

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a year-old female student, who attends a DCPS public charter school.

On June 22, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS (1) failed to place Student in an appropriate school or develop an appropriate IEP, and (2) failed to develop an appropriate postsecondary transitional plan/goals. As relief for this alleged denial of FAPE, Petitioner requested findings in Petitioner's favor; that the hearing officer develop an IEP consistent with Petitioner's claims or order DCPS to do so; and that DCPS be ordered to or agree to provide funding and transportation for Student to attend one of several specified private full-time special education schools or some other public or non-public school that can provide Student with educational benefit, convene an MDT meeting within 10 days to revise the IEP consistent with a previous HOD and to determine placement with placement to be made within 10 days, award reasonable compensatory education, and provide any other relief deemed appropriate.

On July 21, 2011, DCPS filed its Response to the Complaint, asserting therein as follows: (1) A May 18, 2011 HOD addressed the IEP and Petitioner has not appealed same. This IHO cannot reconsider the decision made by the previous IHO and lacks jurisdiction to consider compliance with the previous HOD. Further, DCPS provided an IEP reasonably calculated to provide Student with educational benefit and FAPE. (2) The 5/27/11 IEP was based on current and valid evaluations and attempted to include parental input; however, Parent and her advocate elected

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not to attend the meeting. DCPS disagrees Student should be removed to a segregated environment and asserts she has been placed in the LRE. (3) The previous transitional plan issues were previously litigated and are barred by res judicata and this IHO lacks jurisdiction to enforce the previous HOD.

The parties concluded the Resolution Meeting process by failing to reach agreement on July 5, 2011, but elected not to shorten the resolution period. Hence, the 45-day timeline for this case started on June 23, 2011 and will end on September 5, 2011, the HOD due date.

On July 28, 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 the prior HOD for Student and indicated its desire to have the current hearing officer examine the period from May 11, 2011, the day after the record closed in the previous case, forward. In essence, Petitioner argued that the IEP attempted to implement the May 18, 2011 IEP but did not get it right. The hearing officer issued the Prehearing Order on August 2, 2011.

By their respective disclosure letters dated August 15, 2011, Petitioner disclosed twenty-seven documents (Petitioner's Exhibits 1 – 27), and DCPS disclosed six documents (Respondent's Exhibits 1 - 6).

The hearing officer convened the due process hearing on August 22, 2011.¹ DCPS's disclosures and Petitioner's Exhibits 1-2, 9 and 20-28 were admitted into the record without objection. Petitioner's remaining documents were admitted over objection, but the hearing officer determined that the documents would be weighed in light of DCPS's objection that the documents are irrelevant because too old, and they would not be considered if their consideration would interfere with findings and rulings in the previous HOD. Thereafter, the hearing officer received opening statements, and Petitioner withdrew its request for compensatory education, indicating that it was seeking only a full-time IEP and program. After receiving testimonial evidence and closing statements from both parties, the hearing officer 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)

The issue to be determined is as follows:

1. Did DCPS fail to provide an appropriate school or develop an appropriate IEP for Student subsequent to the May 18, 2011 HOD because, according to Petitioner, Student needs more specialized instruction outside general education, and the assigned DCPS

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

high school is too large and does not have the structured setting required regardless of the IEP requirements?

2. Did DCPS fail to develop an appropriate postsecondary transition plan/goals for Student?

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. Student is a _____ year-old female, who attended _____ grade at a DCPS charter school during SY 2010/11.²
2. Student's previous IEP, developed on January 7, 2011, identified Student's primary disability as Specific Learning Disability ("SLD") and required Student to receive 13 hours per week of specialized instruction in general education and 45 minutes per week of behavioral support services outside general education.³
3. On May 10, 2011, a special education hearing officer convened a due process hearing for Student. On May 18, 2011, the hearing officer determined "that the IEP is not reasonably calculated to provide educational benefit because it lacks an appropriate statement of the special education and supplementary aids and services necessary for the Student, and appropriate measurable postsecondary goals and transition services needed to assist the Student in reaching the postsecondary goals. The Student is in the LRE and this may or may not change (and to a less or more restrictive environment) based on necessary revisions to the special education and supplementary aids and services in IEP." (sic)⁴
4. The May 18, 2011 HOD ordered, *inter alia*, the following:

"3. Any or all portions of the IEP may be reviewed and revised as determined appropriate by the IEP team. However the specifics of this order must be complied with. The IEP must be revised for the 2011-2012 school year to include the following statement of the special education services to be provided:

- 1) Reading instruction presented within the sixth to seventh grade range.
- 2) Math instruction presented within the sixth grade range.
- 3) Writing instruction presented in the fifth to sixth grade range.
- 4) Reciprocal teaching strategy.
- 5) Explicit teaching of specific words, the use of semantic feature analysis to improve vocabulary, and teaching of a variety of independent word-learning strategies.

