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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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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No:

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER DETERMINATION

BACKGROUND AND PROCEDURAL HISTORY

Student is a year-old male, who attended grade at his neighborhood DCPS high school during SY 2010/11.

On May 4, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS (1) failed to comprehensively and timely evaluate Student in all areas of disability by failing to conduct a comprehensive vocational assessment of Student, (2) failed to develop an IEP that was reasonably calculated to provide Student with educational benefit for SY 2009/10 and SY 2010/11, and (3) failed to provide Student with an appropriate educational placement for SY 2009/10 and SY 2010/11.

On May 19, 2011, DCPS filed its Response to the Complaint. In its Response, DCPS asserted that (1) Student had an IEP for SY 2009/10 that was revised and updated on March 14, 2011, but Student has serious truancy issues that prevent DCPS from monitoring Student's progress and determining his educational needs, (2) Student had a transition plan for SY 2009/10 that was updated on March 14, 2011, and DCPS offered to conduct a vocational assessment upon receipt of consent from Parent, (3) the current DCPS high school is able provide Student with the necessary services and meet Student's educational needs, but Student's truancy issues prevent him from receiving the services being offered, and (4) Student's truancy has prevented DCPS

from determining whether additional assessments are required, but DCPS recently received a court-ordered psychoeducational evaluation that it planned to convene a meeting to review.

On June 3, 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 indicated that it would take DCPS's offer to conduct a vocational assessment under consideration and advise of the client's decision.[1] The hearing officer issued the Prehearing Order on June 9, 2011.

By their respective disclosure letters dated June 22, 2011, Petitioner disclosed twenty-six documents, numbered 1 through 27 with no Exhibit 3 (Petitioner's Exhibits 1 – 2 and 4 – 27), and DCPS disclosed eight documents (Respondent's Exhibits 1 – 8).

The hearing officer convened the due process hearing on June 29, 2011.[2] DCPS's disclosed documents and Petitioner's Exhibits 1-2, 6-8, and 12-27 were admitted into the record without objection. DCPS objected to Petitioner's Exhibits 4 and 5 on the ground that records are not in issue, to Petitioner's Exhibits 9 and 10 on the ground that these evaluations were not made available to the IEP team before the Complaint was filed, and to Petitioner's Exhibit 11 on the ground that the team had no opportunity to review this evaluation because it was completed one day prior to the five-day disclosure deadline. The hearing officer admitted Petitioner's Exhibits 4 and 5 over objection but indicated that the lack of a fax confirmation for Exhibit 4 would be taken into account. The hearing officer admitted Petitioner's Exhibits 9 and 10 over objection but indicated that the fact that DCPS did not have access to the evaluations at the time the IEPs were developed would be taken into account. The hearing officer also admitted Petitioner's Exhibit 11 over objection so as to have information about Student's current status but indicated that the fact that DCPS did not have access to the evaluation at the time the IEPs were developed because the evaluation did not exist would be taken into account.

Thereafter, the hearing officer received opening statements and testimonial evidence, limiting the scope of the testimony of Petitioner's two evaluating experts to what would have been apparent about Student two years ago on the ground that the evaluations at issue are simply too recent to have been considered by DCPS at the time of the relevant IEP meetings. After receiving closing statements, 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.").

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[1] Petitioner advised by an email sent on June 8, 2011 that it was accepting DCPS's offer to conduct the vocational evaluation; hence, Petitioner's claim for failure to timely and comprehensively evaluate was resolved prior to the hearing.

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

ISSUE(S)

The issues to be determined are as follows:

1. Did DCPS fail to develop IEPs reasonably calculated to provide educational benefit for SY 2009/10 and SY 2010/11?

2. Did DCPS fail to provide an appropriate location of services for SY 2009/2010 and SY 2010/11?

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 male, who attended grade at his neighborhood DCPS high school during SY 2010/11.[3]

2. Student's current IEP is dated March 14, 2011. The IEP identifies Student's primary disability as Specific Learning Disability ("SLD") and requires Student to receive 7 hours of specialized instruction per week in general education with no related services. The specialized instruction is to be provided in the academic areas of mathematics, reading, and written expression; hence, the IEP contains two annual goals for mathematics, and three annual goals each for the areas of reading and written expression. Baseline data for each academic area is provided from the results of Student's 11/13/09 KTEA-II, which reveals that Student was performing at the following level: Math Concepts & Applications – 3.0 grade equivalent ("GE"); Math Computation – 4.5 GE; Letter and Word Recognition – 2.1 GE; Reading Comprehension – 3.8 GE; Written Expression – 2.1 GE; and Spelling – 3.7 GE. The IEP also includes a Post-Secondary Transition Plan, which recites that it was based on a March 8, 2011 administration of the C.I.T.E. Academic Learning Styles and Work Interest Inventory assessments, and includes selected results from the assessment. The Transition Plan also contains two annual goals each in the areas of post-secondary education/training and employment, but the baseline data sections are populated with goal-related objectives instead of baseline data.[4]

