

**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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STUDENT HEARING OFFICE  
2011 MAR 22 AM 9:14

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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**

Student is a            year-old female, who is currently attending a private special education school pursuant to Parent's unilateral placement. Student's current IEP lists Emotional Disturbance ("ED") as her primary disability and provides for her to receive a total of 21 hours per week of specialized instruction outside general education, as well as 120 minutes per month of speech-language pathology services, 240 minutes per month of behavioral support services, and assistive technology in the form of text-to-speech or text-to-reading software.

On January 31, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS denied Student a free appropriate public education ("FAPE") by failing to comply with the January 20, 2011 HOD ("1/20/11 HOD") issued by this hearing officer by (1) failing to develop an appropriate IEP with the MDT/IEP team, and (2) failing to provide Student with an appropriate placement/location of services. As relief for this alleged denial of FAPE, Petitioner requested, *inter alia*, funding of Student's current unilateral placement retroactive to January 20, 2011 and extending until an appropriate location of services is identified for Student, transportation to the unilateral placement, and an Order requiring DCPS to reconvene Student's MDT meeting to revise the IEP to require no less than 25 hours per week of specialized instruction in a self-contained classroom, 30 minutes per week of speech services, 1 hour per

week of counseling services, 2 hours per month of family counseling, and a behavior intervention program ("BIP").

On February 10, 2011, DCPS filed its Response to the Complaint, which was more in the nature of an Answer. In its Response, DCPS asserted that (1) it had convened an MDT meeting for Student within the 10-day deadline established in the 1/20/11 HOD, (2) the team determined at that meeting to increase Student's hours of specialized instruction from 15 to 21 hours per week in compliance with the hearing officer's determination that Student requires more than 15 hours per week of specialized instruction, (3) a DCPS high school the hearing officer determined in the 1/20/11 HOD to be inappropriate can provide Student with 21 hours of specialized instruction outside general education, and (4) a BIP was developed for Student and revised at the meeting held pursuant to the HOD.

On February 16, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Petitioner acknowledged that a BIP had been provided for Student and withdrew its request for a BIP. Petitioner then clarified its position that DCPS unilaterally developed the IEP and then reassigned Student to the very location of services the hearing officer had already determined to be inappropriate. DCPS reiterated its position that 21 hours is a sufficient amount of specialized instruction for Student and that the DCPS school previously presented can provide those hours out of general education. However, once DCPS confirmed that nothing had changed at the proposed DCPS school since the previous hearing that led to the hearing officer's determination of inappropriateness, the hearing officer stated that the appropriateness of the DCPS school would not be readjudicated at the hearing for this case. Nevertheless, the hearing officer allowed DCPS until February 21 or 22, 2011 to propose alternative locations of services to Parent. The hearing officer rejected DCPS's suggestion that the issue of the number of hours of services Student requires had already been determined and should not be relitigated in this action. The hearing officer issued the Prehearing Order on February 22, 2011.

On February 23, 2011, DCPS filed a Motion to Dismiss, in which it again argued that "[t]he issues of whether the student requires a full-time IEP and special education placement have already been raised and litigated on the merits and are therefore barred by res judicata and collateral estoppel." Motion to Dismiss at 1.

On February 28, 2011, Petitioner filed its Opposition to DCPS's Motion to Dismiss, arguing therein that the previous cause of action for this Student and the current cause of action are not the same because the current action alleges a failure to comply with the 1/20/11 HOD, which did not exist at the time the previous action was filed.

By their respective disclosure letters dated February 24, 2011, Petitioner disclosed twenty-one documents (Petitioner's Exhibits 1 – 21), and DCPS disclosed DCPS-1 through DCPS-5.

The hearing officer convened the due process hearing on March 3, 2011.<sup>1</sup> DCPS's disclosed documents were admitted into the record without objection. Petitioner's Exhibits 1-16 and 19-21 were admitted without objection; Petitioner's Exhibit 17 was admitted over DCPS's objection;

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

and DCPS's objection to Petitioner's Exhibit 18 was sustained with respect to page 14 but otherwise overruled.

Thereafter, the hearing officer denied DCPS's Motion to Dismiss, questioning DCPS's logic, which seemed to be based on the position that because the hearing officer previously ruled on Student's 15-hour IEP, the hearing officer is now precluded from examining and ruling on Student's current 21-hour IEP. Ultimately, the hearing officer denied the Motion, noting both the regulatory provision at 34 C.F.R. § 300.513(c) and that DCPS had taken new action with respect to Student's IEP since the hearing officer's ruling on the previous IEP.

