

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>July 20, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Christopher West, Esq.</p> <p>Counsel for DCPS: Daniel McCall, Esq.</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 July 6, 2009, Petitioner filed an Administrative Due Process Complaint Notice ("Complaint") against the District of Columbia Public Schools ("DCPS"), alleging that DCPS denied Student a free appropriate public education ("FAPE") by (1) failing to provide an appropriate educational placement, and (2) failing to permit Parent to participate in the placement decisions-making, with the result that (3) Student is entitled to compensatory education.

On July 13, 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 August 12, 2009 at 11:00 a.m.

On July 13, 2009, DCPS filed a form pleading, entitled District of Columbia Public School's Second Amended Response, Notice of Insufficiency, and Motion to Dismiss Petitioner's Due Process Complaint Notice, with the words "Second Amended" scratched out from the title.

On July 15, 2009, Petitioner filed Petitioner's Opposition to District of Columbia Public Schools' Motion to Dismiss.

On July 24, 2009, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. The hearing officer noted that the 1½ week timeline between Student's last IEP meeting and the filing of the Complaint seemed much too short to show a denial of FAPE, but on the other hand, DCPS's "site is not placement" argument was not very persuasive in light of its failure to identify a site for Student even as the beginning of the new school rapidly approached. Therefore, the hearing officer denied DCPS's Motion to Dismiss and encouraged the parties to work together to find an appropriate public placement for Student. The hearing officer also denied DCPS's Notice of Insufficiency because it was a mere form pleading that was totally irrelevant to the facts of this case. On July 27, 2009, the hearing officer issued a Pre-Hearing Order that summarized the proceedings at the prehearing conference.

By its disclosure statements dated August 5, 2009, Petitioner disclosed four potential witnesses and twenty-two documents (hereinafter Petitioner's Exhibits 1 – 22). By its "Supplemental Disclosure Statement and Motion to Compel Attendance," on which the date of May 22, 2009 was scratched out and the date of August 5, 2009 was handwritten, DCPS disclosed five potential witnesses and two documents, although only one document was attached to the disclosure.

On August 11, 2009, Petitioner filed a supplemental disclosure letter, which disclosed two

additional witnesses from a full-time, private, special education school.

The hearing officer convened the due process hearing on August 12, as scheduled, and the parties' documents that were disclosed on August 5th were admitted into the record without objection. DCPS also stated that it would not object to Petitioner's supplemental disclosure, which was filed well after the five-day disclosure deadline, so that document was admitted without objection as well. Thereafter, DCPS sought to introduce into the record as DCPS-2 an August 7, 2009 Prior Notice Letter and DCPS's MDT Meeting Notes dated August 7, 2009. DCPS explained that the document was listed in its disclosure but not included therein because the MDT meeting had been scheduled but not yet held on the disclosure deadline date, so the documents had not yet been created. The hearing officer admitted the documents over Petitioner's objection that the advocates notes were not included with the submission, but when Petitioner's counsel's office subsequently faxed the advocate's notes to the SHO, the hearing officer also admitted those notes into the record over DCPS's objection.

III. ISSUE(S)

1. Did DCPS deny Student a FAPE by failing to provide him with an appropriate placement?
2. Did DCPS deny Student a FAPE by failing to permit Parent to participate in the placement decision-making process?
3. Is Student entitled to compensatory education?

IV. FINDINGS OF FACT

1. Student is twelve years old, and he attended 6th grade at a DCPS middle school for the 2008/09 school year ("SY").²
2. On June 25, 2009, DCPS convened an IEP meeting for Student to review Student's psychological evaluation, review and revise Student's IEP, and review placement. The psychological evaluation confirmed Student's ADHD diagnosis and also revealed that he has significant academic issues such that he needs remediation in all areas. At the advocate's suggestion, DCPS agreed to change Student's disability classification to multiple disabilities with LD as the primary disability and OHI (ADHD) as the secondary disability. The team determined that Student needed various accommodations, including a small group setting and constant supervision/assistance. The team also agreed that Student's IEP would reflect 25 hours of specialized instruction per week, 1 hour of counseling per week, .5 hour of occupational therapy per week, and 1 hour of speech and language services per week.³

² Testimony of Student; See Complaint at 3.

³ Petitioner's Exhibit s 9, 10.

3. At Student's June 25, 2009 IEP meeting, the team also determined that he required a full-time academic placement for SY 2009/10. However, no site was determined at that time. DCPS stated its intent to propose a site within the local public schools, but Student's advocate proposed a private full-time special education school and submitted a letter requesting a Prior Notice of Placement ("PNOP") to that school by close of business on July 2, 2009. DCPS indicated that it would pass the case, including the advocate's letter, along to its site placement team.⁴
4. Exactly 11 days later, on Monday, July 6, 2009, Petitioner filed the instant Due Process Complaint.
5. On August 7, 2009, DCPS reconvened Student's IEP/MDT meeting. Parent once again asked for the private full-time special education school. However, DCPS proposed and issued a PNOP for the self-contained learning center ("LC") program at the same DCPS middle school Student attended for SY 2008/09. Parent and the advocate disagreed with the site proposed by DCPS because Student had already attended that school and did not do well there, and the team did not mention the site at the previous IEP meeting. In addition, the fact that Student's 6th grade teacher would be involved in the LC program was especially objectionable to Parent and the advocate, because the advocate was of the opinion that the teacher did not provide Student with the level of assistance and instruction he needed, while Parent felt that Student had experienced a very rough year with that teacher. DCPS overruled Parent and the advocate, stating that it felt it could provide the appropriate accommodations found on student's IEP and recommending a 30-day review of Student's progress to determine whether the program is meeting Student's needs.⁵
6. Subsequent to the June 25, 2009 meeting, DCPS submitted Student's file to the "site review team," which actually consists in any given case of one or more supervisors/coordinators at DCPS headquarters, who look at the capacity of various programs, the vacancies in the programs, and other relevant factors prior to recommending a site or sites for a particular student. DCPS's protocol requires that SECs submit the files of students requiring new site locations to the SECs' superiors at DCPS headquarters without proposing a site at the student's MDT/IEP meeting. This is necessary to allow the supervisors to keep centralized control over who is going into or coming out of a particular placement to make sure the capacity is not exceeded.⁶
7. The LC program, to which DCPS has assigned Student, is designed to focus on remedial skills for students who are more than two grade levels behind. The emphasis is on developing basic skills. The program serves low-functioning learning disabled students, high-functioning mentally retarded students, and multiply disabled Student. The program is located on the third floor of the middle school, and there will be no more than ten

