

**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  
February 25, 2014

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Petitioner,

v

Hearing Officer: Kimm Massey, Esq.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS

Respondent.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**<sup>1</sup>

On October 28, 2013, Petitioner filed a Complaint against Respondent District of Columbia Public School (“DCPS”). On November 6, 2013, DCPS filed its Response to the Complaint. An Amended Complaint and Response thereto also followed.

The parties concluded the Resolution Meeting process by participating in a resolution meeting on January 23, 2014. The resolution period for this case ended on January 10, 2014. Hence, the 45-day timeline for this case started on January 11<sup>th</sup> and will end on February 24<sup>th</sup>, which is the HOD due date.

On January 3, 2014 the hearing officer conducted a prehearing conference and determined, that the claims to be adjudicated, defenses asserted, and relief requested were as follows:

***Petitioner’s Claims:*** (i) Alleged failure to provide an appropriate placement from August 26, 2013 to November 15, 2013; (ii) Alleged failure to implement Student’s IEP during SY 2013/14; (iii) Alleged failure to reevaluate in all areas of suspected disability within a reasonable time period where warranted by conditions; and (iv) Alleged failure to have an appropriate IEP in effect at the start of SY 2013/14.

***Respondent’s Defenses:*** (i) School A is Student’s location of services, not his educational placement; (ii) DCPS informed Petitioner and his mother that the 9<sup>th</sup> grade transition

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

academy program at School B is the assigned location of services for SY 2013/14; (iii) Petitioner has only attended four of forty-one classes since returning to School A; (iv) Student must actually attend school to receive special education services; (v) Petitioner last went through the special education eligibility process on 5/23/12; (vi) Petitioner fails to specify what assessments allegedly were required as a result of Student's gunshot wound, and DCPS's notes do not reflect that any psychological or clinical evaluation was requested; (vi) Petitioner has expressed that he does not desire to attend school and wishes instead to pursue a GED; (vii) DCPS would like to conduct reevaluations but Petitioner has not made himself available; (viii) The IEP team determined on 5/23/13 that it could not determine Student's present levels of performance because of his poor attendance, but DCPS kept Student's previous IEP goals, did not reduce the amount of behavioral support services, and updated the social/emotional goals to help Student regularly attend class and counseling.

**Relief Requested:** (i) DCPS to revise Student's IEP to reflect current areas of disability and present levels of performance; and provide IEE letters for a comprehensive neuropsychological and clinical evaluation at \$3200, a comprehensive psychiatric evaluation at \$2000, a vocational II evaluation at \$2500, and a functional behavior analysis at \$900; (ii) the hearing officer to provide compensatory education extending Student's eligibility under IDEA to age 25.

By their respective letters dated February 3, 2014, Petitioner disclosed thirteen documents (Petitioner's Exhibits 1-13) and DCPS disclosed fourteen documents (Respondent's Exhibits 1-14).

The hearing officer convened the due process hearing on January 3, 2014 as scheduled.<sup>2</sup> All disclosed documents were admitted into the record without objection. The hearing officer then received opening statements and Petitioner's testimonial evidence. Upon the conclusion of Petitioner's case-in-chief, Petitioner made a motion for directed verdict on claims number one and two regarding the alleged inappropriate placement for the period of August 25 through November 15, 2013, and the failure to implement student's IEP. The hearing officer granted the directed verdict on claim one in its entirety and on claim two for the period from August 26<sup>th</sup> through November 15<sup>th</sup> based on the findings of fact of a federal district court judge and the evidence adduced at the hearing. Petitioner then withdrew the remainder of claim two for the period subsequent to November 15, 2013, leaving only claims three and four for decision by the hearing officer. Thereafter, the hearing officer received DCPS's testimonial evidence, as well as closing statements from both parties prior to bringing the hearing to a close.

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.").

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

## ISSUE(S)

1. Did DCPS fail to reevaluate Student in all areas of suspected disability within a reasonable time period where warranted by conditions?
2. Did DCPS fail to have an appropriate IEP for Student at the start of SY 2013/14?

