

District of Columbia
Office of the State Superintendent of Education
Office of Review and Compliance
Student Hearing Office

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STUDENT HEARING OFFICE
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<p>STUDENT¹, by and through his Parent</p> <p>Petitioners,</p> <p>v.</p> <p>District of Columbia Public Schools</p> <p>Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>August 23, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Miguel Hull, Esq.</p> <p>Counsel for DCPS: Harsharen Bhuller/ Daniel McCall/ Tanya Chor</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. JURISDICTION

The Due Process hearing was convened and this Order is written pursuant to the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), 20 U.S.C. §§ 1400 et. seq., the implementing regulations for IDEIA, 34 C.F.R. Part 300, and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

II. PROCEDURAL BACKGROUND

On May 6, 2009, Petitioner filed an Administrative Due Process Complaint Notice ("Complaint") against the District of Columbia Public Schools ("DCPS"), alleging that DCPS (1) failed to place Student in an appropriate school, and (2) failed to allow Parent to fully and meaningfully participate in [the] placement decision, with the result that (3) compensatory education is appropriate for Student. As relief, Petitioner requested a private placement or an IEP/MDT meeting, an independent functional behavior assessment ("FBA") and compensatory education.

On May 8, 2009, DCPS issued a letter waiving a resolution session meeting for this case. Therefore, the case was placed on a 45-timeline and the due process hearing was scheduled for June 10, 2009 at 9:00 a.m.

DCPS did not respond to the Complaint.

The hearing officer was available to convene the prehearing conference at 1:00 pm on May 18, 2009, as scheduled, but was unable to do so because Petitioner's counsel had continued the due process hearing for another case to the date and time previously set aside for the prehearing conference in this case. As a result, Petitioner's counsel was unavailable for the prehearing conference. On June 10, 2009, the hearing officer issued a Pre-Hearing Order based upon Petitioner's Complaint.

DCPS did not submit a Five-Day Disclosure Statement. However, by Petitioner's Five-Day Disclosure Statement dated June 3, 2009, Petitioner disclosed seven potential witnesses and 29 documents (hereinafter Petitioner's Exhibits 1 – 29). Thereafter, pursuant to Petitioner's unopposed Motion for Continuance, which asserted that Petitioner's counsel would be unavailable to participate in the scheduled due process hearing for personal reasons, the hearing officer continued the due process hearing to July 14, 2009.

The hearing officer convened the scheduled hearing on July 14, 2009. Petitioner's documents were admitted without objection, and Petitioner withdrew its request for an independent FBA. Upon DCPS's representation that it had invited Petitioner to a Placement meeting but Petitioner was unable to attend, the hearing officer admitted into the record over Petitioner's objection DCPS-1 through DCPS 3, which consisted of a June 15, 2009 Letter of Invitation to Meeting, a June 19, 2009 letter from Petitioner's counsel's legal assistant proposing three later dates for the meeting, and a June 25, 2009 agreeing to conduct the meeting but asking for a later date and time during the week proposed by Petitioner. The hearing officer admitted these documents on grounds that they were highly relevant and went to the heart of case.

During the course of opening statements, Petitioner's counsel indicated that Petitioner's representatives never responded to DCPS's June 25, 2009 letter because Petitioner's counsel, the legal assistant to Petitioner's counsel, and Parent's advocate were all out of town on separate vacations. In light of Petitioners' failure to respond to DCPS's efforts to convene a Placement Meeting for Student, the hearing officer determined that it would be appropriate to require the parties to attend a placement meeting prior to the due process hearing. Accordingly, the hearing officer issued an Interim Order on Continuance that continued the hearing to August 5, 2009, as well as a July 17, 2009 Interim Order Requiring the Parties to Attend a Placement Meeting.

By an Amended Disclosure Statement dated July 29, 2009, Petitioner disclosed Petitioner's Exhibits 29 and 30.

The hearing officer reconvened the due process hearing on August 5, 2009, as scheduled, and Petitioner's supplemental disclosures were admitted into the record without objection. As a preliminary matter, Petitioner withdrew its request for compensatory education on the ground that the issue had been resolved at the placement meeting, which was held pursuant to the hearing officer's Interim Order. Thereafter, Petitioner began presenting its case. When it became apparent that more time would be required for the hearing than was scheduled, the hearing officer continued the case to August 14, 2009. The hearing officer convened the final hearing on August 14, 2009 to hear the remaining testimonial evidence. Unfortunately, DCPS did not have time to make its closing statement prior to the conclusion of the hearing. As a result, the hearing officer determined that DCPS would be allowed to submit a written closing and, upon Petitioner's request, the hearing officer also allowed Petitioner's counsel to submit a responsive written closing.

