

**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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Petitioner,  
v.  
DISTRICT OF COLUMBIA PUBLIC SCHOOLS,  
Respondent.

Hearing Officer: Kimm Massey, Esq.  
Case No:  
Room No.: 2004

OSSE  
Student Hearing Office  
September 13, 2013

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**

Student is a twelve year old                      who presently attends a DCPS middle school.

On June 17, 2013 Petitioner file a Complaint against Respondent District of Columbia (“DCPS), alleging that DCPS denied the student a FAPE by (1) failing to comprehensively evaluate and reevaluate in all areas of suspected disability, (2) failing to provide Prior Written Notice when it refused to provide the developmental optometry evaluation requested by Parent on March 18, 2013, (3) failing to develop an appropriate IEP on June 12, 2013, and (4) failing to provide an appropriate placement for SY 2013/14. As relief for these alleged denials of FAPE, Petitioner requested an independent occupational therapy (“OT”) evaluation, reimbursement for an independent developmental optometry evaluation, placement and funding at a nonpublic special education school, and a thirty-day meeting at the nonpublic school.

On June 21, 2013 DCPS filed a Response to the Complaint, asserting therein that DCPS is willing to reimburse Petitioner for the requested developmental optometry evaluation at a rate that does not exceed \$850.00; it is unclear what other evaluations, if any, were requested and/or refused, but DCPS is offering certain other to resolve this matter; the IEPs in effect during the past two years were appropriate and Student made progress; a new location of services may be appropriate for Student and DCPS is willing to issue a PWN for a new location of services, but DCPS has been unable to address the issue with Parent because Parent refuses to attend meetings and, in any event, a nonpublic school is not the LRE because the IEP can be implemented at DCPS; and Petitioner’s remaining allegations were not properly presented to the school prior to the initiation of the action.

On July 9, 2013, Petitioner filed a motion for summary judgment, arguing therein that DCPS’s failure to evaluate Student in the areas of visual and motor skills is a denial of FAPE, that the hearing officer has authority to order reimbursement for the vision evaluation as an equitable remedy for the failure to evaluate upon Parent’s request, that the current IEP is inappropriate and not reasonably calculated to provide educational benefit, and that DCPS denied Student a FAPE by failing to revise the IEP in February and June of 2013 to reflect the need for a separate special education school and failing on those same occasions to issue PWNs. In support of its

assertions, Petitioner cites to a variety of sources and relies upon an array of documents attached to the Motion.

On July 10, 2013, DCPS filed a Response to Petitioner's Statement of Material Facts and Counter Statement of Material Facts, as well as an Opposition to the Motion for Summary Judgment. In its Opposition, DCPS points out that Petitioner's Motion is based primarily upon quotes from documents, allegations and arguments that do not constitute undisputed facts, call for legal conclusions, and require the hearing officer to determine disputed issues of fact, with the result that summary judgment is inappropriate.

The parties participated in a Resolution Meeting on July 11, 2013. There was no agreement and the parties determined to proceed straight to hearing. Therefore, the 45-day timeline began on July 20, 2013 and will end on September 12, 2013, which is the HOD deadline.

On July 23, 2013, the hearing officer conducted a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. The hearing officer issued a Prehearing Order on July 29, 2013.

On August 26, 2013, Petitioner filed its disclosures in this matter, which consisted of twenty-three documents (Petitioner's Exhibits 1-23).

On August 27, 2013, Petitioner filed a Motion to Bar Evidence, pointing out that 34 C.F.R. § 300.512(a)(3) affords each party the right to prohibit the introduction of evidence not disclosed at least five business days before the hearing, and DCPS failed to submit its disclosures by the end of the day on August 26, 2013, the five-day disclosure deadline established in the hearing officer's Prehearing Order.

On or about August 28, 2013, DCPS filed a Motion for One Day Extension to File Disclosures and Opposition to Petitioner's Motion to Exclude Respondent's Evidence. Therein, DCPS established good cause for its delay in filing disclosures and asserted that said delay did not prejudice Petitioner. DCPS also asserted that its witnesses should be able to testify because they were disclosed by DCPS at the July 24<sup>th</sup> prehearing conference in this matter. DCPS further asserted that it only seeks to disclose two documents, both of which were previously available to Petitioner. DCPS attached its disclosures consisting of two documents to its Motion and Opposition.

