

**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

---

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

---

**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**

Student is \_\_\_\_\_ female, who presently attends a DCPS elementary school, pursuant to a determination made in a \_\_\_\_\_ Hearing Officer Determination (“HOD”) by the hearing officer who presided over the previous due process hearing for Student.

On \_\_\_\_\_ Petitioner filed a Complaint against Respondent District of Columbia public Schools, alleging that DCPS denied Student a free appropriate public education (“FAPE”) by failing to provide an appropriate location of services \_\_\_\_\_ when she was placed at the current DCPS school, failing to develop an appropriate individualized education plan (“IEP”) at the \_\_\_\_\_ IEP meeting when DCPS changed Student’s placement from a small, therapeutic school to a community school and failing to include a dedicated aide, and failing to implement Student’s IEP from December 2012 forward by failing to have a dedicated aide in the classroom. As relief for these alleged denials of FAPE, Petitioner requested funding and placement, including transportation, at a requested private school.

On \_\_\_\_\_ DCPS filed a Response to the Complaint, asserting therein that the current DCPS school can provide the required IEP services and has staff competent and able to address Student’s needs, and that Student’s \_\_\_\_\_ IEP states that Student is receiving appropriate services and does not require a dedicated aide, which moots claims about the prior IEP and demonstrates there is no failure to implement the \_\_\_\_\_ IEP.

The parties participated in a Resolution Meeting on \_\_\_\_\_ There was no agreement and no change to the timeline. Therefore, the 45-day timeline began on \_\_\_\_\_ and will end on \_\_\_\_\_ which is the HOD deadline.

On \_\_\_\_\_ the hearing officer conducted a prehearing conference and led the parties through a discussion of the issues, relief requested, and other relevant topics. Petitioner clarified that in light of the January 2013 HOD, as well as an Order issued by the undersigned hearing officer in connection with a previous Complaint for Student that was filed and then voluntarily withdrawn, Petitioner’s failure to implement the December 2012 IEP is restricted to the period

from \_\_\_\_\_ through \_\_\_\_\_ The hearing officer issued a Prehearing Order on \_\_\_\_\_

By their respective letters dated \_\_\_\_\_ Petitioner disclosed sixteen documents (Petitioner's Exhibits 1-16) and DCPS disclosed seven documents (Respondent's Exhibits 1-7).

The hearing officer convened the due process hearing on \_\_\_\_\_ as scheduled.<sup>1</sup> All documents disclosed by the parties were admitted into the record without objection. The hearing officer received opening statements and testimonial evidence from Petitioner. The hearing officer also received testimonial evidence from one DCPS witness, but the testimony was stricken because the witness did not have access to the disclosures in this matter and, therefore, could not be fully cross-examined. As DCPS's additional witness did not have access to the disclosures either, DCPS did not present testimonial evidence from that witness. Thereafter, the hearing officer received closing statements and 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 fail to provide an appropriate location of services for Student as of \_\_\_\_\_ when Student was placed at her current DCPS school?
2. Did DCPS fail to develop an appropriate IEP at the \_\_\_\_\_ IEP meeting when DCPS changed Student's placement from a small, therapeutic school to a community school and failed to include a dedicated aide?
3. Did DCPS fail to implement Student's \_\_\_\_\_ IEP from \_\_\_\_\_ through \_\_\_\_\_

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

1. Student is an eight year old female, who presently attends a DCPS elementary school.
2. Student's intellectual functioning is in the Very Low range. Student emotional needs include attachment needs – i.e., she needs to be attached to her caregiver, and Student has difficulty attaching to her peers.<sup>3</sup>
3. Student's \_\_\_\_\_ IEP was developed by a public school system located in the State of Maryland. The IEP identified Student's primary disability as emotional disability ("ED"), indicated that Student requires a dedicated aide to support her learning

---

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

<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 social worker; *see* Petitioner's Exhibit 8 and Respondent's Exhibit 2.

