27, 2009 and received Petitioner's additional testimonial evidence. When DCPS indicated its intent to rest on the record, the hearing officer received closing statements and brought the hearing to an end.

### III. ISSUE(S)

1. Has DCPS failed to develop an appropriate IEP for Student?

### IV. FINDINGS OF FACT

1. Student is \_\_\_\_\_ years old, and his disability classification is emotionally disturbed.<sup>2</sup>
2. Student's January 16, 2009 IEP requires him to receive 900 minutes per week of specialized instruction and no related services.<sup>3</sup>
3. At a March 17, 2009 MDT meeting, Student's IEP "team determined that Student's IEP should be revised to provide for 26.5 hours of specialized instruction and 1 hour of counseling, for a total of 27.5 hours of special education and related service[s] each week. However, the team failed to actually create a new IEP for Student at that time because the team did not have or could not obtain access to DCPS's new computerized IEP software program."<sup>4</sup>
4. On May 8, 2009, DCPS held a placement meeting for Student, but "the team once again failed to complete a full-time IEP for Student in accordance with the MDT's previous decision because the DCPS team members were still waiting to receive a code that would permit them to access the computerized IEP system."<sup>5</sup>
5. On May 22, 2009, this hearing officer ordered DCPS to fund Student's placement at a full-time, private, special education school for the 2009/10 school year. However, the hearing officer dismissed without prejudice Petitioner's April 2, 2009 claim of an inappropriate IEP to allow Petitioner to either (i) seek a remedy from Student's IEP team, or (ii) refile the claim and provide evidence sufficient to prove the required elements of a full-time IEP for Student.<sup>6</sup>
6. Since the issuance of the May 22, 2009 HOD, Student has been arrested, and he has also absconded from two halfway houses. At the time of the August 27, 2009 due process hearing, Student was on the run from law enforcement officials.<sup>7</sup>

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<sup>2</sup> See Complaint.

<sup>3</sup> Petitioner's Exhibit 5.

<sup>4</sup> Petitioner's Exhibit 2 (May 22, 2009 HOD, Finding of Fact 12).

<sup>5</sup> Petitioner's Exhibit 2 (Finding of Fact 15).

<sup>6</sup> Petitioner's Exhibit 2 at 9.

<sup>7</sup> Parent's proffered testimony, as accepted by DCPS.

7. Although Parent and Student's educational advocate attended Student's March 17, 2009 MDT meeting in person, and DCPS never asserted at the May 8, 2009 MDT meeting that it had already developed a full-time IEP for Student, DCPS disclosed in connection with the instant case a full-time IEP that purportedly was developed for Student on March 17, 2009. The document indicates that Parent participated by phone. Moreover, the document requires Student to "show one year's growth in the area[s]" of mathematics and reading, to demonstrate increased personal responsibility, improved coping skills, and improved self-control with 85% mastery, and "to show growth in the area[s]" of post-secondary education and employment skills. The IEP contains no additional goals or objectives besides the following "annual goal" in the area of independent living: "[Student] would like to someday reside in an apartment."<sup>8</sup>
8. Petitioner's expert witness prepared a draft full-time IEP for Student after conversing with parent and reviewing Student's file, especially Student's previous evaluations and IEPs. The draft IEP requires Student to "demonstrate 1 year of progress [in reading] by mastering the [listed] short term objectives," to "improve 1 year growth (sic) in writing skills by mastering the [listed] short term objectives," "demonstrate one year of progress in mathematics," and "show socio-emotional growth over one year period (sic) as evidenced by mastery of the [listed] short-term objectives with 80% accuracy." The draft IEP also lists 8 short-term objectives in the area of reading, 5 short-term objectives in the area of writing, 7 short-term objectives in the area of mathematics, and 9 short-term objectives in the area of social emotional development.<sup>9</sup>
9. Petitioner's expert has never taught or evaluated Student. The expert's goals and objectives merely constitute a draft document. The expert opined that the teachers would be the best ones to make a final determination about Student's IEP because, in the expert's opinion, "that is not [her] job." The expert does not know the whole situation involving the student – all the information that a teacher would know, so the expert attempted to give some idea of what the student would need. The expert intended the draft to be used to develop an IEP at a meeting for Student because DCPS has the final say on Student's IEP, but the expert did not send the draft to DCPS or ask DCPS to consider the draft because "that is not [her] job." The expert further opined, however, that in a situation where there are no teachers available or a student has not been to school, then that student's IEP should be developed in reliance upon evaluations, past IEPs and the like.<sup>10</sup>

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<sup>8</sup> Testimony of Student's advocate; Petitioner's Exhibit 16; DCPS-01.

<sup>9</sup> Testimony of Petitioner's Expert Witness; Petitioner's Exhibit 4.

<sup>10</sup> Testimony of Parent.

## V. CONCLUSIONS OF LAW

Petitioner has asserted that DCPS failed to provide Student with an inappropriate IEP. As the party seeking relief, Petitioner bears the burden of proof. *See* 5 D.C.M.R. § 3030.3; *Schaffer v. West*, 546 U.S. 49, 126 S.Ct. 528 (2005).

IDEIA defines a free appropriate public education (“FAPE”) to mean special education and related services that are, *inter alia*, provided in conformity with a Student’s IEP. *See* 34 C.F.R. § 300.17. Hence, the United States Supreme Court has determined that a FAPE is tailored to the unique needs of a handicapped child by means of an IEP. *See Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982).

