

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

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, DC 20002

OSSE  
Student Hearing Office  
April 09, 2013

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STUDENT, <sup>1</sup>	)	
through the Parent,	)	
	)	Date Issued: April 8, 2013
Petitioner,	)	
	)	Hearing Officer: Virginia Dietrich
v.	)	
	)	Case No: 2013-0043
District of Columbia Public Schools	)	
Respondent.	)	Hearing Date: March 28, 2013
	)	Hearing Room: 2004
	)	

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**HEARING OFFICER DETERMINATION**

**Background**

Petitioner, the mother of fourteen-year old Student, filed a due process complaint notice on January 24, 2013 alleging that Student had been denied a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Student is a ward of the District of Columbia living in a foster home in Prince Georges (“PG”) County, Maryland, having been placed there by a District of Columbia child welfare agency. Since the beginning of the 2012-2013 school year, Student attended her neighborhood school in PG County. Petitioner alleged that District of Columbia Public Schools (“DCPS”) was the local education agency (“LEA”) responsible for Student due to her status as a ward of the District of Columbia. Petitioner contended that DCPS, as the responsible LEA for Student, was required to provide Student with a FAPE while she attended school in Maryland.

Petitioner specifically alleged that DCPS failed to provide Student with a more restrictive educational placement from October 17, 2012 until March 21, 2013, when DCPS placed Student at a therapeutic day school that was acceptable to Petitioner. Petitioner’s allegation encompasses both DCPS’ failure to provide Student with an IEP that prescribed full-time outside of general education services in a therapeutic environment and DCPS’ failure to provide Student with a location of services that provided full-time services in a therapeutic environment. Since Student’s IEP services were eventually increased to full-time outside of general education and an

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<sup>1</sup> Personal identification information is provided in Appendix A.

acceptable location of services was provided by DCPS on 03/21/13, Petitioner withdrew her request for a full-time IEP and a specific nonpublic school placement. Petitioner's claim is limited to a request for compensatory education for DCPS' failure to provide Student with an appropriate IEP and location of services from October 17, 2012 through March 21, 2013.

DCPS asserted throughout the proceedings that PG County Public Schools was the LEA for Student until such time that PG County requested that DCPS find a placement for Student. DCPS argued that despite a prior motions ruling by the Hearing Officer that DCPS was the local education agency ("LEA") for Student, DCPS' position was that DCPS was not the LEA for Student because Student did not fit within the definition of "ward" under the IDEA;<sup>2</sup> i.e., Student has a foster parent who is functioning in loco parentis and therefore the District of Columbia Municipal Regulations ("D.C.M.R.") do not apply.

DCPS asserted that PG County was the LEA for Student until 02/21/13 when PG County relinquished its role as LEA, and that up until 02/21/13, DCPS participated in IEP meetings as an observer only. DCPS also asserted that the case was moot because DCPS provided Student with a full-time IEP and therapeutic nonpublic placement on 03/21/13, and since PG County was the responsible LEA for Student, PG County was the responsible entity to seek compensatory education from. Alternatively, DCPS asserted that if the case was not moot, Student was not entitled to compensatory education because she had not been missed any educational services.

### **Subject Matter Jurisdiction**

Subject matter jurisdiction is conferred pursuant to the IDEA, as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R."), and 38 D.C. Code Section 2561.02(b), 2561.02(c).

### **Procedural History**

The due process complaint was filed on 01/24/13. This Hearing Officer was assigned to the case on 01/29/13. On 01/29/13, DCPS filed District Of Columbia Public Schools's Response And Motion to Dismiss Petitioner's Administrative Due Process Complaint with the Hearing Officer and the Student Hearing Office; however, Petitioner's Attorney was not served with a copy until 02/04/13. Per the Order on Effective Filing Date of DCPS' Response and Motion to Dismiss Petitioner's Administrative Due Process Complaint Notice that was issued on 02/12/13, the effective filing date of DCPS' response to the complaint was 02/04/13.

Neither Petitioner nor DCPS waived the resolution meeting. The resolution meeting took place on 02/07/13, at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period ended on 02/23/13, the 45-

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<sup>2</sup> *Ward of the State* means a child who, as determined by the State where the child resides, is (1) a foster child; (2) a ward of the State; or (3) in the custody of a public child welfare agency. *Ward of the State* does not include a foster child who has a foster parent unless a State or local entity prohibits a foster parent from acting as a parent. 34 C.F.R. 300.45, 300.30.

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day timeline to issue a final decision began on 02/24/13 and the final decision was due by 04/09/13.

A prehearing conference took place on 02/19/13. A Prehearing Order was issued on 02/20/13.