² Testimony of Student.

³ Petitioner's Exhibit 2.

⁴ Petitioner's Exhibit 21 at 2-3; Respondent's Exhibit 6.

- 6) Concrete-representational-abstract teaching techniques for math, including: scripted lessons that include advance organizers, guided and independent practice with the use of mnemonic reminders and feedback; teacher directed demonstration; and data tables that visually link concepts with problem-solving strategies.

The following supplementary aids and services will be documented and provided:

- 1) The use of graphic organizers for reading development and learning new material generally.
- 2) The Add-A-Word spelling program.
- 3) A computer with a word processor for writing assignments and exercises, and to use various other opportunities to develop word knowledge, including hyperlinks and on-line resources for reference materials and content-related websites.
- 4) Use of a semantic map in writing.

The IEP team will determine and record the anticipated frequency, location, and duration of each of all the above services as required by 34 C.F.R. § 300.320(a)(7). This determination will result in a conclusion about the necessary educational placement for the Student which will be documented on the IEP including an explanation of the extent, if any, to which the Student will participate with nondisabled children in the regular class and in the services listed above.

4. The Student's postsecondary goals must be revised to reflect the specific career she is realistically aiming for. These goals must include a specific measurable postsecondary education goal and, if necessary, a specific measurable postsecondary goal for training, as well as specific measurable postsecondary goal for employment. The postsecondary goals must be specific enough to be measurable and meaningful for the Student in terms of what the outcome of her secondary education (and even postsecondary education) could be."⁵

5. On May 27, 2011, Student's IEP team revised Student's IEP to require the provision of 15 hours per week of specialized instruction in general education and to include 4 of the 6 items the May 18, 2011 HOD ordered DCPS to include in the statement of special education services to be provided. The following two items are not listed in the statement of special education services on the IEP: reading instruction within the 6-7 grade range, and reciprocal teaching strategy. Moreover, none of the supplementary aids and services required by the May 18, 2011 HOD were included in the IEP.

Student's IEP was also revised to include the following post-secondary long range goals and interests: education and training – Student will successfully pass all of her core subjects in order to prepare to attend a 2-4 year college or university while pursuing a degree that will prepare her to work in the area of health care or Forensics; employment – Student will prepare herself for full-time, gainful employment. The IEP was also revised to include the following goals: Post-secondary education and training – (1) Student will research courses of study in order to prepare her to enter the career field of choice (Health Care for Children). With this information, Student will pursue colleges and universities that offer a program to prepare her as she determines a final career path. (2) Student will research jobs in a career field of choice (Health Care for Children) and list the positions

⁵ Petitioner's Exhibit 21 at 15-16; Respondent's Exhibit 6.

that interest her. She will also research the educational requirements for these positions. Employment – Student will demonstrate study habits and overall behavior reflective of preparation for completion of school and finding gainful employment.⁶

6. Student's May 27, 2011 revised IEP contains an appropriate post-secondary long range education and training goal. However, the post-secondary long range employment goal and the annual measurable goals for post-secondary education and training, and employment are not specific enough to be measurable and meaningful for Student and are inappropriate in that they require Student to achieve the goals by herself and do not require any support, services or training to be provided by DCPS in connection with the achievement of the goals.⁷
7. Student wants to attend college after high school to become a doctor or to run her own business.⁸
8. Parent and her advocate did not attend Student's May 27, 2011 IEP meeting due to a scheduling mistake on the part of Parent and the advocate. However, Parent and the advocate participated in IEP meetings subsequently held on June 8 and June 14.⁹
9. Student's final grades for SY 2010/11 were as follows: grades of C in Reading Development, Mathematics Lab, and Algebra I; and grades of F in World History I, English 9, and Biology.¹⁰
10. Student was already failing English 9 and Biology at the time of the previous due process hearing on May 10, 2011. Her failing grades were due to incomplete work. Student's educational advocates believed she needed 15 hours of specialized instruction per week outside of the general education setting due to her assessed academic ability, which ranged from a 4th to 5th grade level.¹¹
11. Student attended summer school during the summer of 2011 to avoid being retained in 9th grade. However, at the time of the due process hearing for the instant case, neither Student nor Parent knew whether Student had done well enough in summer school to advance to 10th grade.¹²
12. On June 14, 2011, DCPS issued a Prior Written Notice assigning Student to attend her neighborhood high school.¹³

⁶Respondent's Exhibit 1; Petitioner's Exhibit 22.

⁷See Respondent's Exhibit 1 at 9-10; Petitioner's Exhibit 22 at 9-10.