The hearing officer also inquired about DCPS's provision of alternative locations of services to Parent by the deadline established at the prehearing conference. Upon learning that DCPS had issued a Prior Written Notice to another location of service without providing previous notice to Parent, the hearing officer ruled that the existing location of service would remain the one designated by DCPS at Student's most recent IEP meeting, although the hearing officer would consider any evidence DCPS wished to present about the location designated in the Prior Written Notice.

Once all preliminary matters had been addressed, the hearing officer received opening statements, the parties' testimonial evidence, and closing statements prior to concluding the hearing.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), 20 U.S.C. §§ 1400 et seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

### **ISSUE(S)**

The issue to be determined is as follows:

1. Did DCPS fail to comply with the hearing officer's 1/20/11 HOD by unilaterally revising Student's IEP and failing to offer a location of services other than the DCPS school the hearing officer previously determined to be inappropriate?

### **FINDINGS OF FACT**

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. On January 20, 2011, the undersigned hearing officer issued an HOD which expressly ordered, *inter alia*, as follows:

Within 10 days of the issuance of this Order, DCPS and Petitioner shall participate in an MDT meeting for Student, at which (a) Student's IEP shall be revised to include 1 hour of behavioral support services, the BIP created pursuant to Paragraph 1 above, and baseline data and annual goals in the area of communications; (b) the MDT shall determine exactly how much specialized instruction Student requires to receive educational benefit and revise the IEP to provide same; (c) the MDT shall consider whether Student requires additional goals to address her LD and attentional issues, and if so, develop same; and (d) the MDT shall discuss and determine an appropriate location of services for Student.<sup>2</sup>

2. In the 1/20/11 HOD, the hearing officer specifically concluded as follows about Student's neighborhood school:

. . . DCPS's proposal to place Student in her neighborhood school would have resulted in Student receiving content area instruction in general education classes, either with or without the resource room teacher's presence in the general education class, supplemented by extra work in each subject in the resource room if necessary to enable student and her classmates to understand the concepts presented in the general education class. As a FAPE, by definition, requires that a disabled student's special education and related services be provided in conformity with the IEP, the hearing officer concludes that Petitioner has met its burden of proving that DCPS failed to offer Student a FAPE.<sup>3</sup>

3. The 1/20/11 HOD further provided as follows:

Petitioner's request for reimbursement and future funding for Parent's unilateral placement is hereby denied. However, in the event the MDT meeting ordered in Paragraph 2 above is not held within the timeframe set forth, or the meeting is held but no determination of an appropriate location of services is made, and such failure to hold the meeting or determine a location of services is due to action(s) on the part of DCPS and/or its representatives and is not attributable to actions by Petitioner and/or her representatives, then DCPS shall reimburse Petitioner for the tuition expense Parent incurs beginning on the date of the issuance of this Order and extending until the ordered meeting is held and an appropriate location of services for Student is determined.<sup>4</sup>

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<sup>2</sup> DCPS-1; Petitioner's Exhibit 6.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