and safety, and also stated that it would be difficult for Student to make educational progress without the use of specialized interventions in a small group setting. The IEP also indicated that Student's IEP team determined that the Maryland public school system at issue did not have an appropriate public school for Student to attend, so the team recommended a private separate day school for Student. However, Student is a ward of the District of Columbia, and the DCPS Progress Monitor for Student's case determined that Student would be referred back to the DCPS school system.<sup>4</sup>

4. On \_\_\_\_\_ a hearing officer issued an HOD, in which it was specifically determined that "the BES program at the [current DCPS school] is consistent with the substance of the IEP. Specifically, it is a small therapeutic setting with sufficient behavioral supports for the Student."<sup>5</sup>
5. Student began attending the current DCPS school in January 2013. Student's current classroom includes verbal prompting, a chart on the wall, clothes pins to be moved up and down depending on the child's level, discussion of positive reinforcements, a timer to be used to indicate, for example, lunch time or when Student could play with a toy.<sup>6</sup>
6. At the 30-day review meeting for Student on \_\_\_\_\_ the staff at the current DCPS school raised numerous concerns regarding Student's behaviors, including the following: anger management issues; cursing; having to be removed to the relaxation room multiple times per day for a total of 30 – 40 minutes each day; putting her finger in a pencil sharpener; jumping on furniture; urinating on herself almost daily, which the school felt was behavioral when she did not want to do work instead of physical; hitting people; and having to spend recess inside with her head on the table. Student also has run out of the classroom. The team discussed whether Student continued to require the dedicated aide listed on her IEP that was not being provided by DCPS, but DCPS stated it would have to review Student's IEP and BIP before it could make that determination.<sup>7</sup>
7. Student does not attend the entire academic school day at the current DCPS school, which has an academic day that extends to 5:15 pm, because beginning at approximately 3:00 pm there is no special education classroom for Student and Student would have to be in a classroom with 24 non-disabled students in second grade working on second grade academic information. As a result, Student leaves school at 3:00 pm each day.<sup>8</sup>
8. Student's guardian *ad litem* observed Student in her current DCPS school in February 2013 and saw that Student was being restrained by an aide, who had Student in a seated position in between the aide's legs on the floor. Student was crying and screaming and had no shoes on. The observation lasted for approximately an hour, during which time Student also was sent to the de-escalation room twice.<sup>9</sup>
9. Student needs a small classroom setting with enough adult supervision and intervention to maintain her in the classroom where she can receive academic instruction. She requires ongoing therapeutic intervention, as well as reinforcement at very short intervals.

---

<sup>4</sup> Petitioner's Exhibit 3.

<sup>5</sup> Petitioner's Exhibit 2 at 9.

<sup>6</sup> Testimony of Parent; testimony of guardian *ad litem*.

<sup>7</sup> Testimony of guardian *ad litem*; see Petitioner's Exhibit 6.

<sup>8</sup> Testimony of guardian *ad litem*.

<sup>9</sup> Testimony of guardian *ad litem*.

Student would not benefit from interactions with non-disabled peers, as she would likely find such interactions very frustrating.<sup>10</sup>