Also on August 28<sup>th</sup>, Petitioner filed a Reply to Respondent's Motion for Extension to File Disclosure, Reply to Opposition to Motion to Bar Evidence, and Objections to Disclosures. In this pleading, Petitioner challenged DCPS's assertions in its Motion and Opposition, and Petitioner objected to DCPS's documentary evidence on relevance grounds.

On August 30, 2013, the hearing officer issued an Order that denied Petitioner's motion for summary judgment and DCPS's motion for a one-day extension to file disclosures, and granted in part and denied in part Petitioner's motion to bar evidence.

The hearing officer convened the due process hearing on September 3, 2013, as scheduled.<sup>1</sup> DCPS's documents were barred pursuant to the hearing officer's August 30, 2013 Order. Petitioner's Exhibits 1-7, 9-15, and 17-22 were admitted without objection; Petitioner's Exhibits 8, 16 and 23 were admitted over DCPS's relevance objection because the objection was not

asserted prior to the hearing, as required by the Prehearing Order. Thereafter, the hearing officer received opening statements from both parties and testimonial evidence from Petitioner only, as DCPS declined to present witness testimony. The hearing officer then allowed the parties until close of business on September 4, 2013 to submit written closing statements, which each party timely submitted.

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 fail to comprehensively evaluate in all areas of suspected disability by failing to provide occupational therapy and developmental optometry evaluations?
2. Did DCPS fail to provide Prior Written Notice upon refusing to provide the Developmental Optometry Evaluation requested by Parent on 3/18/13?
3. Did DCPS fail to develop an appropriate IEP on 6/12/13?
4. Did DCPS fail to convene an appropriate IEP team on 6/12/13?
5. Did DCPS fail to provide an appropriate placement for school year 2013/14?

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

1. Student is a twelve year old \_\_\_\_\_ attended 6<sup>th</sup> grade at a DCPS middle school for SY 2012/13. The DCPS middle school remains Student’s currently assigned location of services for SY 2013/14.<sup>3</sup>
2. Student had surgery at the age of three because one of \_\_\_\_\_ eyes was severely crossed. Nevertheless, Parent continued to have concerns about Student’s vision, and \_\_\_\_\_ raised these concerns with Student’s DCPS teachers repeatedly over the years, beginning when Student was 4 to 5 years old.<sup>4</sup>
3. Student’s current IEP is dated February 11, 2013. The IEP identifies Student’s primary disability as Intellectual Disability (“ID”), and it requires Student to receive 24 hours per week of specialized instruction, 30 minutes per week of occupational therapy, 30 minutes per week of behavioral support services, and 120 minutes per month of speech-language pathology services.<sup>5</sup>

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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> Testimony of Parent; *see* Petitioner’s Exhibit 4 at 1.

<sup>4</sup> Testimony of Parent.

<sup>5</sup> Petitioner’s Exhibit 13 at 8.

4. Student has an overall IQ of 56, and currently functions at a pre-kindergarten level (3 to 5 years old). can identify most but not all of the alphabet; can read one sight word and first and last name; can identify a square and a circle but no other shapes; cannot properly identify colors, can rote count up to 14-15 without getting confused, and cannot identify double digit numbers past ten.<sup>6</sup>
5. Adaptive skills reflect a person's ability to apply skills learned. For example, reading versus using being able to use the skill to read a paper, or knowing vocabulary words versus using the vocabulary words to conduct a conversation.<sup>7</sup>
6. Student's deficits in adaptive skills are in the mild to moderate range. Hence, Communication, Daily Living, and Socialization skills are all in the Low range. Given intellectual deficits, Student will have a very difficult time with abstract learning and being able to apply skills learned. As a result, IEP should address functional skills, such as learning the days of the week, how to tell time, and how to identify dates on a calendar. Goals that provide basic reading instruction with progression would also be useful, as would goals that target hygiene and daily living skills. Although Student will never be fully independent, these types of functional skills will help to become as independent as possible.<sup>8</sup>
7. With the exception of Student's IEP goals in the area motor skills/physical development, which require Student to be able to recall and write address and write telephone number, Student's IEP does not contain goals that address the functional skills needs to develop. To the contrary, Student's IEP contains objectives that require to, *inter alia*, measure, describe and classify angles, triangles and quadrilaterals; solve math problems using letter name variables; solve equations using the order of operations; determine the meaning of unfamiliar words using knowledge of English language structure, and Greek and Latin roots, suffixes, and prefixes; analyze the relevance of the setting to the mood and tone of text; and identify and use organizational structures in text, including chronological order, comparison and contrast, cause and effect, logical order, and classification schemes.<sup>9</sup>
8. The reading and math goals and objectives on Student's IEP are inappropriate for Student because they are too difficult given Student's low level of functioning.<sup>10</sup>
9. The skill of generalization allows a person to take skills learned in one setting and apply them in another setting. For example, the ability to use math skills learned in the classroom in the store when counting money.<sup>11</sup>
10. Because Student is a 12-year old functioning at the level of a 3 to 5 year old, it will be difficult for to naturally make the kinds of connections required to generalize. The connections will have to be made for Student explicitly through multi-modal learning inside and outside of the classroom. Hence, Student needs an educational program that