### Motions History

DCPS filed its Motion to Dismiss Petitioner's Administrative Due Process Complaint on 02/04/13. On 02/05/13, Petitioner filed Petitioner's Opposition to DCPS' Motion to Dismiss. On 02/08/13, DCPS filed District of Columbia Public Schools's Reply In Further Support Of Its Motion To Dismiss The Due Process Complaint On The Ground That OSSE Is The SEA And PG County Is The LEA ("DCPS' Reply"). DCPS' motion to dismiss the complaint was denied in an Order on DCPS' Motion to Dismiss Petitioner's Administrative Due Process Complaint that was issued on 02/12/13.

DCPS' Motion to Dismiss Petitioner's Administrative Due Process Complaint was premised by analogy to the Federal Rules of Civil Procedure, Rule 56 for summary judgment. DCPS' motion to dismiss contained no stipulated facts upon which the Hearing Officer could draw conclusions of law. There was no legal basis to dismiss the complaint. The Order also ruled that DCPS' newly asserted grounds that the complaint should be dismissed because OSSE was the SEA for Student and PG County was the LEA for Student would have to be pled separately; that it would not be entertained or ruled on when it was asserted and combined with a reply to an existing motion to dismiss.

On 02/13/13, Petitioner filed a Motion to Limit Defenses. Petitioner's motion asked the Hearing Officer to issue a ruling that at the due process hearing, DCPS could not assert the defense that DCPS was not the LEA for Student. DCPS responded with District of Columbia Public Schools's Opposition to Petitioner's Motion to Limit Defenses. On 02/15/13, Petitioner filed a Reply to DCPS' Opposition to Motion to Limit Defenses.

At the prehearing conference on 02/19/13, Petitioner was directed to file a supplement to her Motion to Limit Defenses with an attachment that included the court order evidencing Student's legal status as a ward of the District of Columbia. On 02/19/13, Petitioner filed her Supplement to Motion to Limit Defenses. In an Order on Petitioner's Motion to Limit Defenses that was issued on 02/27/13, this Hearing Officer granted Petitioner's Motion to Limit Defenses, effectively precluding DCPS from asserting that DCPS was not the LEA for Student. The ruling was based on the operation of fact and law; i.e., (1) that Student was a ward of the District of Columbia (the Hearing Officer took judicial notice of a court order of commitment to Child and Family Services Agency), (2) the LEA must make a FAPE available to any child who is a ward of the District of Columbia (See 5 D.C.M.R. E-3002.1(a)), (3) DCPS is the public LEA in the District of Columbia (34 CFR 300.28(a); DC Code 38-2561.01(2)); therefore, (4) DCPS is the LEA for Student.

On the heels of the Order granting Petitioner's Motion to Limit Defenses, DCPS filed District of Columbia Public Schools's Amended Response, on 02/28/13. DCPS' Amended

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Response was titled as an Amended Response, but contained a footer notation that the pleading was a motion to dismiss. Although the pleading was clearly an amended response to the complaint, DCPS' Amended Response contained a prayer for relief that the hearing officer dismiss the complaint. The Amended Response asserted that DCPS was not the LEA for Student. In response to DCPS' Amended Response, Petitioner filed Petitioner's Opposition to DCPS' Amended Response/Motion to Dismiss, on 03/04/13.

On 02/28/13, DCPS also filed a Motion For Reconsideration Of February 27, 2013 Decision Granting Petitioner's Motion To Limit Defenses ("Motion For Reconsideration"). On 03/04/13, Petitioner filed an Opposition to DCPS' Motion for Reconsideration. On 03/13/13, DCPS filed District of Columbia Public Schools's Supplement to Motion for Reconsideration/Motion to Dismiss/Motion for Summary Adjudication. On 03/14/13, Petitioner filed Petitioner's Opposition to DCPS' Supplement to Motion for Reconsideration/Motion to Dismiss/Motion for Summary Adjudication. On 03/17/13, DCPS' Motion For Reconsideration was denied. The denial reiterated the reasons articulated in the Order that granted Petitioner's Motion to Limit Defenses.

Also on 03/04/13, Petitioner filed her Motion to Strike the District of Columbia Public Schools' Amended Response to the Due Process Complaint ("Motion to Strike"). DCPS did not file an opposition to Petitioner's motion to strike the amended response. On 03/17/13, an Amended Order on Petitioner's Motion to Strike was issued. That Order granted Petitioner's motion. DCPS' Amended Response was stricken from the record.