III. ISSUE(S)

1. Did DCPS fail to place Student in an appropriate school?
2. Did DCPS fail to allow Parent to fully and meaningfully participate in the placement decision for Student?

IV. FINDINGS OF FACT

1. Student is _____ years old, and for the 2008/09 school year ("SY"), he attended a DCPS placement that services LD students who require full-time services.²
2. At an April 7, 2009 IEP meeting, Student's IEP team changed his classification to include emotionally disturbed ("ED") and determined that he required a full-time therapeutic educational setting to implement his IEP. In light of these changes, DCPS indicated that it would send Student's information to "site review" and invite Parent back for a

² See Complaint at 3.
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placement meeting after the site review process had taken place. In response, Student's advocate stated that the advocate and Parent wanted (i) to be invited to the site review meeting, and (ii) to have the Placement Meeting take place on or before June 12, 2009.³

3. Student's April 7, 2009 IEP requires him to receive 25 hours of specialized instruction, 1 hour of occupational therapy, 1 hour of speech/language services, and 30 minutes of behavioral support services, for a total of 27.5 hours of special education and related services each week, with all services to be delivered in an outside of general education setting.⁴
4. On May 6, 2009, well in advance of the advocate's June 12, 2009 deadline for the placement meeting, Petitioner filed the instant Complaint.
5. On July 17, 2009, the hearing officer issued an Interim Order Requiring the Parties to Attend a Placement Meeting. The Order provided, in part, as follows:

The parties shall attend a placement meeting for Student on July 20, 2009 at 1:30 pm. At said meeting, (i) DCPS shall present 2 to 3 placement options to Petitioner, unless DCPS can demonstrate that there is only one DCPS school that can implement Student's IEP; and (ii) Parent may also bring 1 or more placement suggestions to the meeting and the team shall consider Parent's suggestion(s) as well.

6. On July 20, 2009, DCPS convened a Placement Meeting pursuant to the hearing officer's Interim Order. DCPS presented two options as potential sites for Student: (i) a DCPS educational center ("EC") that offers full-time services for ED students, and (ii) an ED cluster program ("Cluster Program") at a DCPS middle school. Parent proposed a private full-time special education school. Representatives from the EC and the Cluster Program participated in the meeting by phone to explain the details of each program to Parent and the advocate. Parent agreed to visit both schools. Ultimately, however, DCPS determined that the EC was appropriate for Student, and DCPS issued a Prior Notice of Placement to the EC.⁵
7. The EC is located on the second floor of a school building that also houses employees from the DC Department of Recreation (in the basement), as well as an alternative school for regular education students who have been moved from their regular placements for various reasons, such as truancy or behavior problems. The EC students do not have any interaction with the students from the alternative school. The EC and the alternative school use separate entrances and exits, and their programs begin and end at different times. The EC also has its own library, and although the EC and the alternative school use the same gym, auditorium and cafeteria, the two programs use the facilities at different times.

³ Petitioner's Exhibit 2; Testimony of advocate.

⁴ Petitioner's Exhibit 2.

⁵ Petitioner's Exhibit 29; Testimony of advocate.

The EC is a full-time special education placement that serves ED students. All students at the EC have ED, but like Student, some of the students also have other disabilities such as learning disabilities, other health impairments or slight mental retardation. Although the EC is funded to serve 120 students, it presently serves approximately 95 students ranging from third grade to eighth grade. The EC consists of approximately 15 classrooms and an alternative behavior classroom/in-school suspension room ("ABC/ISS room") that is staffed by a special education teacher, a social worker, and behavioral assistants. The purpose of the ABC/ISS room is to provide instruction and behavioral support to students, who have committed infractions, so that those students remain in school and are able to return to their regular special education classrooms as expeditiously as possible.

Each classroom in the EC has a certified special education teacher and a certified instructional aide, as well as a social worker that is shared with another class. The EC offers a student-to-adult ratio of 8 to 2, not including the social worker. The students are escorted as a class to their specials or other events such as assemblies. Students are also escorted to pullout related services by a behavioral technician or an instructional aide. Behavioral assistants move through the hallways and are assigned to particular classes as needed.

