

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

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OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
OFFICE OF REVIEW AND COMPLIANCE

<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>November 22, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Domiento Hill, Esq.</p> <p>Counsel for DCPS: Laura George, 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

Petitioner filed its Complaint on September 4, 2009, alleging that DCPS denied Student a free appropriate public education (“FAPE”) by failing to provide an IEP reasonably calculated to provide a FAPE and by failing to provide an appropriate placement. DCPS filed its Response on September 14, 2009, asserting therein that (1) DCPS held multiple IEP meetings for Student over the past year and developed an appropriate IEP at the most recent meeting, and (2) Student’s present school is a small, highly structured environment that provides Student with the specialized instruction he requires.

The prehearing conference for this matter was held on October 9, 2009, and the hearing officer issued the Pre-Hearing Order on October 28, 2009.

The parties submitted their Five-Day disclosures by cover letters dated November 3, 2009, with Petitioner submitting 36 documents (Petitioner’s Exhibits 1 - 36) and DCPS submitting twenty-four documents (DCPS-1 through DCPS-24).

The due process hearing for this matter was held on both November 10, 2009 and November 12, 2009, because the parties ultimately required more time than was originally scheduled for November 10th. DCPS’s twenty-four documents were admitted without objection. All of Petitioner’s documents, with the exception of Petitioner’s Exhibit 26, were admitted without objection. Petitioner’s Exhibit 26 was excluded on grounds that it was unclear what the document was and who completed the document. Moreover, at the second hearing, the hearing officer accepted for admission into the record the following additional exhibits: Petitioner’s Exhibit 37 and DCPS-25, 26 and 27. Each party waived any objection to the admission of the other party’s previously undisclosed document(s). Upon the conclusion of the second and final due process hearing on November 12th, the parties agreed to submit written closing statements on Monday, November 16, 2009 by close of business. The written statements subsequently were received by or before the agreed upon deadline.

III. ISSUE(S)

1. Did DCPS fail to provide an IEP reasonably calculated to provide FAPE?
2. Did DCPS fail to provide an appropriate school site for Student?

IV. FINDINGS OF FACT

1. Student is [REDACTED] years old, and he is in [REDACTED] grade at a DC charter school.²
2. On July 21, 2009, Student's current school conducted an eligibility meeting for Student. The team reviewed the following evaluation reports for Student: 6/2/09 comprehensive evaluation report; 5/29/09 educational evaluation report; 4/2/09 and 6/2/09 social history reports; 6/3/09 FBA; and 12/08 Woodcock Johnson. The team noted that Student's general cognitive ability is in the average range, and most of his scores on the achievement test are in the average range. Moreover, most of Student's scores on the rating scales are in the typical range, except that the area of anxiety was clinically significant. Similarly, on his teacher's scale all areas were average except in the attentional area and the area of learning problems, but the attentional problems were not to the degree of being disruptive. The Notes indicate that the team determined to wait until it received the results of Student's neuropsychological evaluation, which was being conducted by DCPS pursuant to a January 25, 2009 Hearing Officer's Decision, as well as a medical report concerning a possible traumatic brain injury ("TBI") that Parent agreed to supply, before making an eligibility determination.³
3. On August 20, 2009, Student's current school conducted another eligibility meeting for Student. This time, DCPS's psychologist reviewed the neuropsychological evaluation she had recently conducted with Student and stated her belief that Student meets the criteria for the disability of traumatic brain injury ("TBI"), then the team reviewed the definition of and criteria for TBI and agreed that Student meets the criteria for the TBI disability. The team "considered all available information and reports to determine the services" to be placed on Student's IEP. The available information included a written report from Student's [REDACTED] grade math teacher, as well as written reports from Student's [REDACTED] grade science, English and social studies teachers.

The team ultimately agreed to provide the Student with 12 hours of specialized instruction, with 5 of those hours to be provided in the general education setting and the remaining 7 hours to be provided in the special education setting. The team developed math, writing and reading goals for Student, and agreed to the accommodations and modifications for the IEP. When the Student's charter school and DCPS agreed to a combination setting for Student, Parent and the educational advocate requested a smaller, full-time special education setting for Student. However, the charter school and DCPS noted that "since [Student] ha[d] not had special education services in the past and the IEP ha[d] just been written he ha[d] not had the opportunity to make adequate academic progress." Parent and the advocate disagreed and refused to sign the IEP.⁴
4. Parent disagreed with the August 20, 2009 IEP because she believes Student needs more IEP hours because of his inability to recall and make connections. She believes Student

² See Complaint.