On 03/14/13, Petitioner's Motion for Partial Summary Judgment was filed. DCPS opposed the motion with the filing of District of Columbia Public Schools's Opposition to Petitioner's Motion For Partial Summary Judgment and Reply in Further Support of its Motion to Dismiss/Motion for Summary Adjudication. On 03/15/13, Petitioner replied with the filing of her Reply to District of Columbia Public Schools' Opposition to Petitioner's Motion for Partial Summary Judgment. Petitioner's Motion for Partial Summary Judgment was denied by Order on Petitioner's Motion For Partial Summary Judgment that was issued on 03/17/13. Again, there were no stipulated facts upon which this Hearing Officer could draw conclusions of law.

On 03/20/13, DCPS filed District of Columbia Public Schools' Motion to Dismiss or, in the alternative, Motion for Summary Adjudication. On 03/21/13 Petitioner filed Petitioner's Opposition to DCPS' Motion to Dismiss or Motion for Summary Adjudication. On 03/25/13, an Order was issued that denied DCPS' motion to dismiss.

On 03/21/13, Petitioner filed Petitioner's Stay Put Motion. On 03/22/13, DCPS filed District Of Columbia Public Schools's Memorandum In Opposition To Petitioner's Motion For Stay Put Relief And In Further Support Of DCPS's Motion To Dismiss For Summary Adjudication. An Amended Order on Petitioner's Stay Put Motion was issued on 03/25/13. The Amended Order denied Petitioner's request for an Order maintaining Student's location of services at her neighborhood school in PG County pending a decision on the merits of the due process complaint.

Due Process Hearing Procedural History

The due process hearing was a closed hearing that was scheduled for 03/28/13 and 03/29/13. The hearing began and concluded on 03/28/13. Petitioner was represented by Kimberly Glassman, Esq. and DCPS was represented by William Jaffe, Esq. Neither party objected to the testimony of witnesses by telephone. Petitioner participated in the hearing in person.

Petitioner's disclosures, dated 03/21/13, containing a witness list and Exhibits P-1 through P-22, were admitted into evidence without objection. Although DCPS stated its objections to Petitioner's disclosures in DCPS' Disclosure Statement, DCPS failed to file its objections in a separate pleading as was required by the Prehearing Order. DCPS' objections were not considered or ruled on because they were improperly filed.

DCPS' disclosures, dated 03/21/13, contained a witness list of one witness and Exhibits R-01 and R-02. On 03/22/13, Petitioner filed an Opposition to DCPS' Disclosures. Petitioner objected to the proposed testimony of DCPS' witness that (1) DCPS was not the LEA for Student, (2) the case was moot since DCPS had provided Student with a new nonpublic school placement on 03/21/13, and (3) Petitioner's compensatory education claim should be made to PG County Public Schools because DCPS was not the LEA for Student. Over Petitioner's objection, the Hearing Officer ruled that the testimony of DCPS' witness regarding the responsibility of DCPS to provide Student with a FAPE would be allowed. The Hearing Officer also ruled that although the blanket testimony of DCPS' witness in that regard was not prohibited, Petitioner was free to make objections to any specific testimony of DCPS' witness.

Petitioner also objected to the part of DCPS' Exhibit R-01 that consisted of District of Columbia Schools' Motion to Dismiss or, in the alternative, Motion for Summary Adjudication. The basis of the objection was that the motion was not an exhibit to be relied on for the Hearing Officer to reach a legal conclusion. This Hearing Officer ruled that (1) the motion itself was excluded as evidence, and (2) the Prior Written Notice that was appended to the motion was admitted into evidence without objection.

Parties exercised the opportunity to discuss settlement at the beginning of the due process hearing. The only outstanding request for relief was compensatory education. Parties could not reach an agreement and settle the case.

Petitioner presented four witnesses in her case in chief: (1) Community support worker at National Center for Children and Families ("NCCF") ("community support worker"); an educational specialist at NCCF who qualified over DCPS' objection as an educational specialist for at risk youth expert ("educational specialist"); a clinical psychology expert; and a social worker from NCCF ("social worker"). Petitioner presented no rebuttal evidence.

DCPS presented one witness: DCPS program case manager for the nonpublic unit ("DCPS program case manager").

The sole issue to be determined in this Hearing Officer Determination is:

Whether DCPS denied Student a FAPE by failing to timely provide Student with a more restrictive educational placement since October 17, 2012; specifically, (1) the IEP did not reflect the therapeutic needs of Student; (2) the location of services at the PG County local school<sup>3</sup> that Student attended could not provide the therapeutic environment that Student needed to make educational progress; and (3) on October 17, 2012, the IEP Team agreed that PG County local school could not provide the intensive therapeutic environment that Student needed in order to receive meaningful educational benefit.