⁸Testimony of Student.

⁹Testimony of advocate.

¹⁰Respondent's Exhibit 5; Petitioner's Exhibit 24.

¹¹Respondent's Exhibit 6 at 5; Petitioner's Exhibit 21 at 5. (The previous hearing officer made these findings of fact in the May 18, 2011 HOD.)

¹²Testimony of Parent; testimony of Student.

¹³Petitioner's Exhibit 26.

13. Petitioner failed to present evidence concerning the nature of the neighborhood school and the suitability of the program(s) it can offer Student.
14. Student began attending a different DCPS charter school at the start of SY 2011/12. Student actually applied to and was accepted to attend several charter schools for SY 2011/12. Student settled on the one particular charter school because she heard the school has fewer students and she gets distracted in larger classes.¹⁴

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 Inappropriate School and IEP

In the District of Columbia, an LEA's failure to comply with an HOD constitutes a denial of FAPE. Hence, the Consent Decree entered in *Blackman v. District of Columbia*, Civil Action No. 97-1629 (D.D.C. Aug. 24, 2006), establishes a rebuttable presumption of harm for DCPS students who fail to receive timely implementation of HODs. See Consent Decree at ¶ 74. Moreover, one subclass of Plaintiff students in the Consent Decree was defined as "[a]ll children, now [as of January 1, 1995] and in the future, who . . . have been denied [a FAPE] because DCPS . . . failed to fully and timely implement the determinations of hearing officers . . ." Consent Decree at 11.

Under IDEA, 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. However, "educational placement," as used in IDEA means the overall educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) ("*White*") (citations omitted); see also, *A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) (citing *AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004)).

The IEP is the vehicle by which the free appropriate education required by IDEA is tailored to the unique needs of the individual handicapped child. *Board of Education v. Rowley*, 458 U.S. 176 (1982). The State satisfies its obligation to provide a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction . . . [T]he IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act, and if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.*, 458 U.S. at 203-204.

In the instant case, Petitioner argues that Student requires a full-time out of general education placement. However, Petitioner acknowledges that a previous hearing officer issued a May 18,

¹⁴ Testimony of Student.

2011 HOD, which required DCPS to revise Student's IEP to include an extensive list of specified items, and Petitioner acknowledges that this hearing officer is bound by the provisions of that HOD. Hence, Petitioner essentially argued at the due process hearing in the instant case that DCPS attempted to implement the May 18, 2011 in revising Student's IEP but failed to get it right. However, Petitioner also argues that Student's grades dropped during 4th quarter of SY 2010/11 and she was retained at the end of that school year, that the previous hearing officer had no knowledge of this information when the May 18, 2011 HOD was issued, and that, therefore, this hearing officer should take this information into account and determine that Student requires a full-time out of general education placement.

DCPS's position is that this hearing officer cannot re-determine the issues determined by the previous hearing officer. DCPS further maintains that nothing about the Student or her record warrants full removal from the general education setting to a separate school with only non-disabled students. Indeed, DCPS asserts that the total removal of Student from the general education environment would be a disservice to Student.

As an initial matter, the hearing officer agrees that it would be inappropriate to re-determine the issues that have already been determined by the previous hearing officer. *See Brian v. Hampton Public School District/Special Education*, 110 LRP 57473 (E.D. Va. 2010) (under res judicata or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were raised in that action); 34 C.F.R. § 300.514(a) (a hearing officer decision is final if not appealed). Hence, this hearing officer is bound by the determinations of the previous hearing officer in the May 18, 2011 HOD.

Upon a review of the evidence in this case, the arguments of counsel, and applicable law, the hearing officer concludes that Petitioner has met its burden of proving that DCPS denied Student a FAPE by failing to fully comply with the provisions of the May 18, 2011 HOD setting forth required revisions to the following components of Student's IEP: the statement of the special education services to be provided, the supplementary aids and services, and the postsecondary goals. Specifically, DCPS failed to include reading instruction within the 6-7 grade range, and reciprocal teaching strategy in the statement of the special education services to be provided in Student's revised IEP, as required by the May 18, 2011 HOD. Moreover, DCPS failed to include in Student's revised IEP any of the supplementary aids and services required by the May 18, 2011 HOD, and a post-secondary long range employment goal and annual measurable goals for post-secondary education and training, and employment that are specific enough to be measurable and meaningful for Student. Hence, this hearing officer will order DCPS to comply with the May 18, 2011 HOD in the respects set forth herein.