## FINDINGS OF FACT<sup>3,4</sup>

1. Student's \_\_\_\_\_ is an adult student entitled to receive special education and related services from the District of Columbia.<sup>5</sup>
2. Student is currently \_\_\_\_\_ of age, and he remains in the 9<sup>th</sup> grade.<sup>6</sup>
3. Student's most recent IEP is dated May 10, 2013. This IEP identifies Student's primary disability as OHI, and it requires him to receive 7.5 hours per week of specialized instruction in general education and 2 hours per month of behavioral support services outside of general education. The Present Levels of Academic Achievement and Functional Performance sections of the IEP for the academic areas of Mathematics, Reading, and Written Expression all provide as follows:

[Student] is currently a 9<sup>th</sup> grader at [School A]. Due to his poor attendance his present levels of performance are currently unavailable. To date [Student] has missed approximately 95 days with 15 excused. [Student] is currently failing everything with the exception of Computer Literacy.<sup>7</sup>

4. Present levels of performance give a baseline for present performance to allow the development of goals going forward. Goals cannot be developed without present levels of performance, and an IEP must have goals to be effective.<sup>8</sup>
5. Student's previous IEP is dated June 13, 2012. That IEP also identifies Student's primary disability as OHI and requires him to receive 7.5 hours per week of specialized

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<sup>3</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>4</sup> When citing to an exhibit that has been submitted by both parties, the hearing officer may only cite to one party's exhibit.

<sup>5</sup> Stipulation of the parties at the 1/3/14 Prehearing Conference.

<sup>6</sup> Petitioner's Exhibit 7 at 3.

<sup>7</sup> Respondent's Exhibit 2.

<sup>8</sup> Testimony of special education teacher.

instruction in general education and 2 hours per month of behavioral support services outside of general education.<sup>9</sup>

6. At the start of SY 2013/14 Student repeatedly tried to attend School A, but the school staff would not grant Student access to the building. DCPS proposed that Student attend a different DCPS school, but DCPS failed to formally transfer Student to another location.<sup>10</sup>
7. DCPS did not allow Student to return to School A for SY 2013/14 until a Judge of the United States District Court for the District of Columbia issued an 11/14/13 Memorandum Opinion and Order granting “stay put” relief to Petitioner.<sup>11</sup>
8. Student presently attends \_\_\_\_\_ School A. In this program, Student and his classmates are required to sign in, but then they have the option of either taking their classwork home or staying in school to complete the classwork with the teacher’s help. Sometimes Student simply signs in, takes his work and leaves.<sup>12</sup>
9. Student presently has a total of four classes in the twilight program; however, Student is unclear on the names of his teachers and the names of his classes.<sup>13</sup>
10. Student has been diagnosed with both bipolar and ADHD, and he functions at the 4<sup>th</sup> percentile intellectually, so he has both cognitive and emotional issues. The ADHD affects Student’s ability to learn in that he is highly distractible, it’s very difficult for him to focus, it’s very hard for him to get himself organized, it’s very hard for him to initiate activities, he tends to get overwhelmed by his own emotions and impulses, and it is hard for him to stay headed in a particular direction without a lot of guidance and assistance.<sup>14</sup>
11. In the early hours of the morning on or about March 11, 2013, Student was one of numerous people injured in a shooting incident that took place near his home. Student was shot in the hand he uses to write, with the bullet entering at his index finger and stopping mid-wrist. Student went to the hospital, where a cast was put on his hand. Thereafter, Student did not go to school very much because he could not write and felt there was no point in going. Student also experienced physical pain as a result of the shooting. He had been prescribed pain medication, but the medicine made him tried. Although the teachers and school administrators at School A knew about the shooting incident, no one at the school offered to take notes for him, or to give him a computer to use for taking notes, or to provide him with counseling/therapy, or to do anything else to help him in school after the shooting.<sup>15</sup>

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<sup>9</sup> Respondent’s Exhibit 1.