10. During another observation of Student on \_\_\_\_\_ by the guardian *ad litem*'s colleague, Student's teacher reported that Student had progressed slightly and was no longer wetting herself, but the outbursts, cursing, and refusing to do work continued to occur on a weekly basis and often occurred daily.<sup>11</sup>
11. Student is allowed to sleep in class and often sleeps for up to 1-2 hours per day.<sup>12</sup>
12. By the time of Student's \_\_\_\_\_ IEP meeting, Student's was continuing to exhibit the same disruptive and aggressive behaviors that were discussed at her 30-day review meeting, and those behaviors were interfering with Student's ability to participate in day-to-day activities at school. Nevertheless, DCPS revised Student's IEP to indicate that she required full-time placement in a self-contained special education class in a community school, which fits the description of Student's current location of services. Moreover, despite the disagreement of Student's non-DCPS team members, DCPS changed Student's IEP to indicate that she does not require a dedicated aide.<sup>13</sup>
13. Student has in the past exhibited difficulty traveling, in that she has attempted, for example, to exit moving vehicles. Hence, Student needs a designated aid for travel with the potential for therapeutic restraint when necessary. Alternatively, Student needs as short a commute as possible.<sup>14</sup>
14. By letter dated \_\_\_\_\_ Student has been accepted to attend a nonpublic special education school located in suburban Maryland for children in grades kindergarten through fifth grade. It is a highly structured, therapeutic program that focuses not only on academic well-being, but also on social and emotional well-being. All staff at the school has a background in psychology or a related field, and all are trained and retrained yearly in verbal de-escalation, crisis intervention, and crisis prevention. It is an attachment-based program, which operates on the belief that developing a healthy trusting relationship is critical for the child's development. The program provides a school-wide behavior plan system, as well as an individualized behavior management program for each student. There are no more than 35-40 students in the school, with a maximum of nine students in each class and a minimum ratio of one staff person per three students, with a more likely ratio of one staff person to every two students because of the dedicated aides at the school. Classroom staff consists of a minimum of one certified special education teacher, one teaching assistant and one aide. The cost of the program is more than \$40,000 per school year.<sup>15</sup>
15. Student previously attended a small therapeutic school in southern Maryland that offered a very structured environment with well-planned behavior management plans, all full-time special education students, a very small classroom setting and a low student-teacher

---

<sup>10</sup> Testimony of clinical psychologist.

<sup>11</sup> Testimony of guardian *ad litem*; see Petitioner's Exhibit 10.

<sup>12</sup> Testimony of guardian *ad litem*.

<sup>13</sup> Testimony of guardian *ad litem*; see Petitioner's Exhibits 4-5; Respondent's Exhibit 3.

<sup>14</sup> See Petitioner's Exhibit 1; testimony of social worker.

<sup>15</sup> Testimony of private school's clinical director; Petitioner's Exhibit 14.

ratio. Student did very well in that school, but she had to leave when her foster care placement changed.<sup>16</sup>

16. The nonpublic school which accepted Student for admission by letter dated represents the least restrictive environment for Student, as she would not benefit from interactions with non-disabled peers, and the school is an appropriate location of services for Student because it can implement Student's IEP and provide Student with the small therapeutic setting with sufficient behavioral support that she requires.

## **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 claims.

### **Location of Services**

Under IDEIA, a public agency must 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 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.

In the instant case, Petitioner argues that Student's current DCPS school does not provide the small therapeutic setting with sufficient behavioral supports that Student requires as determined in the previous hearing officer's January 2013 HOD. In support of this assertion, Petitioner points to evidence demonstrating significant disruptive and acting out behaviors throughout Student's tenure at the current DCPS school. Although as DCPS argues, some of Student's negative behaviors such as bedwetting decreased over time, the evidence shows that as late as mid-April Student was still exhibiting negative behaviors that included outbursts, cursing, and refusing to do work weekly and often daily. Moreover, Student was being removed to a de-escalation room daily, and she was being allowed to sleep in class for up to 1-2 hours per day. As a result, Student's behaviors interfered with her ability to participate in day-to-day activities at school and she missed significant portions of instruction each day. There is no evidence tending to indicate that DCPS was implementing a behavior intervention plan for Student or that the current DCPS school has been able to provide Student with the therapeutic setting she needs.

---

<sup>16</sup> Testimony of guardian *ad litem*;

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 provide Student with an appropriate location of services beginning \_\_\_\_\_ when it placed Student at her current DCPS school, which was unable to provide Student with the small therapeutic setting with sufficient behavioral supports that she needs. *See Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176, 203-4 (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”).

In light of this conclusion and based on the hearing officer’s finding that the requested private school is an appropriate school for Student, the hearing officer will award Petitioner placement and funding, including transportation, for Student to attend the private school for SY 2013/14. *See 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)) (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 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)) (considerations relevant to determining whether a particular placement is appropriate for a particular student includes 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).

Moreover, as Student will have to commute to the private school, which is located in suburban Maryland, and the evidence in this case proves that Student will require a designated aid for travel with the potential for therapeutic restraint when necessary, the hearing officer will also award Petitioner a designated aid who has been trained in therapeutic restraint to accompany Student on her commute to and from the private school. *See Letter to Armstrong*, 28 IDELR 303 (O.S.E.P. \_\_\_\_\_ (due process system must give hearing officers the authority to order any relief necessary to ensure a student receives a FAPE).