With respect to Petitioner's placement claim, the hearing officer is not persuaded by the evidence and arguments of counsel that Student requires a full-time out of general education placement. Petitioner contends that Student's failing grades subsequent to the conclusion of the previous due process hearing supports its position in this regard. However, the previous hearing officer was aware that Student was failing her English 9 and Biology classes at the time of the previous due process hearing, and he determined that Student's failing grades were due to incomplete work. Hence, the fact that Student ultimately failed both of those classes, as well as her World History I class, does not require a different result than the one reached by the previous hearing officer in

the May 18, 2011 HOD. Moreover, as Petitioner failed to present evidence about the nature of the assigned neighborhood school and the program(s) it offers, Petitioner failed to meet its burden of proving that the neighborhood school is too large and unstructured to meet Student's needs.

On the other hand, the hearing officer is persuaded that, under the facts of this case, where Student was in clear danger of failing 2 to 3 of the 6 classes she was taking at the time her revised IEP was developed, the decision of Student's IEP team to increase Student's hours of specialized instruction by a mere two hours per week in general education constituted a denial of FAPE because the slight increase in IEP hours did not produce an IEP reasonably calculated to enable Student to achieve passing marks and advance from grade to grade in the coming year. *See School District of Philadelphia v. Deborah A. ex rel. Candiss C.*, 52 IDELR 67 (E.D. Pa. 2009) (citation omitted) (determination of IEP's appropriateness must be made at time IEP is offered, not at some later date). Unfortunately, the evidence in this case is insufficient to allow the hearing officer to determine exactly how much specialized instruction Student requires and whether said instruction should be in or outside general education. It could be that 15 hours of specialized instruction outside general education, as requested by Petitioner in the previous administrative proceeding, would be appropriate. It could be that more hours of specialized instruction in general education would be appropriate. Perhaps some combination of the two might be required. In any event, as the evidence in this case is insufficient to allow the hearing officer to determine exactly what is required for an appropriate IEP, the hearing officer will require the IEP team to make a determination of same when the team reconvenes to revise the IEP in compliance with the May 18, 2011 HOD.

Alleged Inappropriate Transition Plan/Goals

The IEP is the vehicle by which the free appropriate education required by IDEA is tailored to the unique needs of the individual handicapped child. *Board of Education v. Rowley*, 458 U.S. 176 (1982). Beginning not later than the first IEP to be in effect when a disabled child turns 16, the IEP must include (1) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (2) the transition services (including courses of study) needed to assist the child in reaching those goals. 34 C.F.R. § 300.320(b).

Upon review of the evidence and applicable law, the hearing officer concludes that DCPS denied Student a FAPE by failing to include in the revised IEP's transition plan appropriate measurable post-secondary goals and the transition services needed to assist Student in reaching those goals. In reaching this conclusion, the hearing officer has relied heavily upon the fact that the post-secondary long range employment goal and the annual measurable goals for post-secondary education and training, and employment in the revised IEP require Student to achieve the goals by herself and do not require any support, services or training to be provided by DCPS in connection with the achievement of the goals. *See School District of Philadelphia v. Deborah A. ex rel. Candiss C.*, 52 IDELR 67 (E.D. Pa. 2009) (IEP was inappropriate where, *inter alia*, the transition goals were extremely general); *compare B.D. and D.D. ex rel. C.D. v. Puyallup School District*, 53 IDELR 120 (W.D. Wash. 2009) (IEPs were adequate where, *inter alia*, transition plans indicated that student's teachers would explore areas of vocational interest with him and

Student was linked with an agency that evaluated and accepted him for further transition planning).

ORDER

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

1. Within 21 calendar days of the issuance of this Order, DCPS shall reconvene Student's IEP team and the IEP team shall revise Student's IEP:
 - a. to include in the statement of the special education services to be provided "reading instruction within the 6-7 grade range," and "reciprocal teaching strategy."
 - b. to include the following supplementary aids and services: The use of graphic organizers for reading development and learning new material generally; the Add-A-Word spelling program; a computer with a word processor for writing assignments and exercises, and to use various other opportunities to develop word knowledge, including hyperlinks and on-line resources for reference materials and content-related websites; and use of a semantic map in writing.
 - c. so that Student's post-secondary transition plan includes a post-secondary long range employment goal and annual measurable goals for post-secondary education and training, and employment that are specific enough to be measurable and meaningful for Student and to provide for support, services and/or training by DCPS and/or appropriate state agencies that will assist Student in achieving said goals.
 - d. to include an appropriate amount of specialized instruction either in general education, outside of general education, or some combination thereof that results in an IEP that the team determines is reasonably calculated to enable Student to achieve passing marks and advance from grade to grade in the coming school year.

2. All remaining claims and requests for relief in Petitioner's June 22, 2011 Complaint are **DENIED AND DISMISSED WITH PREJUDICE.**

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: 9/5/2011

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