<sup>10</sup> Petitioner’s Exhibit 7 at 4.

<sup>11</sup> See Petitioner’s Exhibit 7; testimony of Student.

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

<sup>13</sup> See testimony of Student.

<sup>14</sup> Testimony of licensed private psychologist.

<sup>15</sup> Testimony of Student.

12. Student's attendance was problematic even at the start of SY 2012/13. Student's special education teacher would call Student on his cell phone in the mornings and ask Student to stop by his office in the mornings, but that did not help Student's attendance. Student was given an attendance counselor and DCPS tried to incorporate Student's affinity for bike racing as an attendance intervention, but that did not work either. Student would always say that he was on board with the attendance plan and would give it a try, but his attendance never improved and sometimes got worse. After Student was shot near the end of SY 2012/13, DCPS convened an attendance meeting for Student. Student had a cast on his hand and said the cast was preventing him from writing and completing assignments. DCPS offered certain accommodations for Student, but the only accommodation DCPS's witness could remember at the time of testifying at the due process hearing for this case was tutoring.<sup>16</sup>
13. It is possible that shooting incident has an effect on Student's ability to learn, because at least half of the victims of gunshot wounds develop a form of anxiety called post-traumatic stress disorder ("PTSD") which interferes with every day functioning. Although the effects of PTSD are not always obvious, they tend to have an immediate impact. As a result, it would have been reasonable to assess Student after the shooting incident to determine whether and/or to what extent it affected his ability to learn.<sup>17</sup>
14. The fact that Student was involved in the March 2013 shooting incident did not necessarily require a reevaluation; however, it would have been appropriate to reevaluate Student if he was displaying difficulties that warranted the assessment.<sup>18</sup>
15. A neuropsychological assessment can be used to diagnose PTSD; the assessment is also used to determine whether neurological processes are affecting a disabled child's ability to respond to the environment, his or her ability to learn, or aspects of daily living. A psychiatric assessment may be used to diagnose emotional, behavioral or developmental disorders and determine the educational impact of the disorders. When a child with a disability is referred for an evaluation, the purpose is not to diagnose a specific disorder, but to determine whether social/emotional or academic issues are interfering with the child's ability to access the general education curriculum. As a result, neuropsychological and psychiatric assessments are helpful, but they are not always necessary to obtain information for purposes of the child's IEP.<sup>19</sup>
16. The current compliance case manager ("CCM") for Student's case spoke to Student several times during the summer of 2013 after an employee of the Department of Juvenile Justice reached out to the CCM for assistance with getting assessments for Student and/or getting him back into school. The CCM and Student scheduled at least four appointments to meet and Student confirmed each time, but he never showed up. The CCM wanted to get comprehensive psychological and vocational assessments for Student

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<sup>16</sup> See testimony of special education teacher.

<sup>17</sup> Testimony of licensed private psychologist.

<sup>18</sup> Testimony of school psychologist.

<sup>19</sup> Testimony of school psychologist.

because there was no current information for him. No one asked the CCM to arrange any other types of assessments for Student.<sup>20</sup>

17. At the November 15, 2013 re-entry meeting for Student to return to School A, there was a discussion about assessments for Student. However, Student had attendance issues, so DCPS was unable to assess him.<sup>21</sup>

18. Student signed a Consent for Initial Evaluation/Reevaluation form on November 18, 2013.<sup>22</sup>

### **CONCLUSIONS OF LAW**

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

The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. 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, which will be grouped together to the extent that they are interrelated.

#### **Alleged Inappropriate Placement/Location of Services and Alleged Failure to Implement Student's IEP from August 26 through November 15, 2013**

Under IDEIA, a public agency 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. Moreover, the FAPE required by IDEA is tailored to the unique needs of the handicapped child by means of an IEP. *See 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 consist 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.