IDEIA provides that an IEP is a written statement for each child with a disability that is developed, reviewed and revised in a meeting, and that must include, *inter alia*, a statement of the child’s present levels of academic achievement and functional performance, and a statement of measurable annual goals, including academic and functional goals. 34 C.F.R. § 300.320(a)(1)-(2). Moreover, each child’s IEP team must include the child’s parent(s), an IEP must be in effect for each child with a disability at the beginning of each school year, and each child’s IEP must be reviewed periodically, but not less than annually, and revised as appropriate. *See* 34 C.F.R. §§ 300.321(a)(1), 300.323(a), 300.324(b)(1).

The evidence in this case demonstrates that Student’s IEP team determined on March 17, 2009 that Student’s IEP needed to be revised to provide for 26.5 hours of specialized instruction and 1 hour of counseling. However, the team failed to create the new IEP for Student at that March 17th meeting, as well as at the subsequent MDT/IEP meeting held for Student on May 8, 2009. Student’s most recent IEP that was developed at a meeting, as required by IDEIA, is a January 16, 2009 IEP that requires Student to receive 900 minutes per week of specialized instruction and no related services.<sup>11</sup> Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proving that DCPS failed to provide Student with an appropriate IEP.

In an attempt to provide the hearing officer with probative evidence sufficient to permit the hearing officer to craft an appropriate full-time IEP for Student, Petitioner introduced into evidence a draft IEP, along with the testimony of its expert witness, who had reviewed Student’s evaluations and previous IEPs and used the information gleaned to develop the draft IEP. However, the expert testified that it was not her job to make a final determination of Student’s IEP, and that she intended the draft IEP to be used to develop an IEP at a meeting for Student because DCPS has the final say regarding Student’s IEP. Hence, the hearing officer concludes that, at least in the first instance, it would be inappropriate to order DCPS to use the draft IEP as Student’s current, finalized IEP.

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<sup>11</sup> “In making changes to a child’s IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child’s current IEP.” 34 C.F.R. § 300.324(a)(4)(i). However, there is no evidence that such an agreement was made in this case.

On the other hand, DCPS introduced into the record a document purporting to be a March 17, 2009 full-time IEP for Student. However, the document indicates that Parent participated in the IEP meeting by phone, whereas credible testimony and the documentary evidence in this case prove that Parent attended the meeting in person. Moreover, the document primarily contains vague and undefined goals that do not constitute the measurable annual goals required under IDEIA. As a result, the hearing officer further concludes that, at least in the first instance, it would be inappropriate to allow DCPS to use this document as Student's current, finalized IEP.

This hearing officer follows a general policy of declining to issue Orders that require IEP teams to meet to address one or more violation(s) of IDEIA by DCPS, because the hearing officer prefers not to delegate to IEP teams the hearing officer's authority to resolve disputes arising under IDEIA. In the instant case, however, this is Petitioner's second Complaint and due process hearing on the issue on the appropriateness of Student's IEP, and unlike the first case, in this case Petitioner has made a serious effort to attempt to meet its evidentiary burden of proving the contents of an appropriate IEP for Student. Moreover, whereas the hearing officer made provision in the first case for Student to attend a private school where he would be provided with full time services, the evidence in this case demonstrates that, due to Student's recent involvement with the criminal justice system, he is unlikely to be able to attend the private school in the immediate future. As a result, in the interests of fundamental fairness, judicial efficiency, and making appropriate provision for Student's special education needs to the extent possible, the hearing officer will order the parties to participate in an IEP meeting for Student to develop an IEP that provides Student with the 26.5 hours of specialized instruction and the 1 hour of behavioral services his IEP team previously determined he requires. In the event that either or both parties fail(s) to participate in this meeting, or the meeting fails to occur for any reason, then DCPS-02 shall be revised to include the short-term objectives listed in Petitioner's draft IEP as additional annual goals in the areas of reading, writing, mathematics, and emotional/social/behavioral development, and said combined document shall constitute Student's current full-time IEP and shall remain in effect until Student's next school/site conducts a 30-day review and revision of his IEP, or Student's next annual IEP meeting takes place, whichever occurs soonest.

## **VI. SUMMARY OF DECISION**

The hearing officer determined that Petitioner met its burden of proving that DCPS failed to provide Student with an appropriate IEP but failed to provide the hearing officer with reliable evidence proving the contents of an appropriate IEP for Student.

## **VII. ORDER**

1. Within 20 calendar days of the issuance of this Order, the parties shall meet and participate in an IEP meeting for Student to develop an IEP that provides Student with the 26.5 hours of specialized instruction and the 1 hour of behavioral services his IEP team previously determined he requires.

2. In the event that either or both parties fail(s) to participate in this meeting, or the meeting fails to occur for any reason, then DCPS-02 is hereby revised to include the short-term objectives listed in Petitioner's draft IEP as additional annual goals in the areas of reading, writing, mathematics, and emotional/social/behavioral development, and said combined document shall constitute Student's current full-time IEP and shall remain in effect until Student's next school/site conducts a 30-day review and revision of his IEP, or Student's next annual IEP meeting takes place, whichever occurs soonest.

/s/ Kimm H. Massey

Kimm H. Massey, Esq.

Impartial Due Process Hearing Officer

Dated this 6th day of September, 2009.

**NOTICE OF APPEAL RIGHTS**

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).