⁴ Petitioner's Exhibits 4, 9, 10; Testimony of advocate.

⁵ DCPS-2; Testimony of advocate; Testimony of Parent.

⁶ Testimony of SEC.

students per class with both a teacher and an aide. The students rotate to different classrooms, such as reading, math, art and gym, as a class. Although Student's 6th grade teacher will be in the LC program, he will continue to be a 6th grade teacher, which means he will not be Student's teacher. The program will also have access to the school psychologist, as well as a staff of full-time social workers who will provide Student's related services either as pullout or in the classroom, depending on what is needed. The program can implement Student's IEP, and Student will receive the individualized help he needs, as well as the hours and accommodations on his IEP.⁷

V. CONCLUSIONS OF LAW

The issues to be determined in this case are whether DCPS denied Student a FAPE by failing to provide him with an appropriate placement and failing to permit Parent to participate in the placement decision-making process, and if so, whether Student is entitled to compensatory education as a result. 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).

1. Placement

Petitioner has alleged that DCPS failed to provide Student with an appropriate placement, with Petitioner using "placement" to mean a site location where Student's IEP can be implemented.⁸ However, the evidence in this case proves that DCPS issued a PNOP to the LC program at Student's current middle school on August 7, 2009, that the LC program can implement Student's IEP, and that Student will be provided with the hours and accommodations listed on his IEP. While it is true that DCPS ultimately placed Student at the same middle school he attended during the 2008/09 school year, Student has been placed in a special program that was designed to provide the remedial skills he needs for SY 2009/10, and DCPS has agreed to conduct a 30-day review of Student's progress to determine whether the program is meeting Student's needs. Based on this evidence, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS failed to provide Student with an appropriate site location for the implementation of his IEP. Nevertheless, in light of the difficulties Student faced at this middle school during SY 2008/09, the hearing officer further concludes that it is imperative for DCPS to conduct the 30-day review of Student's progress that it recommended at the August 7, 2009 MDT meeting.

2. Parental Participation

Petitioner also has alleged that DCPS failed to permit Parent to participate in the placement decision-making process for Student because Parent was not allowed to participate in the site review process for Student. In support of this argument, Petitioner cites to 34 C.F.R. § 300.501(c), which provides that the parent must be a member of any group that makes decisions

⁷ Testimony of SEC.

⁸ *See* 34 C.F.R. § 300.116(b)(2) (Each public agency must ensure that the educational placement of a child with a disability is based on the child's IEP.)

on the educational placement of the child. However, the hearing officer is not persuaded that 34 C.F.R. § 300.501(c) requires DCPS to allow parents to participate in its internal review of its various site locations to determine which site(s) might be appropriate for a particular child.⁹ The hearing officer acknowledges that Parent was entitled to provide input into the selection of a site for the implementation of Student's IEP,¹⁰ and the evidence in this case reveals that Parent was allowed to give such input. Hence, after DCPS submitted Student's file for the site review process and a site was selected, DCPS reconvened Student's IEP/MDT meeting on August 7, 2009 to share information concerning the site with Parent. Moreover, when Parent and Student's advocate disagreed with the selected site, DCPS agreed to convene a meeting after Student has attended the selected site for 30 days to determine whether the site is meeting Student's needs. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proving that DCPS failed to permit Parent to participate in the placement decision-making process for Student.

3. Compensatory Education

Compensatory education is a form of equitable relief that may be awarded only upon a finding of a violation of IDEIA. *See Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. 2005). As Petitioner has failed to meet its burden of demonstrating that DCPS denied Student a FAPE, an award of compensatory education would be improper.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner failed to meet its burden of proof, but DCPS must nevertheless comply with its agreement to conduct a 30-day review of Student's performance in his new site location.

⁹ 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)).

¹⁰ *See White*, 343 F.3d at 180 (court assumed *arguendo* that there is a parental right to provide input into the location of services).

VII. ORDER

1. Petitioner's July 6, 2009 Complaint is hereby **DISMISSED**, and its requests for relief therein are hereby **DENIED**.
2. Within 20 days of the conclusion of Student's first 30 days at his new site location, DCPS shall convene an MDT meeting to review Student's performance and determine whether the new site location continues to be appropriate for Student.

/s/ Kimm H. Massey

Kim H. Massey, Esq.

Impartial Due Process Hearing Officer

Dated this 20th 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).