At the due process hearing in this case, the hearing officer granted a directed verdict for Petitioner on these two claims, thereby determining as a matter of law that Petitioner met its burden of proof on these claims.

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

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

<sup>22</sup> Respondent's Exhibit 7.

### **Alleged Failure to Reevaluate Where Warranted By Conditions**

Under IDEA, a public agency must ensure that a reevaluation of a child with a disability is conducted if the public agency determines that the educational or related services needs of the child warrant an evaluation, or if the child's parent or teacher requests a reevaluation. 34 C.F.R. § 300.303(a). IDEA also hold each public agency responsible for ensuring that a disabled 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). Each public agency must ensure that the evaluation of each disabled child is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(7). In this regard, the failure of a handicapped student to cooperate with his or her educational program does not relieve a school district of its obligations under IDEA to provide the student with a FAPE. To the contrary, a student's lack of cooperation may instead indicate a need for reevaluation, a revised IEP or change in placement. *See Letter to Borucki*, 16 IDELR 884 (OSEP April 11, 1990).

In the instant case, Petitioner argues that Student should have been reevaluated after he was involved in the shooting incident to determine the emotional impact the incident had on Student and his ability to access the education, and also to determine what accommodations Student required to access his education in light of his physical injuries, the cast that prevented him from being able to write, and the physical pain he experienced. Petitioner also argues that Student should have been reevaluated when DCPS discovered that Student's present levels of performance were unavailable.

DCPS does not disagree that Student requires a reevaluation. To the contrary, DCPS points out that it has been attempting to evaluate Student since at least the summer of 2013 but has been unable to do so because of Student's failure to attend scheduled meetings and his extreme truancy problems. DCPS further points out that although Student signed a Consent to Evaluate form in November 2013, he has rarely attended school since then so DCPS has not had an opportunity to evaluate him pursuant to the consent granted. DCPS argues that it cannot be held liable for failing to conduct evaluations when Student will not make himself available to be evaluated. DCPS further argues that it did not know about the possible need for reevaluation as a result of the shooting until the filing of the Amended Complaint because there was nothing to suggest an evaluation for educational purposes was required, so it should not be held liable for failing to evaluate for that purpose either.

A review of the evidence in this case reveals that at least as early as May 10, 2013, when DCPS developed Student's current IEP, DCPS was aware that it lacked present levels of performance data for Student in all academic areas; however, it was not until the summer of 2013 when an employee of the Department of Juvenile Justice reached out to the CCM for assistance with getting assessments for Student that the CCM affirmatively began attempting to obtain evaluations for Student. The evidence further reveals that DCPS staff at School A knew that Student was involved in a shooting incident in March 2013 and saw Student come to school with a cast on his hand. Moreover, Student told the DCPS staff members who attended his post-

shooting incident attendance meeting that he could not write or complete assignments due to the cast on his hand. Nevertheless, DCPS did not attempt to evaluate Student to determine whether and to what extent the shooting incident affected his ability to access his education and what accommodations he might require.

Based on the evidence outlined above, the hearing officer concludes that Petitioner has met its burden of proof on this claim, and the hearing officer will award Petitioner a comprehensive psychological assessment that includes behavioral scales designed to determine Student's current emotional state, an occupational therapy assessment to determine whether Student requires accommodations to address any lingering physical effects of his gunshot wound, a vocational II assessment in light of Student's advanced age, and a functional behavior assessment with a follow-up behavioral intervention plan to address Student's extreme truancy issues. The hearing officer will also award Petitioner a meeting to review the assessments ordered, determine whether additional assessments are warranted, review and revise Student's IEP to incorporate as appropriate the assessment results, including Student's present levels of performance, and to discuss and determine an appropriate location of services for Student that provides him with a restrictive enough environment to help curb his extreme truancy issues. However, as the evidence also proves that Student's repeated failure to attend scheduled meetings regarding evaluations and his extreme truancy prevented DCPS from conducting assessments for Student once it determined that assessments were appropriate, the hearing officer rejects Petitioner's request for independent evaluations and will instead order Student to make himself available so that DCPS's evaluators can administer the assessments awarded herein.