3. Student's previous IEP was dated March 17, 2010. That IEP also identified SLD as Student's primary disability, required Student to receive 7 hours of specialized instruction in general education with no related services, contained baseline data from an 11/13/09 administration of the KTEA-II, and contained a Post-Secondary Transition Plan. The IEP required the specialized instruction to be provided in the areas of mathematics, reading and written expression, with the same two annual goals for mathematics as the current IEP, the same three annual goals for reading as the current IEP along with an additional (4th) goal, and the same three annual goals for written expression as the current IEP.

[3] Testimony of Student.
[4] Respondent's Exhibit; Petitioner's Exhibit 17.

Instead of repeating the baseline data associated with each goal, the baseline section under each goal contains goal-related objective. The Transition Plan included with the IEP contains the same annual goals in the areas of post-secondary education/training and employment as the current IEP, and also goal-related objectives in the baseline data sections below the goals.[5]

4. The copies of Student's Progress Reports for October 28, 2010 and December 3, 2010 that were included in the administrative record are difficult to read but seemingly indicate that Student was failing all the classes he was taking during the first and second advisories of SY 2010/11.[6]

5. Student's IEP Progress Report for Period 3 of SY 2009/10 (1/27/10 – 4/12/10) indicated that Student was making No Progress on either of his math goals, but was Progressing towards all four of his reading goals and all three of his written expression goals. However, Student's IEP Progress Report for Period 3 of SY 2010/11 (1/22/11 – 3/25/11) indicated that Student was making No Progress on any of his IEP goals.[7]

6. Student's Discipline Report for the first semester of SY 2010/11 states that Student was suspended for a total of 6 days that semester. Specifically, Student was suspended from 9/30/10 to 10/4/10 for leaving school without permission, and Student was suspended from 11/18/10 to 11/22/10 for "any other Tier 3 behavior."[8]

7. Student's June 22, 2011 DCPS Transcript indicates that Student has earned 13.5 credits toward graduation and has received the following grades during the past four school years: one D and seven Fs for SY 2007/08; one B+, one C+, one C, one C-, three Ds, and three Fs for SY 2008/09; one C, seven Ds, and three Fs for SY 2009/10; and nine Fs for SY 2010/11. According to the transcript, as of June 22, 2011, Student ranked 245 out of the 245 members of his class.[9]

8. Student feels that his teachers helped him more and were willing to explain things to him during SY 2009/10 when he was in 10th grade, but during SY 2010/11 when he was in the 11th grade the teachers were no longer willing to fully explain things to him. He would so he did not understand.[10]

9. During SY 2009/10, Parent called the Special Education Coordinator ("SEC") at Student's current school and asked the SEC to get Student extra help with his school work and counseling services; however, Parent never heard anything back from the SEC.[11]

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[5]. Respondent's Exhibit 1; Petitioner's Exhibit 12.
[6] Petitioner's Exhibits 13-14.
[7] Respondent's Exhibit 3; Petitioner's Exhibit 18.
[8]Petitioner's Exhibit 16.
[9] Respondent's Exhibit 5.
[10] Testimony of Student.
[11] Testimony of Parent.

10. Student's June 22, 2011 DCPS Attendance Summary for SY 2010/11 indicates that Student was present for only 52.5 of the 182 days of instruction.[12]

11. Student acknowledges that his attendance was not very good during SY 2010/11. Student had a son in March 2010, near the end of SY 2009/10, which negatively affected his attendance at the end of SY 2009/10 and throughout all of SY 2010/11. Student's son has asthma. So during SY 2010/11, Student missed school 2 to 3 times per week due to issues with his son, such as taking his son to the hospital. Once, Student went to the office at school and said that he needed to leave to school to take his son to the doctor. When the school officials told Student he could not leave, Student set a locker on fire so that he could leave. In fact, everyone had to leave after the fire.