### **Appropriateness of IEP**

The FAPE required by IDEA is tailored to the unique needs of a disabled child by means of the IEP. *See Rowley, supra*, 458 U.S. 176. 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. Hence, 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.* at 203-4. Moreover, in the case of a child whose behavior impedes the child’s learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). 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 the team changed Student's placement from a small therapeutic school to a community school and the team changed Student's IEP to indicate that she no longer required a dedicated aide. DCPS disagrees, arguing that the current DCPS school can implement Student's IEP and that Student does not require a dedicated aide as shown by its removal from the IEP on

A review of the evidence in this case reveals that at the time the IEP was developed, Student was exhibiting negative and disruptive behaviors that were interfering with Student's ability to participate in day-to-day activities at school and often resulted in Student being removed from the classroom and sent to the de-escalation room. Nevertheless, DCPS DCPS revised Student's IEP to indicate that she required full-time placement in a self-contained special education class in a community school, which fits the description of Student's current location of services. Moreover, DCPS eliminated from Student's IEP the requirement that she be provided with a dedicated aide. Under these circumstances, the evidence proves that Student's March 2013 IEP was not reasonably calculated to provide Student with educational benefit at the time it was developed. Hence, the hearing officer concludes that Petitioner has met its burden of proof on this claim, and the hearing officer will require DCPS to revise Student's IEP to reflect that Student continues to require a small therapeutic setting with sufficient behavioral supports to allow her to make academic progress. *See Spielberg v. Henrico Public Schools*, 853 F.2d 256, 259 (4<sup>th</sup> Cir. 1988) (finding a denial of FAPE where a public school system determined to educate a student at a particular school and then developed an IEP to carry out that decision). However, as the hearing officer has already determined to award Student a private placement in a small, full-time, therapeutic special education school with sufficient behavioral supports and a low student-teacher ratio, the hearing officer concludes that Student will no longer require a dedicated aide to receive a FAPE, and DCPS will not be required to revise the IEP in this regard.

### **Implementation of IEP**

As noted above, the FAPE required by IDEA is tailored to the unique needs of a disabled child by means of the IEP. *See Rowley, supra*, 458 U.S. 176. However, "to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. *Catalan v. District of Columbia*, 478 F.Supp.2d 73 (D.D.C. 2007) (citations omitted). Hence, the deviations from the IEP must be material to constitute a denial of FAPE. *Id.*

In the instant case, there is no dispute that DCPS wholly failed to provide Student with a dedicated aide from through Moreover, the evidence demonstrates that during the period when Student was not being provided with the required services of a dedicated aide, she was engaging in significant negative and disruptive behaviors that were interfering on a daily basis with her ability to participate in day-to-day activities at school and often resulted in her removal from the classroom. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proving a material deviation from Student's IEP which resulted in a denial of FAPE. However, as the hearing officer has already determined to award Student a prospective private placement for SY 2013/14, the hearing officer concludes that no additional relief is required to address the denial of FAPE resulting from the failure to fully implement Student's IEP. *See e.g., Branham v. District of Columbia*, No. 04-7084 (D.D.C.

2005) (award of private-school placement is prospective relief aimed at ensuring child receives tomorrow the education required by IDEA); *Mr. I. and Mrs. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1<sup>st</sup> Cir. 2007) (appellate court affirmed district court's decision to decline compensatory education request where district court reasoned that IEP it ordered would necessarily take into account the identified denials of FAPE).

### **ORDER**

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

1. DCPS shall provide placement and funding, including transportation, for Student to attend the requested private school for SY 2013/14, as well as a designated aid who has been trained in therapeutic restraint to accompany Student on her commute to and from the private school.
2. Within 15 calendar days of the issuance of this Order, DCPS shall revise Student's IEP to indicate that Student continues to require a small therapeutic setting with sufficient behavioral supports.

### **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).

/s/ Kimm Massey

Kimm Massey, Esq.  
Hearing Officer