4. On January 28, 2011, DCPS convened an MDT meeting for Student. Participants in the meeting included an array of DCPS team members, as well as Parent and Student's educational advocate, and representatives from Student's current unilateral placement. DCPS provided Parent and the advocate with a draft IEP at the meeting. In the draft IEP, DCPS had increased the amount of Student's specialized instruction from 15 hours per week to 21 hours per week, and also increased Student's behavioral support services from 120 minutes per month to 240 minutes per month. The MDT reviewed and discussed the draft IEP by going over each section of the IEP, and the IEP Coordinator at Student's current unilateral placement agreed to revise the baseline information and goals on the draft IEP. The IEP Coordinator was charged with revising the draft IEP because the DCPS team members had not worked with Student and were not aware of student's capabilities. After the team discussed the new BIP that had been prepared for Student, the discussion turned to the number of hours of specialized instruction Student should receive. The DCPS team members had determined that Student required 21 hours of specialized instruction per week, but the educational advocate disagreed and stated her opinion that 21 hours was not enough. The DCPS team members then discussed their determination that Student's revised IEP could be implemented at the same DCPS school this hearing officer previously determined to be inappropriate. Parent and the educational advocate disagreed with DCPS's determination, and the advocate pointed out that Student has benefitted from her time at the unilateral placement. The participants from the unilateral placement opined that they could implement the revised IEP. Ultimately, the DCPS team members declined to change the number of hours of specialized instruction and the assigned location of services. The assigned location of services that DCPS declined to change was the same neighborhood school this hearing officer previously found to be inappropriate in the 1/20/11 IEP because the school was unable to provide Student with the 15 hours of specialized instruction outside of general education that her then IEP required. Although the advocate reminded DCPS of the hearing officer's determination during the MDT meeting, DCPS nevertheless declined to provide and consider alternative locations of services.<sup>5</sup>
5. On January 31, 2011, Petitioner initiated the instant action.<sup>6</sup>
6. On February 4, 2011, DCPS issued a resolution session waiver for this case, thereby choosing to proceed straight to hearing instead of meeting with Petitioner to attempt to resolve this matter.<sup>7</sup>
7. On February 16, 2011, the hearing officer convened a prehearing conference for this case. Despite DCPS's failure to assign at the January 28, 2011 meeting a location of services other than the location the hearing officer had already determined to be inappropriate, and DCPS's failure to engage in the resolution process and take advantage of yet another opportunity to assign a location of services other than the one the hearing officer had already determined to be inappropriate, the hearing officer determined to allow DCPS until February 21 or 22 to propose alternative locations of services to Parent prior to the

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<sup>5</sup> Petitioner's Exhibits 7, 8 and 14; DCPS-2 and DCPS-5; testimony of advocate; testimony of IEP Coordinator.

<sup>6</sup> See Complaint.

<sup>7</sup> See 2/4/11 DCPS Resolution Session Waiver.

due process hearing in this case. The hearing officer explained that the February 21-22 deadline would allow Petitioner time to investigate any options provided, so that both parties could present evidence regarding those options at the due process hearing.<sup>8</sup>

8. By email dated February 18, 2011, DCPS issued to Petitioner a Prior to Action Notice changing Student's location of services from the school the hearing officer had previously determined to be inappropriate to another DCPS high school. In the section where a description and explanation of the proposed action should have been inserted, DCPS provided only the following: "Per HOD." DCPS did not provide Petitioner with any advance notice of its intent to change Student's location of services prior by issuance of the Prior Notice.<sup>9</sup>
9. The advocate visited the newly assigned location of services on March 2, 2011, the day before the due process hearing in this case.<sup>10</sup> However, the advocate's testimony concerning her visit to the school was later rendered unreliable and incredible by the testimony of DCPS's rebuttal witness, the SEC at the newly assigned location.
10. Although Student's current unilateral placement is considered a "full-time placement," Student is not receiving full-time specialized instruction there because, in general, Student receives instruction from a general education teacher in each subject and the special educator comes into each class on a rotating schedule for approximately 20 minutes per class. Student's science teacher is certified in both science and as a special educator, but it is unclear whether any of Student's other teachers are also dually certified. The IEP Coordinator is a certified special educator, and she sometimes goes into the classrooms to provide assistance to students or to provide pull-out services.<sup>11</sup>
11. Student is doing well at her current unilateral placement. She is in the high school with approximately 30 other students, and there are no more than 5 students per class.<sup>12</sup>
12. Student's most recent clinical/psychoeducational evaluation, which was conducted in June of 2010, reveals that Student is performing at a 2<sup>nd</sup>-3<sup>rd</sup> grade level in reading, oral language, math and written language, which is significantly below grade level. However, the evaluation also reveals that there is no discrepancy between Student's ability, as represented by her scores on cognitive testing, and her achievement, which means that Student is achieving at the level of her ability. On the other hand, a comparison of Student's scores on a 2008 achievement assessment with her scores on the 2010 achievement assessment reveals that Student did not make any real progress over the two-year period. Although Student's ability scores are not expected to change over time, with adequate teaching, one would expect her achievement scores to increase over time. The amount of increase would be difficult to predict, and Student certainly would not be exactly to make the jump from a 2<sup>nd</sup>/3<sup>rd</sup> grade level to grade level in a two-year period,

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<sup>8</sup> See 2/22/11 Prehearing Order.

<sup>9</sup> Petitioner's Exhibits 16 and 17; DCPS-4; testimony of advocate.