#### **Alleged Inappropriate IEP at the Start of SY 2013/14**

An IEP is a written statement for each disabled child that must include, *inter alia*, a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals, including academic and functional goals, and a statement of the special education and related services and supplementary aids and services to be provided to the child or on behalf of the child. *See* 34 C.F.R. § 300.320(a). At the beginning of each school year, each public agency must have an IEP in effect for each child with a disability within its jurisdiction. 34 C.F.R. § 300.323(a).

In the instant case, Petitioner has alleged that DCPS failed to have an appropriate IEP in effect for Student at the start of SY 2013/14 due to the lack of present levels of performance in Student's current IEP and due to a decrease in behavioral support services. The evidence in this case clearly proves that Student's current IEP lacks the statutorily-required data concerning Student's present levels of performance, and as a result, the hearing officer concludes that Petitioner has met its burden of proof on this claim with regard to that contention. However, the evidence disproves Petitioner's assertion that DCPS reduced Student's behavioral support services in the current IEP.

#### **Compensatory Education**

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, Petitioner has requested compensatory education consisting of an extension to age 25 of Student's eligibility for special education and related services under IDEA. However, the denials of FAPE that the hearing officer has found in this case relate only to the periods from approximately March 2013 through the end of SY 2012/13 and August 26<sup>th</sup> through November 15<sup>th</sup>, 2013. Moreover, Student is currently only 18 years old, and his eligibility for special education and related services pursuant to the IDEA already extends through his 22<sup>nd</sup> birthday. *See e.g.* 34 C.F.R. § 300.101(a) (FAPE must be available to all children residing in the State between the ages of 3 and 21, inclusive). Under these circumstances, the hearing officer concludes that it would be inequitable to extend Student's eligibility under IDEA by three years as a form of compensatory education. Instead, the hearing officer has determined that Student requires compensatory education in the forms and amounts of four hours of independent one-on-one tutoring per week and one hour of independent one-on-one behavioral support services per week throughout the remainder of SY 2013/14 and the summer of 2014 to provide him with the additional academic and emotional support he requires to obtain the educational benefits he likely would have received from the special education and related services DCPS should have provided him with during the periods of the denials of FAPE found herein.

### **ORDER**

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

1. Within 10 business days of the issuance of this Order, DCPS shall provide Petitioner and Petitioner's counsel with at least three sets of proposed dates that fall within forty days of the issuance of this Order for the administration of the following assessments: a comprehensive psychological assessment that includes behavioral scales designed to determine Student's current emotional state, an occupational therapy assessment to determine whether Student requires accommodations to address any lingering physical effects of his gunshot wound, a vocational II assessment in light of Student's advanced age, and a functional behavior assessment with a follow-up behavioral intervention plan to address Student's extreme truancy issues.
2. Within seven calendar days of receipt of the three sets of proposed dates required under Paragraph 1 above, Student shall select one set of dates and commit to presenting himself at School A for the administration of the awarded assessments. Should Student fail to present himself on the dates selected, the timelines in this Order shall be extended by one day for every day of delay caused by Student's failure to appear for the administration of the assessments.
3. Within 15 calendar days of the issuance of the reports for the assessments awarded herein, DCPS shall convene a meeting of Student's IEP team to review the assessment

reports, determine whether additional assessments are warranted, review and revise Student's IEP to incorporate as appropriate the assessment results, including Student's present levels of performance, and to discuss and determine an appropriate location of services for Student that provides him with a restrictive enough environment to help curb his extreme truancy issues.

4. DCPS shall fund the following forms and amounts of compensatory education services for Student: four hours of independent one-on-one tutoring per week and one hour of independent one-on-one behavioral support services per week throughout the remainder of SY 2013/14 and the summer of 2014.

**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: 2/24/14

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