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<sup>6</sup> Testimony of neuropsychologist; see Petitioner's Exhibit 9.

<sup>7</sup> Testimony of neuropsychologist.

<sup>8</sup> Testimony of neuropsychologist.

<sup>9</sup> Petitioner's Exhibit 13; see testimony of neuropsychologist.

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

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

provides opportunities during the school day for community-based learning so that can learn to generalize.<sup>12</sup>

11. Occupational therapy evaluation data is necessary for a student who receives occupational therapy services pursuant to an IEP, because the IEP needs to have a baseline of student's abilities that can be used to develop appropriate goals and measurable objectives for the student and to determine whether the student made progress.<sup>13</sup>
12. A school-based occupational therapy assessment would include a motor assessment (posture control, balance, etc.), a visual motor assessment (including a visual exam for tracking and attending visually in the classroom, which is a mechanical function), a visual perception assessment, and a handwriting assessment.<sup>14</sup>
13. The administrative record for this case does not include an occupational therapy assessment for Student.<sup>15</sup>
14. Although visual perception issues are not treated by primary care optometrists or ophthalmologists, some OT providers are trained to address visual perception issues.<sup>16</sup>
15. The information contained in Student's February 11, 2013 IEP and Meeting Notes, as well as the information contained in Student's March 18, 2013 Analysis of Existing Data, indicating, *inter alia*, that Student is confusing letters, writing backwards, needs adapted paper and has issues with sizing, spacing and orientation, and inconsistently copies sentences from near and far points was sufficient to put DCPS on notice that Student may have visual perception difficulties. Indeed, the accommodations in the February 11, 2013 IEP indicating that, *inter alia*, Student needs markers to maintain place, needs large print, needs oral response and dictated response, and needs special lighting are accommodations for a visual problem, which reveals that the IEP team was aware that Student is experiencing some visual issues.<sup>17</sup>
16. On February 11, 2013, Parent attended an IEP meeting for Student with Student's special education teacher and two other DCPS personnel. Although additional individuals were supposed to attend the meeting, they did not participate. At the meeting, the team determined that Student needs a smaller, more restrictive, therapeutic learning environment provided by a special education school focusing on improving the few critical skills Student has acquired, because skills are severely behind where they need to be for to function in a general education school with special education support. That team also determined that it is critical for Student to begin learning daily adaptive living skills and transitional skills that will help become a productive adult.<sup>18</sup>

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<sup>12</sup> Testimony of neuropsychologist.

<sup>13</sup> Testimony of occupational therapist.

<sup>14</sup> Testimony of occupational therapist.

<sup>15</sup> See testimony of occupational therapist.

<sup>16</sup> Testimony of developmental optometrist.

<sup>17</sup> Testimony of developmental optometrist; see Petitioner's Exhibits 1, 12, and 13.

<sup>18</sup> Testimony of Parent; Petitioner's Exhibit 17.