For relief,<sup>4</sup> Petitioner requested a finding that Student had been denied a FAPE and an award of compensatory education in the form of 70 hours of tutoring, 30 hours of counseling and 20 hours of mentoring services, for DCPS' failure to provide Student with an appropriate IEP and location of services from October 17, 2012 through March 21, 2013.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

### **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. Petitioner, the adoptive mother of Student, is a resident of the District of Columbia.<sup>5</sup> Student, age fourteen, is a ward of the District of Columbia.<sup>6</sup>

#2. In March 2012, Student attended a District of Columbia public school as a 6<sup>th</sup> grader. The LEA for Student at that time was DCPS. Student was classified as a special education student with a Specific Learning Disability. Student had an IEP dated 03/09/12 that prescribed 3 hours/day of specialized instruction, 1 hour/week of specialized instruction in mathematics, and behavioral support services of 45 minutes/week, with all services to be provided inside of general education.<sup>7</sup>

#3. Student had long standing emotional regulation issues with a history of disruptive behaviors in class.<sup>8</sup> In March 2012, Student's emotional and educational behavior was on the decline. Student's behaviors at that time consisted of avoiding class, attention and behavioral problems that included opposition and aggression towards peers and some of her teachers.

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<sup>3</sup> See attached Index for name of the PG County local school.

<sup>4</sup> Petitioner withdrew, with prejudice, her request for a specific nonpublic school placement. By Prior Written Notice on 03/20/13, DCPS provided Student with services that included a full-time outside of general education therapeutic setting. On 03/21/13, DCPS provided Student with a therapeutic nonpublic school placement that was acceptable to Petitioner. (See R-01).

<sup>5</sup> P-12-2, P-16.

<sup>6</sup> Educational specialist, social worker.

<sup>7</sup> P-2.

<sup>8</sup> Clinical psychology expert.

Student also required psychiatric hospitalization directly from school. Student was at least two grades below grade level in Mathematics and Reading.<sup>9</sup>

#4. In May 2012, a psychoeducational evaluation was completed. Student was diagnosed with Bipolar Disorder, and a Learning Disorder with weaknesses in Reading and Mathematics. From a clinical psychological perspective, Student required a full time special education academic setting with the capacity to monitor her emotionally and academically and to provide daily counseling, along with on-site psychotherapy. Student's academic progress was predicated on having her emotional needs met.<sup>10</sup>

#5. Since September 2012, Student has been residing in a foster home in Maryland, having been placed there by a District of Columbia child welfare agency.<sup>11,12</sup> In mid September 2012, DCPS was made aware that Student was a ward of the District of Columbia who was attending 7<sup>th</sup> grade at her neighborhood school in PG County, Maryland.<sup>13</sup> The District of Columbia was paying for Student to attend school in Maryland.<sup>14</sup> At that time, DCPS also became aware that (a) Student had been placed in a Maryland foster home by a District of Columbia child welfare agency, (b) Student was experiencing severe behavioral problems including suicidal ideations that occurred in school, and (c) Petitioner's educational advocate wanted to insure DCPS' participation in upcoming meetings in order to determine an appropriate academic program for Student.<sup>15</sup> DCPS routinely is invited to attend out of state IEP meetings if the potential for a more restrictive placement exists.<sup>16</sup>

#6. By the end of September 2012, Student had been suspended twice and hospitalized twice. Student's behaviors in school consisted of using foul language towards teachers, displaying disruptive behavior towards adults in the classroom setting, sharing sexual history with her classmates, stating that she had thoughts of killing her teacher, and practicing self mutilation in the classroom.<sup>17</sup> The IEP team at the PG County local school convened on 09/28/12 to determine whether or not Student's 03/09/12 IEP could be implemented. The team reviewed the May 2012 psychoeducational evaluation that outlined Student's emotional and academic profile. The team determined that Student qualified as a student with a Specific Learning Disability and that she qualified for special education services.<sup>18</sup>

#7. An annual review and evaluation of Student's educational needs was conducted by the IEP team at a meeting on 10/17/12.<sup>19</sup> The IEP meeting was convened by PG County Public

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<sup>9</sup> P-2.

<sup>10</sup> P-12-2, clinical psychology expert.

<sup>11</sup> Social worker.

<sup>12</sup> See Index for name of child welfare agency.

<sup>13</sup> P-15-1, DCPS program case manager, social worker.

<sup>14</sup> Educational specialist, P-3-1.

<sup>15</sup> P-15, DCPS program case manager.

<sup>16</sup> DCPS program case manager.

<sup>17</sup> P-3-7.

<sup>18</sup> P-3-2, P-3-3.

<sup>19</sup> P-3-1.