³ DCPS-23; Petitioner's Exhibit 17.

⁴ Petitioner's Exhibit 17.

needs more hands-on instruction, manipulatives, and similar interventions. Parent was very involved with Student's teachers during the previous school year, his [REDACTED] grade year. She stayed in close contact with all of his teachers and his math tutor. She knows that Student struggled academically last school year and during summer school.

At the August 20, 2009 meeting, Parent proposed a specific private school for Student, but DCPS wanted to review the existing IEP and conduct a 30-day review. Parent noted that Student had been with the charter school for a number of years, and she was of the opinion that the charter school had tried many options to no avail, with the result that it was time to move on to something else.⁵

5. On September 4, 2009, Petitioner filed the Complaint that initiated the instant action.
6. On October 8, 2009, Student's educational advocate conducted a two-hour observation of Student. The advocate observed Student's social studies class, which contained 26 students who, for the most part, traveled to all academic classes together. The advocate was of the opinion that the class as a whole engaged in a lot of chattering during class. The social studies teacher informed the advocate that Student has retention issues and does not want to reveal his deficits in front of his classmates. However, the teacher had implemented the following two accommodations for Student: preferential seating and pairing Student with a very strong fellow student.

The advocate also spoke with Student's special education "pullout" teacher during the observation. This teacher indicated that she is working with Student on his self-advocacy skills so that he will let his other teachers know when he needs additional assistance. The teacher also indicated that math is a relative strength for Student, while reading comprehension and retention are areas of weakness. The special education teacher was of the opinion that other methods of assisting Student, including revision of his IEP, should be tried prior to looking at a change in placement for him.⁶

7. On October 14, 2009, a DCPS Placement Specialist conducted an observation of Student from 9:20 a.m. through 12:30 pm. During this time period, Student went to math, science, special education pullout and lunch. Based on her observations, the observer concluded that Student's interactions with peers and adults are appropriate, that he seems to be well-functioning, that the interventions which have been put in place for him facilitate his success, and that he does not require a more restrictive educational setting to be successful.⁷
8. On October 16, 2009, Student's current school convened an IEP team to conduct a 30-60 day review for Student. Student's grade reports revealed that as of October 13th, he was earning the following grades: C+ in English, D+ in Algebra I, a D+ in science, and a B- in social studies. Student's performance on the 2009 DC CAS resulted in a proficient score in math and a basic score in reading. Similarly, Student's score on the May 2009 Stanford 10 resulted in an average score in math and a below average score in reading.

⁵ Testimony of Parent.

⁶ Testimony of educational advocate.

⁷ DCPS-5.

The team also received reports from Student's current social studies, science, English, math and special education teachers. The teacher reports indicate that Student is inconsistent with respect to the quality and completion of his homework, and he tends not to ask for help when he needs it. Moreover, Student's talkativeness in science is leading to poor grades, he continues to struggle with reading comprehension and writing ability in English, and he is easily distracted in math.

The team agreed to the following additional accommodations for Student: to spread tests over more days, to provide more shortened and more clearly chunked assignments that focus on demonstrating skill mastery instead of repetition, and to allow Student to sit in the corner seat in the front row during science. The team agreed to provide Student with a tape recorder without adding it to the IEP until its effectiveness could be determined.

With the exception of Parent, who requested a specific private placement, and the educational advocate, the team members were of the opinion that Student's needs can be met in a combination setting. After considering all available information and reports, the team agreed to increase Student's hours to 15 hours of specialized instruction per week, with five hours in the general education setting and 10 hours in the special education setting, because Student needs additional support in writing, reading, and math. The team also determined to provide Student with .5 hours of counseling each week, to address how Student's knowledge of a possible change in placement may be impacting his performance in school and affecting whether or not he puts forth his best effort.⁸