    Then, in November 2010, Parent suffered a stroke and Student began visiting her in the hospital and helping to take care of her once she returned home, which resulted in an even worse attendance record.[13]

12. DCPS's December 2010 Notes Report for Student reveals that one or more teachers from Student's current DCPS high school repeatedly called Student's home during the 1st semester of SY 2010/11 to discuss Student's excessive truancy. On September 21, 2010, a teacher spoke with Parent, whose speech was badly slurred, and who stated that she had just suffered a stroke. On September 23, 2010, Student's teacher advised Parent by phone that Student had not been attending period 1 regularly and Parent expressed surprise. On October 1, 2010, a teacher noted that Student still had not reported to class despite repeated phone calls home, so the teacher left a message for Parent with Student's aunt.[14]

13. In early 2011, the attendance officer at Student's current school referred Student to the District of Columbia Superior Court for truancy. Hence, Student has had a probation officer since March 22, 2011. Student must report in to his probation officer weekly, meet with the probation officer once per week, meet curfew and attend school. Although Student has been generally compliant, he has not complied with the requirements of refraining illegal drug use and attending school regularly. The probation officer does not know why Student is not going to school, but Student seems stressed with respect to the physical care of his mother and the care of his son. Moreover, the probation officer is of the opinion, based on her interactions with Student, that Student has limited comprehension/low intelligence.[15]

14. On April 18, 2011, the report of Student's court-ordered psychoeducational evaluation was issued. The background information section of the report states that Student came to the court's attention as a result of being charged with Person in Need of Supervision-Truancy and that Student has been having attendance issues since SY 2007/08. The report indicates that Student had 54 unexcused absences during SY 2007/08, 45 excused absences (sic) during SY 2008/09, 53 unexcused absences during SY 2009/10, and 31

[12] Respondent's Exhibit 4.
[13] Testimony of Student.
[14] Petitioner's Exhibit 15.
[15] Testimony of Probation Officer.

unexcused absences between September and December of SY 2010/11. Student reported to the evaluator that he does not attend school regularly because he has to take care of his mother, who recently suffered a massive stroke in November 2010, and because his son is often sick. Student's performance on the assessments administered revealed that he has a Full Scale IQ score of 71, which is in the Borderline range, and that he is functioning at the following grade equivalencies ("GE"): Total Achievement – 4.1 GE; Broad Reading – 3.8 GE; Broad Mathematics – 4.6 GE; Broad Written Language – 4.0 GE. Personality/emotional testing revealed, *inter alia*, that Student has difficulties coping with losses, troubled relationships, and academic issues. With respect to academics, Student has had academic problems since elementary school and feels as if teachers do not provide him with adequate assistance to succeed. Hence, Student avoids attending school, and when he does attend, he does not participate and will lay his head on the desk. Ultimately, the evaluator rendered the following diagnoses, among others: Mood Disorder NOS, Reading Disorder, Mathematics Disorder, Disorder of Written Expression, and Borderline Intellectual Functioning.[16]

15. On April 22, 2011, a clinical psychologist issued an Addendum to Student's April 18, 2011 court-ordered psychoeducational evaluation. The Addendum stated that more specific recommendations regarding Student's educational planning had been requested, and the psychologist proceeded to make the following recommendations, among others: a school placement with a significantly reduced teacher/pupil ratio, an updated IEP with markedly increased hours of special education intervention, in-school counseling, and a tutor to help with make-up work at home.[17]

16. The clinical psychologist who issued the Addendum to Student's April 18, 2011 psychological evaluation noted that at the time Student's March 2010 and March 2011 IEPs were developed, Student's baseline data reflected that he was performing at a 3rd to 4th grade level, which was approximately 6-7 years below his actual grade levels, and the psychologist opined that under those circumstances the 7 hours of inclusion services provided in the IEPs were inappropriate and insufficient to allow Student to make progress. The psychologist pointed out that Student has made little to no progress since the 11/13/09 KTEA-II, and the psychologist further opined that Student needs intervention to address his mood and depression, and a higher quantity of assistance with his academics to make a change from his current pattern of avoiding and not attending school. The psychologist is of the opinion that Student's mood problems became very pronounced when Student was in 4th grade and began experiencing significant academic difficulties. The psychologist further notes that Student began having significant attendance problems at school during SY 2007/08, even though Parent's medical concerns and Student's new baby were much more recent developments. Hence, Student's interpretation that his mother's medical condition and his new son have interfered with his ability to go to school does not correlate with the objective data showing that Student has been missing/avoiding school for 4 years. With respect to the Addendum recommending markedly increased intervention, a reduced teacher/pupil ratio, tutoring and in-school counseling for Student, the psychologist opined that Student has

[16] Petitioner's Exhibit 9.
[17] Petitioner's Exhibit 10.

probably needed these interventions since 4th grade but has certainly needed them since 2007 when his absences increased dramatically and his mood began to noticeably deteriorate.[18]