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

<sup>11</sup> Testimony of IEP Coordinator.

<sup>12</sup> Testimony of IEP Coordinator.

but at least some improvement in Student's achievement scores would be expected over time.<sup>13</sup>

13. Based on Student's history and her performance on the various assessments administered during her 2010 clinical/psychoeducational evaluation, the evaluator determined that the following diagnoses were indicated for Student: dysthymic disorder, early onset; learning disorder, NOS; attention deficit hyperactivity disorder, predominantly inattentive type; and educational problems. As a result of Student's learning and emotional difficulties, she requires a therapeutic educational setting.<sup>14</sup>
14. The DCPS school DCPS assigned Student to attend in its February 18, 2011 Prior Notice offers a self-contained ED group, and the students in the group are, at a minimum, provided with a general education teacher, a special education teacher, and an instructional aide in each subject area class. Student's current IEP requires her to receive 7 hours of specialized instruction per week in the areas of math, reading, and written language, for a total of 21 hours of specialized instruction per week, but the newly assigned DCPS school cannot provide that level of specialized instruction to Student. Instead, at the newly assigned school Student would receive instruction in the following subjects, with each class lasting 40 minutes: Learning Lab; Read 180; English; Environmental Science; ROTC; Math; and Career Management. Hence, Student would receive 200 minutes, or 3 hours and 20 minutes, of formal instruction in math and reading per week, as well as additional support in those areas in her daily Learning Lab class. It is possible that Student would receive additional support in reading and support in written language in other classes such as science and social studies. All of the content area teachers are general education teachers, but the special education teacher accompanies the students to all classes except ROTC.<sup>15</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:

#### Alleged Unilateral Revision of Student's IEP

IDEA assigns to a student's IEP team the task of developing, reviewing and revising the child's IEP. See 34 C.F.R. § 300.324. In turn, the child's IEP team must include, *inter alia*, the child's parents, at least one of the child's regular education teachers, at least one of the child's special education teachers, and an LEA representative. See 34 C.F.R. § 300.321. Moreover, in this case, the 1/20/11 HOD specifically required Student's MDT, or multidisciplinary team, which is essentially the equivalent of an IEP team for purposes of this case, to determine exactly how much special education Student requires, determine whether Student requires additional IEP goals, and discuss and determine an appropriate location of services for Student.

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<sup>13</sup> Petitioner's Exhibit 10; testimony of independent evaluator.

<sup>14</sup> Petitioner's Exhibit 10; testimony of independent evaluator.

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

Petitioner has alleged that despite the Order included in the 1/20/11 IEP, DCPS unilaterally revised Student's IEP by presenting at Student's January 28<sup>th</sup> MDT meeting an IEP that contained DCPS's previous determinations of Student's goals and objectives, as well as the number of hours of specialized instruction Student would receive. On the other hand, DCPS asserts that it merely provided a draft IEP at the IEP meeting and it adopted suggestions made by Student's current unilateral placement, even going so far as to allow a staff member at the unilateral placement to revise the goals on the draft IEP, and it also participated in a discussion with the other team members about the number of hours of services Student needs.

A review of the evidence in this case reveals that DCPS did indeed present a pre-prepared IEP to the rest of the team at the January 28<sup>th</sup> MDT meeting. However, the IEP was clearly marked "Draft," even on the copy Petitioner included in its disclosures, the team reviewed each section of the draft IEP and agreed that the IEP Coordinator from the current unilateral placement would revise the goals and baseline data on the IEP, and the team discussed the BIP that had been prepared for Student, the increased number of hours of specialized instruction DCPS believed would be appropriate for Student, and DCPS's proposed location of services for Student. DCPS ultimately declined to change the number of hours of specialized instruction on the draft IEP or the proposed location of services, despite the opinions of Parents, the advocate and the participants from the unilateral placement that the number of hours and placement were inappropriate. Nevertheless, the Meeting Notes are clear that the team reviewed all elements of the draft IEP and modified some of those elements prior to approving the IEP. Under these circumstances, Petitioner has failed to meet its burden of proving that DCPS failed to comply with the 1/20/11 HOD by unilaterally determining Student's IEP goals, objectives, and number of hours of services. *See Brennan v. Reg'l Sch. Dist. No. 1 Bd. Of Educ.*, 531 F. Supp. 245, 274-275 (D.Conn. 2007) (no procedural violation of IDEA was committed where team met and reviewed draft IEP, which was adopted based on the agreement of all team members except the mother and the independent psychologist).<sup>16</sup>