9. Parent chose not to participate in the IEP revision process during the October 16, 2009 IEP meeting for Student because she did not agree with the revisions. She wanted more IEP hours because she felt Student had not made any progress since the previous meeting in August 2009 and he continues to struggle in all classes. However, DCPS said Student had not made enough progress, and DCPS decided to increase the IEP hours to 15 (with 5 hours per week in general education and 10 hours per week outside general education) and add .5 hour of counseling per week. Parent feels the increase was insufficient. She notes that she and Student stay up until the early morning hours working on homework, even though Student is supposed to receive reduced homework. She also questions the legitimacy of Student's first advisory grades for the current school year because his mid-conference and homework grades were much lower. Parent acknowledges that Student's current charter school, which is a school of choice, is more stringent than a regular public school would be, and she had in the past considered sending Student to a regular DCPS public school.⁹
10. Student's first advisory Progress Report for the current school year, SY 2009/10, indicates that he earned the following grades: B- in social studies; B in orchestra; C in English; C- in science and algebra I; P in Saturday School; and E in PE.

Student's work samples and lists of scores for science, algebra I and social studies are in line with the grades he received for the first advisory of SY 2009/10.¹⁰

⁸ Petitioner's Exhibit 19; DCPS-2.

⁹ Testimony of Parent; DCPS-3.

¹⁰ Petitioner's Exhibit 37; DCPS-1, DCPS 25, DCPS-26, DCPS-27.

11. On November 2, 2009, DCPS's School Psychologist conducted an observation of Student during his math, science and PE classes. Based on her observations, the psychologist concluded that Student appears to be performing at an average level in his rigorous educational program, that he is exhibiting no significant emotional or behavioral difficulties but, like most adolescents, does occasionally need to be reminded to limit socializing and return to task, and that he appears to be receiving significant support through his special education services and many accommodations. The psychologist noted that Student continues to struggle to understand some concepts and to retain information for tests and quizzes once it has been mastered, so the psychologist recommended augmenting and extending Student's review/preparation for tests and quizzes.¹¹
12. Student's current charter school is the highest performing charter school in the District of Columbia based upon the DC-CAS scores. The school has high expectations of its students. All of the students are college bound, and the school tracks the children through college. The school is a very structured environment; the children are very well behaved because there is a behavior management plan in place; the classrooms and transitions between classes are very quiet; and the teachers work closely together to ensure they are all on the same page with respect to discipline and academics. Moreover, Student's math and English classes are very structured and follow the same routine each day. His social studies class is very structured and quiet, as well.¹²
13. Student earned the following first advisory grades in his academic subjects during SY 2008/09: C in social studies; C- in science; D+ in math; D- in English. Hence, Student earned Cs and Ds during the previous school year, but he is earning Bs and Cs during the current school year. This comparison tends to prove that Student's special education services and interventions are working because his IEP took effect at the beginning of the current school year and he did not receive special education services during the previous school year. Now that Student has begun receiving special education services, he needs less prompting and he has more confidence. He is learning strategies to deal with his memory/recall issue and other issues. Although he exhibited problems with his homework across the board early on in the school year, he has begun doing better on homework. Moreover, he has made progress in terms of note-taking, organization, and related areas.¹³
14. Student is currently receiving inclusion services in his math and English classes on Tuesdays and Thursdays. He receives 2.5 hours of inclusion service in each of the two classes each week, for a total of 5 hours of specialized instruction in the general education setting each week. Student also receives 20 minutes per day of direct assistance in his homeroom class, and he receives additional pullout services during the

¹¹ DCPS-8.

¹² Testimony of charter school's Director of Special Education; Testimony of special education teacher; Testimony of social studies teacher.

¹³ Petitioner's Exhibit 33; Testimony of charter school's Director of Special Education; Testimony of special education teacher; Testimony of social studies teacher.

periods when he is supposed to take the electives of Spanish and orchestra each week. Although Student receives 3 hours per week of additional help in a Learning Team class, that class is not taught by a special education teacher.¹⁴

V. CONCLUSIONS OF LAW

As the party seeking relief in this case, 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. Appropriateness of IEP

Petitioner has alleged that Student's IEP is not reasonably calculated to provide a FAPE. However, in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court rejected the notion that a school district must furnish every special service necessary to maximize each handicapped child's potential. 458 U.S. at 199. Instead, the court held that IDEIA is designed to provide a "basic floor of opportunity," and that the requirement to provide a FAPE is satisfied by providing personalized instruction with sufficient support services to permit the handicapped child to benefit educationally. See 458 at 201-203. Hence, an IEP "should be formulated in accordance with the requirements of the Act, and if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley*, 458 at 203-204.