Schools. Petitioner's mother, a DCPS progress monitor from the Office of Special Education ("OSE"), and the community support worker attended.<sup>20</sup>

#8. After a review of all relevant information at the IEP team meeting on 10/17/12, Student's disability classification was changed to Emotional Disability. The team agreed that Student's Emotional Disability was having the greatest impact on her academically. Student's IEP services were increased to 11 hours and 40 minutes/week of specialized instruction inside of general education with the general education teacher as the primary provider and the special education teacher and instructional assistant as secondary providers; 2 hours and 30 minutes/week of specialized instruction inside of general education with the special education teacher as the primary provider and the general education teacher and instructional assistant as secondary providers; 30 minutes/week of counseling services outside of general education with the guidance counselor serving as the primary provider and the special education chair serving as a secondary service provider; and 1 hour/week of counseling services with the school based mental health provider serving as the primary provider and the guidance counselor, psychologist and school social worker serving as secondary providers.<sup>21</sup>

#9. Due to the seriousness of Student's behaviors, the 10/17/12 IEP team conducted a Functional Behavioral Assessment and a Behavioral Intervention Plan that was to be implemented.<sup>22</sup> These assessments related to and addressed Student's lack of self-management and work completion.<sup>23</sup> Although Student had been receiving school based counseling with her guidance counselor, 7<sup>th</sup> grade administrator, and the special education chair, the counseling had not been successful in teaching Student how to manage her feelings, handle conflict resolution, and change her behaviors.<sup>24</sup>

#10. Beginning on 10/17/12, Student required a small classroom with specialized instruction, and intensive counseling and mental health services to help her interact with staff and peers, manage her behaviors and address her deficits in Mathematics and Reading.<sup>25</sup>

#11. On 10/17/12, the IEP team agreed that the PG County local school that Student was attending was not the correct school placement for Student. The IEP team agreed to send Student's records to the PG CIEP for review.<sup>26</sup> The PG CIEP is an entity that reviews Student's file, determines the appropriate level of services for Student and determines if PG County has a school placement that can meet Student's educational needs. In PG County, the local school must demonstrate that they have exhausted all interventions prior to referring a case to the PG CIEP. The PG CIEP looks to see that the local school has exhausted all interventions before looking for another location of services. After the meeting on 10/17/12, the DCPS program case manager was informed by the PG County local school that the PG County local school first would provide Student with a more restrictive setting within the PG County local school.<sup>27</sup>

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<sup>20</sup> P-8, DCPS program case manager, social worker.

<sup>21</sup> P-5-25, P-5-26.

<sup>22</sup> P-3-2.

<sup>23</sup> P-3-7.

<sup>24</sup> P-3-7, educational specialist.

<sup>25</sup> Educational specialist.

<sup>26</sup> P-3-2, community support worker.

<sup>27</sup> DCPS program case manager.

#12. In December 2012, PG County provided Student with a more restrictive setting. Student's special education service hours remained the same; however, Student was placed in another classroom with more supports in the setting. Her classroom size was decreased from 29 to 21 students. Student had fewer classroom transitions; they decreased from 7 to 4 per day. Student's classroom included a behavior technician, a psychologist who worked with Student, and special education teachers. Student was provided with more 1:1 counseling and more opportunity to speak with staff on off topic issues. Student's behaviors decreased some, Student could be redirected, and Student did not incur as many time outs. Overall, Student continued to decline both academically and behaviorally. Student's academic and emotional needs, even in this new setting, were taxing on school personnel. By the end of the first half of the 2012-2013 school year, Student had failed the majority of her classes.<sup>28</sup> The PG County local school did not have a full-time out of general education setting.<sup>29</sup>

#13. The IEP team met a third and fourth time on 01/15/13 and 01/17/13.<sup>30</sup> These meetings followed immediately on the heels of Student being hospitalized as a result of expressing suicidal ideations at school.<sup>31</sup> DCPS was not present at those meetings.<sup>32</sup> The team discussed the need for a more restrictive environment immediately.<sup>33</sup> Student had made no educational progress and had had additional outbursts since the last IEP meeting.<sup>34</sup> The PG County school representatives informed that the local school had limited resources and did not have the therapeutic component that Student needed. The local school had previously submitted a referral packet to the PG CEIP, but it had been kicked back to the local school.<sup>35</sup> The IEP team agreed for the second time that a referral packet should be sent to the PG CIEP and the actual referral was made on 01/17/13.<sup>36</sup> The IEP team also suggested that DCPS work to find a more appropriate Least Restrictive Environment since Student was a ward of the District of Columbia.<sup>37</sup>

#14. On 02/21/13, the PG CIEP determined that Student needed more intensive educational services and increased Student's IEP services to full-time outside of general education in a therapeutic setting. The PG CIEP also determined that it did not have a location of services that was appropriate for Student due to her low IQ and behavioral problems. On 02/21/13, the PG CIEP formally requested that DCPS find a suitable location of services for Student since Student was a ward of the District of Columbia.<sup>38</sup> Once PG CIEP determined that it could not provide a location of services for Student, DCPS took the lead in identifying an

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<sup>28</sup> P-14, educational specialist.