### **Alleged Failure to Offer an Appropriate Location of Services**

Under IDEIA, a public agency must provide an appropriate location of services for each child with a disability, so that the child's needs for special education and related services can be met through the implementation of the child's IEP in the least restrictive environment. *See* 34 C.F.R. § 300.17; 34 C.F.R. §§ 300.114-300.120. Moreover, in this case, the undersigned hearing officer explicitly determined in the 1/20/11 HOD that Student's neighborhood school is an inappropriate location of services for Student. The 1/20/11 HOD further provides that if the MDT failed to determine an appropriate location of services for Student at the MDT meeting held pursuant to the HOD, through no fault of Petitioner's, DCPS would be required to reimburse Petitioner for the tuition expense Parent incurred beginning on the date of the issuance of the HOD and Order and extending until an appropriate location of services for Student has been determined.

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<sup>16</sup> In reaching this conclusion, the hearing officer has taken into account that DCPS's draft IEP increased Student's hours of specialized instruction from 15 to 21, and although Petitioner asserts that Student requires full-time specialized instruction hours, Student is thriving at her current unilateral placement without receiving specialized instruction on a full-time basis.

In the instant case, Petitioner asserts that DCPS failed to comply with the 1/20/11 HOD by failing to offer at the January 28<sup>th</sup> MDT meeting a location of services other than the DCPS neighborhood school that the hearing officer had already determined was inappropriate for Student. The evidence in this case clearly supports Petitioner's contention, because the DCPS team members of the MDT insisted on re-assigning Student to the neighborhood school this hearing officer had already determined to be inappropriate, even after the advocate pointed out at the meeting that the hearing officer had already ruled against that location of services. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of proof on this claim.

As a remedy for this violation by DCPS of the 1/20/11 HOD, Petitioner has requested funding for the unilateral placement as an interim location of services from 1/20/11 until DCPS provides an appropriate location of services. On the other hand, DCPS argues that because the unilateral placement is unable to implement Student's current IEP, it would be punitive and inappropriate to require DCPS to provide funding for that school as an interim location of services. Upon consideration of the evidence and the parties' arguments, the hearing officer has determined to follow the dictates of the 1/20/11 HOD and require DCPS to provide funding for the unilateral placement as an interim location of services from 1/20/11 until DCPS provides an appropriate location of services for Student. In reaching this decision, the hearing officer has taken the following facts into account: DCPS re-assigned Student to the neighborhood at the January 28<sup>th</sup> MDT meeting despite the hearing officer's explicit prior ruling that the neighborhood school is an inappropriate location of services for Student; DCPS declined to take advantage of another opportunity to discuss and determine an appropriate location of services after this cause of action was filed by waiving the resolution session meeting; after the hearing officer offered DCPS yet a third opportunity to present alternative locations of services after the prehearing conference but prior to the due process hearing, DCPS unilaterally assigned Student to attend another DCPS high school that cannot provide Student with the level of specialized instruction that her current IEP requires; Student has made great progress at her current unilateral placement; and throughout the entire period continuing into the present Student has been without an appropriate location of services.

Finally, as the only expert testimony presented tends to prove that Student requires a therapeutic educational environment, and Student's ED disability classification and progress at the unilateral placement provide further support for that proposition, the hearing officer will order DCPS to provide Student with a location of services that offers a therapeutic setting. In accordance with the hearing officer's ruling above, however, said location of services does not have to offer full-time specialized instruction but must be able to provide Student with the 21 hours of instruction required under her current IEP.

### ORDER

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

1. DCPS shall provide funding for Student at her current unilateral placement as an interim location of services, retroactive to January 20, 2011 and extending until DCPS provides

an appropriate location of services for Student that offers a therapeutic environment and can provide Student with the specialized instruction and related services required by her current IEP.

2. In determining an appropriate location of services for Student in accordance with Paragraph 1 above, DCPS shall convene an MDT meeting and present at least one or more options to the MDT, and then discuss, determine and confirm with the MDT the appropriateness of the proposed location(s) of services before issuing a Prior to Action Notice.

**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 USC §1415(i).

Date: 3/21/2011

/s/ Kimm Massey

Kimm Massey, Esq.  
Hearing Officer