In this case, the evidence demonstrates that Student's IEP team considered recent evaluation data and teacher reports, as well as all other available information in developing and revising Student's IEP. See 34 C.F.R. § 300.324 (which lists general and special factors to be considered by IEP team in developing, reviewing and revising IEP). The evidence further demonstrates that since the implementation of Student's initial IEP approximately three months ago, he has made progress in terms of note-taking and organizational skills. Moreover, Student has been doing a better job on his homework, he requires less prompting and has more confidence, and his grades have improved from Cs and Ds during the previous school year to Bs and Cs during the current school year. Based on this evidence, the hearing officer concludes that Student's IEP was formulated in accordance with the requirements of IDEIA, and the IEP is reasonably calculated to enable Student to receive educational benefit, achieve passing marks, and advance from grade to grade. As a result, the hearing officer further concludes that Petitioner has failed to meet its burden of proof on this claim.

Finally, the hearing officer understands that Parent is frustrated because the impact of Student's disability on his academics has not been totally neutralized. However, the hearing officer notes that Student has only been receiving special education services for a few months, and the hearing officer strongly encourages Parent to allow the services time to work.

¹⁴ Testimony of special education teacher.
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2. Appropriateness of School Site

Petitioner has alleged that DCPS failed to provide an appropriate placement/school site for Student because Student requires a small, highly structured special education environment.

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. Here, the evidence shows that Student's IEP team has reviewed his evaluation data, his teacher reports, Parent's requests for a full-time private special education placement, and other available information, and determined that a combination setting represents the least restrictive alternative for Student. Moreover, while Student's current school is not a full-time special education setting, the evidence demonstrates that it offers a very structured, quiet environment with well-behaved children, who are held to high expectations. The school also offers a behavior management plan and teachers who work closely together to ensure consistent discipline and academic standards. Finally, as noted above, Student has already begun to make progress at his current school now that he is receiving special education services. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proving that Student's current school is an inappropriate placement for him.

On the other hand, the evidence also demonstrates that Student's current IEP requires him to receive 15 hours per week of specialized instruction, with 5 such hours to be provided in the general education setting and the remaining 10 hours to be provided in the special education setting. While the evidence demonstrates that Student is receiving the 5 hours of inclusion services in the general education setting, it does not appear that Student is receiving all of his pullout services in the special education environment. Student's special education teacher testified that she meets with Student for 20 minutes every morning and also provides additional pullout services during the periods when Student is supposed to take his elective classes of Spanish and orchestra. Moreover, Student receives additional assistance in a Learning Team class that he takes for three hours each week, but the evidence demonstrates that this class is not being taught by a special education teacher. As the implementation of Student's IEP was not raised as an issue in Petitioner's Complaint, the hearing officer makes no conclusion concerning the issue. However, in light of the evidence outlined herein, the hearing officer strongly encourages DCPS to ensure that Student's IEP is fully implemented at his current school.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner failed to meet its burden of proof on both claims asserted.

VII. ORDER

1. Petitioner's September 4, 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 22nd day of November, 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).

APPENDIX A

INDEX OF NAMES
In the MATTER OF “Student” v. DCPS

Placement Specialist Monitor	
Principal	
School Psychologist	[REDACTED]
Special Education Teacher	
Special Education Coordinator, [REDACTED]	
Placement Specialist	
Teacher (8 th Grade Social Studies)	
Physical Therapist	
Private Psychologist (Learning Solutions)	
Child and Child’s DCPS ID # or SSN (insert ID # or Case Number on each page of the HOD vice child’s name)	
Child’s Parent(s) (specific relationship)	[REDACTED]
Child/Parent’s Representative	Domiento Hill
School System’s Representative	Laura George
Parent’s Advocate	[REDACTED]
Name of School	[REDACTED]
Student’s Cousin	
	[REDACTED]
Clinical Therapist	
Spanish Language Interpreter	