17. Although there was also a discussion regarding an IEP at the February 11, 2013 IEP meeting for Student, no IEP document was provided to Parent. Instead, DCPS offered Parent a copy of Student's current IEP after the meeting.<sup>19</sup>
18. On March 13, 2013, Parent met with Student's then special education teacher and the school psychologist at Student's current DCPS middle school. Parent provided the educators with a vision symptom checklist and requested a developmental optometry evaluation for Student. The school psychologist advised Parent that vision was being covered during Student's OT services, but then the psychologist was unable to find any OT evaluations or documentation for Student in DCPS's computerized database.<sup>20</sup>
19. Approximately two weeks prior to the due process hearing in this case, DCPS requested that Parent take Student to a DCPS ophthalmologist. The ophthalmologist's assistant examined Student's eyes with a light after Student's eyes were dilated, and then the ophthalmologist met with Student for approximately five minutes. At the conclusion of the appointment, the ophthalmologist told Parent that there is nothing wrong with Student's eyes and Parent should just continue to have Student use the glasses recently prescribed for Student. The ophthalmologist did not provide Parent with a written report or any other paperwork at the end of the visit.<sup>21</sup>
20. On June 12, 2013, DCPS convened an IEP meeting for Student. In attendance at the meeting were Parent, Petitioner's counsel, the school psychologist, a special education teacher who had previously taught Student for approximately one month at the start of the school year, and the LEA representative. None of Student's current teachers were in the meeting, and the previous teacher stated that he had no knowledge about Student's current performance. When Parent opined that Student's reading and math IEP objectives were too hard and needed to be revised, DCPS advised that Student's IEP could not be revised because Student's most recent teacher had left his employment and Student no longer had a permanent teacher – they were using substitutes and an aide, and the teachers were at lunch. The team determined that Student is not making any progress adaptively in current setting; needs one-on-one assistance and is easily distracted; the areas of communication, functioning, and self-care are where requires the most assistance; and Student's current setting is not working for as needs more structure and a more restrictive placement.<sup>22</sup>
21. Student needs an intensive level of services where is with peers with the same type of disabilities all the time in a separate special education school setting. needs an individualized program with constant one-to-one attention that will teach adaptive skills for daily living and opportunities for community-based learning.<sup>23</sup>
22. Student has been accepted to attend a nonpublic full-time special education school that has a total population of 23 ID students, some with visual impairments as well. The school groups students into three categories: pre-K/Kindergarten; Kindergarten/1<sup>st</sup>-2<sup>nd</sup> grade; and 3<sup>rd</sup> – 4<sup>th</sup> grade. Student would be placed in the pre-K/Kindergarten group with 7 other students. There are five adults in that classroom, consisting of a special education teacher and four dedicated aides. The school offers small class-sizes, life skills training

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<sup>19</sup> Testimony of Parent.

<sup>20</sup> Testimony of Parent; *see* Petitioner's Exhibit 2.

<sup>21</sup> Testimony of Parent.

<sup>22</sup> Testimony of Parent; Petitioner's Exhibit 18.

<sup>23</sup> Testimony of neuropsychologist.

to all students as part of the school day, and opportunities to bring academic lessons out of the classroom and into the community through vocational field trips and other opportunities. All of the students at the school are on a non-diploma track, so the focus is on survival skills, life skills and vocational skills. The school has a kitchen, and a washer and dryer that are used as part of the daily curriculum to teach life skills. The school also offers the related services of counseling, OT, physical therapy and speech therapy. All of the students at the school have been placed there by OSSE, DCPS or a hearing officer; and OSSE pays the tuition.<sup>24</sup>

23. The requested private school is appropriate for Student and the program the school offers is reasonably calculated to provide Student with educational benefit.

### **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 (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 claim.

#### **Alleged Failure to Comprehensively Evaluate**

Under IDEA, a public agency conducting the evaluation of a disabled child must ensure that a variety of assessment tools and strategies are used to gather relevant functional, developmental, and academic information about the child, including information provided by the parent. *See* 34 C.F.R. § 300.304(b)(1). Moreover, the public agency must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.304(c)(4). The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the child's disability classification. 34 C.F.R. § 300.304(c)(6).

In the instant case, Petitioner argues that DCPS denied Student a FAPE by failing to provide with a developmental optometry evaluation and an occupational therapy evaluation. DCPS disagrees, noting, *inter alia*, that Student receives OT services pursuant to IEP and that DCPS provided Student with a vision examination by an ophthalmologist at no cost to Parent shortly before the due process hearing in this case.