<sup>29</sup> DCPS program case manager.

<sup>30</sup> P-3-2.

<sup>31</sup> P-3-9, P-4.

<sup>32</sup> P-4, educational specialist, social worker.

<sup>33</sup> P-3-24.

<sup>34</sup> P-4.

<sup>35</sup> Educational consultant.

<sup>36</sup> P-3-25, P-9.

<sup>37</sup> P-3-9.

<sup>38</sup> Bass

appropriate location of services.<sup>39</sup> Prior to 02/21/13, DCPS was aware of the need for a change of placement for Student, due to the discussions at the prior IEP meetings.<sup>40</sup>

#15. From 02/21/13 through 03/21/13, DCPS moved expeditiously to find a suitable location of services for Student. DCPS sent packets to several schools to determine Student's appropriateness for those school programs. Prior to acceptance, Student had to be interviewed by the prospective schools. DCPS' efforts to finalize a location of services were thwarted by Student's unavailability for interviews at the prospective schools.<sup>41</sup>

#16. On 03/20/13, DCPS issued a Prior Written Notice indicating that Student required a full-time out of general education setting with a therapeutic component that could address Student's educational, social and psychological needs as a child with an Emotional Disability.<sup>42</sup> On 03/21/13, DCPS identified a therapeutic nonpublic location of services that could implement Student's IEP for the 2012-2013 school year.<sup>43</sup>

#17. Tutoring will be beneficial to Student to address her deficits in Reading and Mathematics. Counseling will be beneficial to Student to address her recent hospitalizations, suicidal ideations, coping mechanisms and problem solving. Mentoring will be beneficial to Student to assist Student in modeling appropriate behaviors and to help Student problem solve when Student gets upset.<sup>44</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 overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a

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<sup>39</sup> DCPS program case manager, social worker.

<sup>40</sup> DCPS program case manager.

<sup>41</sup> DCPS program case manager.

<sup>42</sup> R-1-4.

<sup>43</sup> R-1-6.

<sup>44</sup> Educational specialist.

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child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The sole issue to be determined is whether DCPS denied Student a FAPE by failing to timely provide Student with a more restrictive educational placement since October 17, 2012; specifically, (1) the IEP did not reflect the therapeutic needs of Student; (2) the location of services at the PG County local school that Student attended could not provide the therapeutic environment that Student needed to make educational progress; and (3) on October 17, 2012, the IEP Team agreed that PG County local school could not provide the intensive therapeutic environment that Student needed in order to receive meaningful educational benefit.

Free appropriate public education or FAPE means special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate school and are provided in conformity with the IEP. 34 C.F.R. 300.17.

Under the IDEA, the responsibility for providing FAPE to a student falls on the LEA in which the student's parent or guardian resides. 34 C.F.R. 300.101(a); *Irvine Unified School District v. California Department of Education*, 60 IDELR 123 (9<sup>th</sup> Cir. 2013). District of Columbia municipal law mirrors the IDEA. Pursuant to 5 D.C.M.R. E-3000.1, E-3002.1, all local education agencies (LEA) in the District of Columbia shall ensure, pursuant to the Individuals with Disabilities Education Act, that all children with disabilities, ages three to twenty-two, who are residents or wards of the District of Columbia, have available to them a free appropriate public education.

In *Irvine*, the student was a ward of the state who was placed at an out of state residential treatment facility. *Irvine* established that the LEA, not the California Department of Education, was responsible for providing Student with a FAPE. Noting that the student's responsible adult resided within the district's jurisdiction, the court in *Irvine* ruled that the district was the student's district of residence and, therefore required to provide Student a FAPE.

Petitioner is Student's adoptive mother who resides in the District of Columbia. At the due process hearing, there was credible and uncontroverted testimony by the educational specialist and social worker who had ongoing case care responsibilities for Student, that Student was a ward of the District of Columbia who had been placed in a foster home in PG County, Maryland. Student attended her neighborhood school in Maryland.

DC Code 4-1422 (II), (V) makes clear that despite Student's "placement with a family" outside of the District of Columbia, the District of Columbia still retains jurisdiction over all matters concerning Student. Therefore, by operation of fact and law, an LEA in the District of Columbia is responsible for providing Student with a FAPE.

"LEA" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary school in a city, county, township, school district, or other

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political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools. 34 C.F.R. 300.28(a). "DCPS" means the public local education system under the control of the Board of Education in the District of Columbia. DC Code 38-2561.01(2). By operation of law, DCPS is the responsible LEA for Student.