17. On May 4, 2011, Petitioner's counsel forwarded to DCPS a copy of Student's April 18, 2011 psychoeducational evaluation report and April 22, 2011 addendum with a cover letter stating that counsel was filing a Complaint with the Student Hearing Office "contemporaneously with the provision of these evaluations."[19]

18. On June 20, 2011, the report from Student's court-ordered psychiatric evaluation was issued. The evaluator relied upon the following sources of information to prepare the report: the evaluator's interview with Student; the Court Order for the psychiatric evaluation; and a "Memo to Student Hearing Office" from petitioner's counsel, which is most likely the attachment to the Complaint filed in this matter. The evaluator rendered the following Axis I diagnoses: Major Depressive Disorder; Dysthymic Disorder; Cannabis Abuse; and Learning Disorder NOS. The evaluator explained that dysthymic disorder is diagnosed when people suffer from symptoms of chronic low level depression for at least two years, and that Student's symptoms for major depressive disorder include symptoms of depression, guilt, decreased ability to enjoy activities, and feelings of hopelessness. The evaluator opined that Student's problems with "school attendance and repeated suspensions" are the direct result of his mood disorder and emotional disturbance, and that Student has not been emotionally available to benefit from his public education because of his untreated psychiatric conditions. The evaluator recommended, *inter alia*, a small and highly structured classroom environment for Student in a program with the ability to address emotional needs which interfere with Student's ability to be available for his education.[20]

19. Although Student's June 20, 2011 psychiatric evaluation was based solely on Petitioner's counsel's "Memo to Student Hearing Office," an interview with Student and the Court Order for a psychiatric evaluation, the psychiatrist who conducted the evaluation is of the opinion that Student's dysthymic disorder began when Student was approximately 14 to 15 years old, as Student's symptoms began to appear then. However, the psychiatrist acknowledged that there is no way to diagnose dysthymic disorder without allowing two years to lapse. The psychiatrist opined that the dysthymic disorder is at a low level and was present for several years, which led to the development of Student's major depressive disorder and had a direct correlation to Student's drug use, which the evaluator characterized as self-medication. The evaluator further opined that Student's major depressive disorder started at least 6 months ago, but could have been present longer although it's hard to tell when the condition switched from dysthymic disorder to more severe depressive symptoms. The evaluator had an opportunity to review some of Student's school records subsequent to his evaluation of Student and is of the opinion that the records corroborated the information Student had previously provided during his interview. The evaluator does not believe that Student can remediate his attendance

[18] Testimony of Child Psychologist.
[19] Petitioner's Exhibit 6.
[20] Petitioner's Exhibit 11.

problems without higher levels of intervention. However, although the evaluator recommended a full-time IEP for Student at the due process hearing in this case, the evaluator stated that he could only comment on the social/emotional aspects of a full-time program and that the tutoring, specialized instruction and related components of the IEP would have to be developed by other experts.[21]

20. On June 20, 2011, Petitioner provided DCPS with a copy of Student's psychiatric evaluation.[22]

21. June 22, 2011 was the five-day disclosure date for this case, and the hearing officer convened the due process hearing on June 29, 2011.

22. The Notes from the parties' May 13, 2011 resolution session meeting indicate that DCPS advised Petitioner that Student has had a significant attendance issue for the past three years, with the result that he has not been available to receive his IEP services. DCPS offered to convene a meeting to review Student's psychoeducational evaluation and addendum, to conduct a vocational assessment of Student, and to discuss the site location and compensatory education. However, Petitioner's counsel was unwilling to accept the offer because DCPS was not offering the private site location requested in the instant Complaint.[23]

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:

1. Appropriateness of the IEPs

The free appropriate public education required by IDEA is tailored to the unique needs of each child with a disability by means of an IEP. *See Board of Education of the Hendrick Hudson Central School District, Westchester County, et al., v. Rowley et al.,* 458 U.S. 176, 182 (1982).

In the instant case, Petitioner alleges that Student's two most recent IEPs are totally inappropriate because, *inter alia*, they provide for only 7 hours of specialized instruction in an inclusion environment when Student was performing significantly below grade level, they do not provide for behavioral support services although Student was experiencing significant mood problems, the goals and other aspects of the IEPs did not change over the two-year period even though Student was struggling and not making sufficient progress, and the transition plans are vague.

On the other hand, DCPS maintains that Student's IEP goals did not change because he did not master the goals, which is a result of his excessive absences that have led to his academic

[21] Testimony of Child and Adolescent Psychiatrist.
[22] Petitioner's Exhibit 8.
[23] Respondent's Exhibit 6.

struggles. DCPS also maintains that Petitioner failed to meet its burden of proof in this case because the bulk of Petitioner's evidence focused on Student's current status, based upon very recent evaluations, and did not address the information available to DCPS at the time the IEPs in question were developed.