A review of the evidence in this case shows that Student has a history of eye problems and had surgery at age three to uncross one of eyes. Thereafter, beginning when Student was 4 to 5 years old and continuing into the present, Parent has expressed concerns to DCPS that Student continued to have vision problems. The evidence reveals that Student's IEP team was aware that Student is experiencing visual problems, because the IEP includes accommodations designed to help a student with visual issues, and other sections of the IEP list problems, such as needing adapted paper and having issues with sizing, spacing and orientation, which also suggest

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<sup>24</sup> Testimony of private school's clinical coordinator.

that Student may be experiencing visual perception problems. Indeed, the IEP requires that Student be provided with thirty minutes of OT services every week, and when Parent asked DCPS to conduct a developmental optometry evaluation of Student at a March 2013 IEP meeting, the DCPS school psychologist told parent that Student's vision issues were being addressed through the OT services.

However, the administrative record is devoid of any evidence that Student has been provided with an OT evaluation; to the contrary, there is evidence that the DCPS school psychologist checked DCPS's electronic records and was unable to find any OT evaluations or documentation for Student. As a result, Student is receiving OT services, but there is no evaluation data to provide a baseline of Student's abilities so that appropriate goals and objectives can be developed and Student's progress can be measured. Moreover, although Student is experiencing problems with vision and an OT evaluation would have included a visual motor assessment and a visual perception assessment, the evaluation has not been conducted so Student's IEP team has not been provided with the evaluation data necessary to determine whether Student's vision problems may be interfering with ability to access education and whether Student requires special education or related services to address that problems. Finally, although DCPS provided Student with an evaluation by an ophthalmologist shortly before the due process hearing in this case, the type of symptoms Student is exhibiting, such as writing backwards, indicates a visual perception issue, which is not treated by ophthalmologists.

Based on the evidence outlined above, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to conduct an occupational therapy evaluation for Student. On the other hand, the hearing officer is not persuaded that DCPS denied Student a FAPE by failing to conduct a developmental optometry evaluation under the facts of this case, because while the evidence proves that DCPS should have conducted an evaluation to determine the nature and extent of Student's vision problems, there is no evidence that Student required a developmental optometry evaluation in addition to the OT evaluation that would have explored vision issues. Hence, Petitioner has failed to meet its burden of proof with respect to this aspect of the claim regarding evaluations.

To remedy the denial of FAPE identified herein, the hearing officer will order DCPS to conduct an OT evaluation of Student that includes visual motor and visual perception assessments.

### **Prior Written Notice**

Under IDEA, a public agency must give the parents of a disabled child written notice a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child. 34 C.F.R. § 300.503(a). This written notice must include, *inter alia*, a description of the action proposed or refused, an explanation of why the agency proposes or refuses to take the action, a statement regarding the protection provided to the parents by IDEA's procedural safeguards, a description of the other options the IEP team considered, and a description of other factors relevant to the agency's proposal or refusal. *See* 34 C.F.R. § 300.503(b).

In the instant case, Petitioner argues that DCPS denied Student a FAPE by failing to provide Prior Written Notice upon declining Parent's request that DCPS provide Student with a developmental optometry evaluation. While a review of the evidence confirms that DCPS denied Parent's request for a developmental optometry evaluation, and there is no evidence that DCPS issued a Prior Written Notice upon refusing Parent's evaluation request, the hearing

officer has already determined above that DCPS's failure to conduct a developmental optometry evaluation of Student did not constitute a denial of FAPE. As a result, the hearing officer concludes that DCPS's failure to issue a Prior Written Notice upon declining to conduct the requested evaluation constituted a mere procedural violation that did not rise to the level of a denial of FAPE. *See, e.g.*, 34 C.F.R. § 300.513(a)(2) (hearing officer may find denial of FAPE only where procedural inadequacies impeded child's right to FAPE, impeded Parent's opportunity to participate in decision-making, or caused deprivation of educational benefit); *Lesesne v. D.C.*, 447 F.3d 828 (D.C. Cir. 2006) (only procedural violations that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable).

### **Failure to Develop an Appropriate IEP on 6/12/13**

The FAPE required by IDEA is tailored to the unique needs of a disabled child by means of the IEP. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982). Hence, IDEA defines a FAPE to mean special education and related services that are provided, *inter alia*, in conformity with an IEP. *See* 34 C.F.R. § 300.17(d). 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." *Rowley*, 458 U.S. at 203.

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. *See Rowley, supra*. 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).