The Office of the State Superintendent of Education ("OSSE"), the State Education Agency for the District of Columbia, was not the LEA for Student, as was put forth in the testimony of the DCPS program case manager. It was a DCPS representative who attended all of the relevant IEP meetings in Maryland, not a representative of the OSSE.

DCPS was the LEA for Student prior to her being placed in a foster home in Maryland. Based upon the evidence presented, the Hearing Officer concludes that DCPS had an ongoing responsibility to provide Student with a FAPE since September 2012. Student was a ward of the District of Columbia. Petitioner, the adoptive mother of Student, was a resident of the District of Columbia. Under municipal law, DCPS was the LEA responsible for providing Student with a FAPE.

Although it was undisputed that the Student's IEP meetings on 10/17/12, 01/15/13, 01/17/13 and 02/21/13 were convened by PG County and that it was the PG CIEP that determined the level of services that Student needed, DCPS was ultimately responsible for providing Student with a FAPE. Although DCPS was not the predominant player, DCPS attended the IEP meetings on 10/17/12 and 02/21/13 in the capacity as the DCPS program manager for nonpublic placements. PG County took the lead because Student was attending her neighborhood school in PG County. DCPS' purpose was to be available if a more restrictive placement was sought. DCPS was aware of all actions of the IEP team.

The evidence was clear and uncontroverted that on 02/21/13, (1) the PG CIEP increased Student's services to a full-time IEP with services to be provided in a therapeutic setting outside of general education, (2) the PG CIEP informed DCPS that PG County did not have an appropriate location of services that could meet Student's educational needs, and (3) the PG CIEP asked DCPS to find Student an appropriate location of services since Student was a ward of the District of Columbia.

On 02/21/13, DCPS actively began the process of finding an appropriate location of services for Student. DCPS sent out several referral packets to nonpublic schools and lined up school interviews for Student. DCPS' timely efforts to finalize a school placement were hampered only by Student's unavailability for school interviews.

The Hearing Officer determines that DCPS acted reasonably and expeditiously from 02/21/13 through 03/21/13 to find Student a school placement that could implement Student's full-time IEP in a therapeutic setting. DCPS' actions during this time period did not deny Student a FAPE.

The only question remaining is whether or not DCPS' actions or inactions from 10/17/12 through 02/21/13 resulted in Student being denied a FAPE.

The evidence in the record revealed that on 10/17/12, Student's disability classification changed from Specific Learning Disability to Emotional Disability due to her severe emotional behaviors that interfered with her access to the curriculum. The team agreed on 10/17/12 that Student needed a therapeutic educational setting and that Student's current program at the local school was insufficient to meet her educational needs.

On 10/17/12, Student's specialized instruction was increased to 11 hours and 40 minutes/week of specialized instruction within general education with a primary general education teacher and a secondary special education teacher, and 2.5 hours/week of specialized instruction inside of general education with the special education teacher as the primary provider and the general education teacher as the secondary provider. Student's behavioral support services were increased significantly so that Student received services both inside and outside of the general education setting by a medley of providers that included a mental health provider, the school counselor, the school psychologist and school social worker. All of these services and interventions were prescribed by the 10/17/12 IEP to address Student's behavioral and academic problems. However, these amped up services were not put into place right away.

An initial referral was made by the PG County local school to the PG CIEP for a more restrictive placement, but the referral was kicked back. Although the reason for the referral kickback was not in the record, it is likely that the PG County local school had not exhausted all available interventions within the school prior to sending the referral to the PG CIEP.

It wasn't until December 2012 that the PG County local school actually provided Student with stepped up services that included (1) a classroom with a lower teacher to student ratio, (2) a classroom with the services of a behavior technician, (3) a class schedule that required half the amount of transitions per day, (4) a psychologist who worked with Student, (5) the assistance of special education teachers, (6) more opportunity for Student to speak with staff on off topic issues, and (7) 1:1 counseling for Student. Despite these increased services and interventions, the setting was insufficient to address Student's emotional and academic needs. Although Student showed a modest amount of improvement, Student's academic progress was predicated on her emotional needs being met. The PG County local school was not equipped to handle Student's emotional demands and her frequent emotional disintegration. Student was hospitalized directly from school in mid January 2013 due to suicidal ideation. Student needed full-time instruction in a therapeutic setting outside of general education. This level of services could not be provided at the PG County local school.

At the IEP team meeting on 01/15/13, the team again agreed to send a referral to the PG CIEP. During the five weeks between 02/21/13 and 03/21/13, the PG County local school made the appropriate referral to the PG CIEP and the PG CIEP scouted for an appropriate location of services within PG County. Five weeks was a reasonable amount of time for this process to take place. On 02/21/13, the PG CIEP (1) amended Student's IEP to include full-time special education services in a therapeutic setting outside of general education, and (2) informed DCPS that it did not have an appropriate location of services. From that point forward, DCPS took on the full responsibility of locating an appropriate location of services for Student.