A review of the evidence in this case reveals that Petitioner presented evidence concerning (1) Student's March 17, 2010 IEP, which covered the limited portion of SY 2009/10 from March 17, 2010 through the end of the school year in June, Summer 2010, and the portion of SY 2010/11 extending from August 2010 through March 2010, and (2) Student's March 14, 2011 IEP, which is relevant only from the limited period from March 14, 2011 through May 4, 2011, when Petitioner filed the instant Complaint. Hence, although Petitioner alleged claims concerning SY 2009/10 and SY 2010/11, Petitioner failed to present any evidence regarding the IEP in effect for Student for most of SY 2009/10 -- namely, the approximately 7-month period extending from August 2009 through March 17, 2010.

With respect to the limited time period covered by Petitioner, the evidence demonstrates that Student's IEPs provided him with only 7 hours of specialized instruction in an inclusion environment and no behavioral support services although he was performing 6 to 7 grades below grade level, his grades were spiraling down to mostly and/or all Fs, and his attendance was increasingly poor and reflected a serious truancy problem. Moreover, the transition plan included in each IEP did not include appropriate baseline data for the transition goals listed. Based on this evidence, the hearing officer concludes that Petitioner has met its burden of proving that from the period beginning March 17, 2010 and ending May 4, 2011 DCPS failed to provide Student with an appropriate IEP. However, for reasons noted above, Petitioner has failed to meet its burden of proof on this claim with respect to the period extending from August 2009 through March 17, 2010.

Moreover, Petitioner failed to present evidence sufficient to prove exactly what an appropriate IEP for Student should include. Hence, Petitioner's psychological evaluator indicated merely that Student required markedly increased intervention, a reduced teacher/pupil ratio, tutoring and in-school counseling for Student but failed to specify the frequency and duration of services required or the goals to be addressed through the provision of the services. Similarly, although Petitioner's psychiatric evaluator recommended a full-time IEP for Student, the evaluator candidly admitted that he lacked the experience and training to speak to the tutoring, specialized instruction and related components an appropriate IEP for Student would include. The hearing officer further notes that all of the evaluation data Petitioner relies upon was obtained subsequent to the development of both of the IEPs at issue, and Petitioner rejected DCPS's attempt to convene a meeting to review the new evaluation data and discuss Student's site location and compensatory education. Under these circumstances, the hearing officer has determined to order DCPS to convene an IEP meeting to review Student's new evaluation data; revise Student's IEP to provide for more specialized instruction, a sufficient amount of behavioral support services, and an appropriate transition plan, as determined by the IEP team; determine an appropriate site location; and discuss and determine the amount of compensatory education that will compensate Student for DCPS's failure to provide him with an appropriate IEP from March 17, 2010 through May 4, 2010.

2. Appropriateness of the Assigned 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 the instant case, Petitioner alleged that DCPS failed to provide Student with an appropriate location of services during SY 2009/10 and SY 2010/11. However, Petitioner presented little, if any, evidence in support of this claim. At best, Petitioner presented expert opinion testimony that Student requires a reduced teacher/pupil ratio and a small and highly structured classroom environment in a program with the ability to address his emotional needs, while Student's class at his current DCPS high school consists of 245 students. As noted above in the previous subsection, however, the expert opinion testimony is based upon very recent evaluation data that was not available to DCPS at the start of SY 2009/10 and SY 2010/11, and that Petitioner has failed to allow DCPS an opportunity to review at an IEP team meeting. The hearing officer further notes that Petitioner failed to present at the due process hearing even a scintilla of evidence about the types of programs, services and student/teacher ratio the current DCPS high school is capable of providing. Under these circumstances, the hearing officer concludes that Petitioner has wholly failed to meet its burden of proof on this claim.

ORDER

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

1. On or before August 1, 2011, DCPS shall convene an IEP meeting to (i) review Student's April 18, 2011 psychoeducational evaluation, April 22, 2011 Addendum to the pscyhoeducational evaluation, and June 20, 2011 psychiatric evaluation, as well as any new vocational evaluation data that may be available; (ii) revise Student's IEP to provide for an increased and appropriate amount of specialized instruction in a proper setting, a sufficient amount of behavioral support services, and an appropriate transition plan, as determined by the IEP team; (iii) determine an appropriate site location for implementation of the revised IEP; and (iv) discuss and determine the appropriate amount of compensatory education, which must be more than zero, that will compensate Student for DCPS's failure to provide him with an appropriate IEP from March 17, 2010 through May 4, 2010.

2. All remaining claims and requests for relief in Petitioner's May 4, 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: 7/18/2011

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