In the instant case, Petitioner argues that Student's IEP is inappropriate because it was not developed with the participation of the full IEP team, and because, substantively, it contains inappropriate goals, it lacks a dedicated aide although Student requires constant one-on-one attention, and it lacks goals to address the critical skill Student needs to acquire to become as independent as possible. Petitioner further contends that, as a result, DCPS's failure to revise the IEP on June 12, 2013 constituted a denial of FAPE. DCPS disagrees with Petitioner's position, arguing that Petitioner's IEP claim is premature because necessary evaluations must be conducted and/or provided to DCPS first, after which time the IEP team will meet to review and, if necessary, revise Student's IEP.

A review of the evidence in this case proves although that Student's current IEP is inappropriate because DCPS failed to comply with IDEA's procedures in developing the IEP, and the IEP was not reasonably calculated to provide Student with educational benefit at the time it was created, DCPS's failed to revise the IEP at Student's June 12, 2013 IEP meeting upon Parent's request.

With respect to IDEA's procedures, the evidence in this case proves that the current IEP was not developed by the full IEP team, including Parent, but instead the IEP was developed and presented to Parent subsequent to Student's February 2013 IEP meeting. *Compare* 34 C.F.R. § 300.324(a)(1) & (b)(1) (which assign the tasks of developing and revising a disabled child's IEP to the child's IEP team); 34 C.F.R. § 300.321(a)(1) (public agency must ensure the IEP team for each disabled child includes the child's parents). With respect to substance, the evidence in this case proves that the reading and math objectives in Student's IEP are too difficult for Student; and that with the exception of goals requiring Student to learn to recall and write address and

write telephone number, Student's IEP does not contain goals that address the functional and adaptive skills needs to develop to become as independent as possible, even though Student's February 11, 2013 IEP team determined that it is critical for Student to begin learning daily adaptive living skills and transitional skills that will help become a productive adult. Nevertheless, when Parent requested that DCPS revise Student's IEP at the June 12, 2013 IEP meeting, DCPS failed to do so.

Based on the evidence outlined above, the hearing officer concludes that Petitioner has met its burden of proving a denial of FAPE due to DCPS's failure to develop an appropriate IEP for Student on June 12, 2013. To remedy this denial of FAPE, the hearing officer will order DCPS to reconvene Student's IEP meeting to revise Student's IEP to include appropriate math and reading objectives tailored to Student's level of academic performance and the functional and adaptive daily living skills needs to learn to become as independent as possible.

### **IEP Team Composition on 6/12/13**

Under IDEA, a disabled child's IEP team must include, *inter alia*, the child's parents, at least one of the student's regular education teachers if the student is or may be participating in the regular education environment, and at least one of the student's special education teachers. *See* 34 C.F.R. § 300.321(a).

In the instant case, Petitioner argues that Student was denied a FAPE when DCPS failed to convene a full IEP team on June 12, 2013, because DCPS was unable to revise Student's IEP at Parent's request in the absence of Student's teacher. The evidence in this case supports Petitioner's assertions. Hence, the evidence proves that DCPS convened an IEP meeting for Student on June 12, 2013, but none of Student's current teachers were in attendance, with the result that when Parent opined that Student's reading and math goals were too difficult and needed to be revised, DCPS stated that the IEP could not be revised because Student did not have a permanent teacher and the teachers were at lunch. Although one of Student's former teachers was in attendance at the meeting, that teacher stated that he had no knowledge of Student's performance.

The hearing officer has already concluded above that Student's current IEP is inappropriate. In light of that conclusion, together with the evidence outlined herein, which proves that DCPS was unable to revise Student's IEP at the June 12, 2013 meeting due to the failure to convene a full IEP team that included at least one of Student's current teachers, the hearing officer proves that Petitioner has met its burden of proving a denial of FAPE in connection with this claim. *See* 34 C.F.R. 300.513(a)(2), *supra* (hearing officer may find denial of FAPE where procedural inadequacies impeded child's right to FAPE or caused deprivation of educational benefit); *Lesesne v. D.C.*, *supra* (procedural violations that result in loss of educational opportunity or seriously deprive parents of their participation rights are actionable). However, as the hearing officer has already determined to order DCPS to revise Student's inappropriate IEP to provide goals and objectives that are on Student's level and meet individualized needs, the hearing officer has determined that that no additional relief is required to remedy the instant denial of FAPE.