## Hearing Officer Determination

Each public agency must ensure that (1) to the maximum extent appropriate, children with disabilities are to be educated with children who are nondisabled, and (2) special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR 300.114. In determining the educational placement of a child, the public agency must ensure that the child's placement is based on the child's IEP and is as close as possible to the child's home. 34 C.F.R. 300.116(b).

It was evident that beginning on 10/17/12, Student required a small classroom with specialized instruction, and intensive counseling and mental health services to help her interact with staff and peers, manage her behaviors and address her deficits in Mathematics and Reading.

Under the IDEA, the PG County local school was required to exhaust all services and interventions available at the PG County local school prior to asking the PG CIEP to provide Student with a full-time placement in a therapeutic out of general education setting. The PG County local school fulfilled its obligation under the IDEA. On 10/17/12, the IEP team significantly increased Student's special education services in the general education setting as a necessary prerequisite to the ultimate determination on 02/21/13 that there was no combination of services and supplementary aids that would allow Student to access the curriculum in the general education setting. However, the PG County local school delayed in providing the stepped up services for two months, i.e., the services were not put into place until December 2012 when they should have been put into place on 10/17/12 when the new IEP was developed. Although a Behavior Intervention Plan was implemented beginning in October 2012, Student's level of dysfunction in the general education setting required more.

Although it is understandable that DCPS worked in harmony with the PG County local school to fulfill the mandates of the IDEA to provide Student with the least restrictive environment where Student's educational needs could be met, at a school closest to Student's home, DCPS is ultimately responsible for providing Student with a FAPE. Student is a ward of the District of Columbia. DCPS is the LEA for Student. The LEA is responsible for providing Student with a FAPE. The Hearing Officer determines that the two-month delay in providing more intensive services and interventions in the general education setting from October – December 2012 resulted in Student being denied a FAPE.

Petitioner requested compensatory education in the amount of 70 hours of tutoring, 30 hours of counseling and 20 hours of mentoring for the alleged denial of a FAPE between 10/17/12 and 02/21/13, a period of four months. This Hearing Officer has determined that Student was denied a FAPE by the lack of appropriate specialized instruction and counseling services for a two-month period of time.

“When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning “appropriate” relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place.” *Reid v. District of Columbia*, 43 IDELR 32 (2005).

The qualitative standard for determining compensatory education is that “compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.” *Reid v. District of Columbia*, 43 IDELR 32 (2005).

The credible testimony of the educational consultant was that tutoring, counseling and mentoring would be beneficial to Student. Student’s severe behavioral maladjustment in the general education setting bespoke a general lack of educational and behavioral progress. Student failed most of her classes. Petitioner will be awarded half of the requested relief.

**ORDER**

(1) No later than 10 business days from the date of this Order, DCPS shall provide funding for Student to receive 35 hours of tutoring, 15 hours of counseling, and 10 hours of mentoring. The authorization for funding shall entitle an independent provider to provide the services. The authorization for funding shall expire 9 months from the date of this Order.

**IT IS SO ORDERED.**

**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: April 8, 2013

*/s/ Virginia A. Dietrich*  
Hearing Officer

Copies to:  
Petitioner: (U.S. mail)  
Petitioner’s Attorney: Kimberly Glassman, Esq. (electronically)  
DCPS’ Attorney: William Jaffe, Esq. (electronically)  
DCPS (electronically)  
SHO (electronically)

APPENDIX A



Student	[REDACTED]
Date of Birth	[REDACTED]
Student ID Number	[REDACTED]
[REDACTED]	[REDACTED]
Petitioner (adoptive parent)	[REDACTED]
Community support worker at National Center for Children and Families (NCCF)	[REDACTED]
Educational specialist for at risk youth expert	[REDACTED]
Expert in clinical psychology	[REDACTED]
Social worker from [REDACTED]	[REDACTED]
LEA representative and DCPS program case manager for nonpublic unit	[REDACTED]
Child welfare agency that placed Student in a foster home in Maryland	[REDACTED]
[REDACTED]	[REDACTED]

[REDACTED]

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■ NOTE: Please do not modify subject line when replying \*\*

\*\* This email was sent by Virginia Dietrich [mailto:  
Virginia.Dietrich@dc.gov] \*\*

[REDACTED]

[REDACTED]

Thank you,

Virginia Dietrich  
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■ NOTE: Please do not modify subject line when replying \*\*

\*\* This email was sent by Virginia Dietrich [mailto:Virginia.Dietrich@dc.gov] \*\*

[REDACTED]

[REDACTED]

Thank you,

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