The EC has a 32-hour program, and it can implement Student's IEP. In fact, Student will receive more behavioral support services at the EC than his IEP requires because, although Student will receive his 30 minutes of pullout services, the social workers at the EC are located in the classrooms, where they routinely work on social skills. Each social worker is assigned two classrooms, and the social workers stay in a given classroom all day unless they are providing pullout services, with the result that each classroom has a social worker that is present 2 to 3 days per week. Moreover, the EC has 8 certified behavioral technicians, all of whom have passed the examination for instructional aides, as well 14 instructional aides. The behavioral technicians and the instructional aides have all been trained in a method of therapeutic crisis intervention that was developed at Cornell University. The EC is also fully staffed with respect to related services providers.

The EC offers an extended school year program every year and a tutoring program, through which the regular special education teachers offer after-school assistance to students who need extra help. The EC anticipates adding Saturday School to its program for the 2009/10 academic year.⁶

V. CONCLUSIONS OF LAW

The issues to be determined in this case are whether DCPS failed to place Student in an appropriate school and failed to allow Parent to fully and meaningfully participate in the placement decision. As the party seeking relief in this action, Petitioner bears the burden of proof. See 5 D.C.M.R. § 3030.3; *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005).

⁶ Testimony of EC special education coordinator.
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1. Placement

Petitioner has alleged that DCPS failed to place Student in an appropriate school.⁷ However, the evidence in this case proves that DCPS has placed Student at the EC, and the EC can implement Student's IEP. While it is true that Parent sought to have DCPS place Student at a private special education school and DCPS declined to do so, it nevertheless remains true that DCPS placed Student at an appropriate public school that can implement his IEP. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS failed to provide Student with an appropriate school.

2. Parental Participation

Petitioner has also alleged that DCPS failed to allow Parent to fully and meaningfully participate in the placement decision for Student (because Parent was not allowed to participate in the site review process). In support of this argument, Petitioner cites to several provisions of IDEIA and its implementing regulations, as well as the DCMR and relevant case law. Ultimately, however, the hearing officer is not persuaded that the applicable statutory provisions, regulatory provisions, and case law require DCPS to allow parents to participate in DCPS's internal review of its various schools to determine which site(s) may be appropriate for a particular child.⁸ The hearing officer acknowledges that a parent is entitled to provide input into the selection of a school for the implementation of his or her child's IEP.⁹ However, the evidence in this case reveals that at the Placement Meeting held pursuant to the hearing officer's Interim Order, Parent was provided with relevant information about the potential sites selected for Student, and Parent was allowed to give input concerning Student's placement.¹⁰ Based on this evidence, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS failed to allow Parent to fully and meaningfully participate in the placement decision for Student.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner failed to meet its burden of proof.

⁷ IDEIA requires each public agency to provide an appropriate school 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. §§ 300.114-300.120.

⁸ This point of view is supported by case law holding that "'placement' refers to the overall educational program offered, not the mere location of the program." *Roher v. District of Columbia*, 1989 WL 330800, *3 (D.D.C. 1989); see also, *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003) ("*White*") ("[e]ducational placement," as used in the IDEA, means educational program-not the particular institution where the program is implemented) (citations omitted); *A.K. v. Alexandria City School Board*, 484 F.3d 672, 680 (4th Cir. 2007) ("educational placement" as used in stay put provision refers to overall educational environment rather than precise location where disabled student educated) (citing *AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004)).

⁹ See *White*, 343 F.3d at 180 (court assumed *arguendo* that there is a parental right to provide input into the location of services).

¹⁰ See *White*, *supra* (parent does not have right to require school system to send child to a particular school).

VII. ORDER

1. Petitioner's May 6, 2009 Complaint is hereby **DISMISSED**, and its requests for relief therein are hereby **DENIED**.

/s/ Kimm H. Massey

Kimm H. Massey, Esq.
Impartial Due Process Hearing Officer

Dated this 23rd day of August, 2009.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision may appeal to a State court of competent jurisdiction or a district court of the United States, without regard to the amount in controversy, within 90 days from the date of the decision pursuant to 20 U.S.C. § 1415(i)(2).