### **Educational Placement for SY 2013/14**

Under IDEA, a public agency must also provide an appropriate educational placement for each child with a disability, so that the child's needs for special education and related services can be met. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. In this regard, a FAPE consists of

special education and related services that, *inter alia*, include an appropriate preschool, elementary or secondary school and are provided in conformity with the Student's IEP. *See* 34 C.F.R. § 300.17.

Each public agency must ensure that a continuum of alternative placements is available to meet the needs of disabled children for special education and related services. The continuum must include alternative placements such as instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and must make provision for supplementary services, such as resource room or itinerant instruction, to be provided in conjunction with regular class placement. 34 C.F.R. § 300.115. However, to the maximum extent possible disabled children must be educated with nondisabled children, and special classes separate schooling, or other removal of disabled children from the regular educational environment may occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114(a)(2).

In the instant case, Petitioner argues that Student's current educational placement is inappropriate because Student requires a therapeutic separate special education school, and accordingly, Petitioner has requested that the hearing officer provide Student with placement and funding at the requested private school. DCPS disagrees that funding and placement at the requested private school is appropriate and argues that Petitioner failed to prove that the requested private school is Student's LRE.

A review of the evidence in this case reveals that Student's IEP team determined in February 2013 that Student needs a smaller, more restrictive, therapeutic learning environment provided by a special education school focusing on improving the few critical skills Student has acquired, because skills are severely behind where they need to be for to function in a general education school with special education support; and that Student's IEP further determined in June 2013 that Student is not making any progress adaptively in current setting; needs one-on-one assistance and is easily distracted; the areas of communication, functioning, and self-care are where requires the most assistance; and Student's current setting is not working for as needs more structure and a more restrictive placement. Moreover, the evidence proves that Student needs an intensive level of services where is with peers with the same type of disabilities all the time in a separate special education school setting. Despite this evidence, Student attended a DCPS middle school in SY 2012/13 that continues to be assigned location of services for SY 2013/14. As a result, the hearing officer concludes that Petitioner has met its burden of proving a denial of FAPE in connection with this claim.

“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 *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)).

In the instant case, the evidence proves that the requested private school is a small, nonpublic, full-time special education school with a total population of twenty-three ID students, some of whom have visual impairments as well, where Student would be placed in a class with 7 other students functioning on the pre-K/Kindergarten level and five adults, including a special education teacher and four dedicated aides. The school offers life skills training to all students as part of the school day, and opportunities to bring academic lessons out of the classroom and into the community through vocational field trips and other opportunities, because the focus at the school is on survival skills, life skills and vocational skills. The school also offers the related services of, *inter*, counseling, OT, and speech therapy.

This evidence proves that the requested private school offers a program that is well-matched to the nature and severity of Student's disability, and that can meet Student's specialized educational needs in light of the strong link between those needs and the services offered by the school. The school also represents the least restrictive environment for Student because the evidence proves that Student requires a separate special education school setting where is with peers with the same type of disabilities all the time, which is exactly what the school offers. Although Petitioner failed to present evidence of the annual tuition at the school, Petitioner's evidence proves that all of the students at the school are from the District of Columbia and OSSE pays the tuition for those students, which indicates that the tuition rates are acceptable to OSSE.

Based on the evidence outlined herein, the hearing officer has determined that the requested private school is appropriate for Student and is reasonably calculated to provide Student with educational benefit. Therefore, the hearing officer will award Petitioner funding and placement at the requested private school, plus transportation, for SY 2013/14.

### **ORDER**

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

1. Within thirty (30) days of the issuance of this Order, DCPS shall conduct an Occupational Therapy evaluation of Student that includes visual motor and visual perception assessments.
2. Within 15 days of the conclusion of Student's Occupational Therapy evaluation, DCPS shall reconvene Student's IEP meeting to revise Student's IEP to reflect the results of the evaluation, and to include appropriate math and reading objectives tailored to Student's level of academic performance and goals addressing the functional and adaptive daily living skills Student needs to learn to become as independent as possible.
3. DCPS shall provide placement and funding, including transportation, for Student to attend the requested private school for SY 2013/14.
4. All remaining requests for relief in Petitioner's June 17, 2013 Complaint are **DENIED**.

### **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: 9/12/2013

/s/ Kimm Massey

Kimm Massey, Esq.  
Hearing Officer