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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STUDENT[1], by and through his Parent Petitioners, v. District of Columbia Public Schools Respondent.	HEARING OFFICER'S DETERMINATION November 27, 2009 Representatives: Counsel for Petitioners: Christopher Anwah, Esq. Counsel for DCPS: Laura George, Esq. Hearing Officer: Kimm H. Massey, Esq.

[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 October 2, 2009, alleging that DCPS denied Student a free appropriate public education ("FAPE") by failing to implement Student's IEP during school year ("SY") 2009/10, failing to provide Student with an appropriate placement for SY 2009/10, and failing to provide Student with compensatory education for missed services during SY 2008/09.

On October 7, 2009, DCPS filed its Response to the Complaint. DCPS asserted that the appropriateness of Student's placement was previously litigated and could not be relitigated in this case, that Student did not begin attending school regularly until the last week of September and all services described in the prior hearing are available to him, and that DCPS sent Parent an authorization letter for the compensatory education services but Parent failed to obtain the services.

The prehearing conference for this matter was held on November 3, 2009, and the hearing officer issued the Pre-Hearing Order on November 3, 2009.

On November 9, 2009, DCPS disclosed 8 documents (DCPS-1 through DCPS-8). On November 10, 2009, Petitioner disclosed 21 documents (Petitioner's Exhibits 1 - 21).

The due process hearing for this matter was held on November 17, 2009, and the parties' disclosed documents were admitted without objection. As a preliminary matter, DCPS conceded that Student had indeed been placed in a regular education class at the beginning of the school year. As a result, DCPS thought he was absent from school at the beginning of the year because he had been placed in the wrong class. By the date of the due process hearing, however, Student had already been placed in the self-contained ED program he was originally supposed to attend. In addition, the parties stipulated that Petitioner's deadline for obtaining the compensatory education services awarded by this hearing officer in a July 30, 2009 HOD would be extended to the end of SY 2009/10. Finally, DCPS agreed to allow Petitioner to address at the hearing the following issue, which Petitioner did not include in the Complaint: DCPS's alleged violation of the 7/30/09 HOD by failing to develop a behavior intervention plan ("BIP") for Student.[2]

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[2] *See* 34 C.F.R. § 300.511(d) (complaining party may not raise issues at hearing that were not raised in the Complaint unless other party agrees otherwise).

III. ISSUE(S)

1. Did DCPS fail to implement Student's IEP during SY 2009/10?

2. Did DCPS fail to provide an appropriate school site for Student?

3. Did DCPS deny Student a FAPE by failing to provide compensatory education services for missed services during SY 2008/09?

4. Did DCPS violate a former HOD by failing to provide a BIP?

IV. FINDINGS OF FACT

1. Student currently attends [redacted] grade at a DCPS middle school.[3]

2. On May 26, 2009, DCPS convened a special education eligibility meeting for Student. After reviewing Student's evaluation reports and other available data, the team determined (i) that student was eligible for special education and related services as an emotionally disturbed ("ED") student; and (ii) that Student should receive a full-time special education program that consisted of 27.5 hours of specialized instruction and 1 hour of behavioral support weekly. The team then developed an IEP that contained this level of services.[4]

3. On June 5, 2009, Student's IEP was revised. Pursuant to this IEP, Student is to receive 26 hours per week of specialized instruction in an outside-of-general-education setting and 1.5 hours per week of behavioral support services in a general education setting.[5]

4. In late June and early July of 2009, DCPS advised Parent that it had selected the ED cluster program at Student's current school as Student's school site for SY 2009/10.[6]

5. In a subsequent administrative due process proceeding, this hearing officer determined based on the evidence presented by DCPS that the ED cluster program would provide Student with all of his academic subjects in a self-contained classroom, that there would be a maximum of 10 students in the class, and that there would be three adults – a certified teacher, a social worker, and a behavior specialist – in the classroom at all times. Moreover, Student and his classmates would transition from the main class to their electives as a class with an escort, and although there would possibly be other non-ED special education students in the electives, there would not be any general education students in such classes. Indeed, Student's interaction with general education students would be limited to breakfast in the cafeteria until such time as he and his classmates

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[3] Testimony of Parent; testimony of Student.

[4] Petitioner's Exhibit 2 at 4-5.

[5] Petitioner's Exhibit 8.

[6] Petitioner's Exhibit 2 at 5.

would be picked up and taken to their classroom, lunch time when they would be escorted to the cafeteria by the behavioral specialist who would stay with them through the lunch period, and general assemblies when the behavioral specialist and the teacher would also be present with them. In the July 30, 2009 HOD the hearing officer ultimately issued, the hearing officer concluded that Petitioner had failed to meet its burden of proving that the ED cluster program at Student's current school was an inappropriate placement/location for Student.[7]

6. In the July 30, 2009 HOD, the hearing officer also (i) ordered DCPS to develop and begin implementing a BIP for Student within the first 30 days of SY 2009/10; and (ii) awarded Student compensatory education in the form and amount of three hours of tutoring per week and two hours of independent counseling per month from the date the HOD was issued through the beginning of Winter Break for SY 2009/10.[8]

7. On August 20, 2009, DCPS held a Placement Meeting, at which Student was formally assigned to attend his current DCPS school over Parent's objection, and Parent was provided with a Prior Notice Letter listing Student's current school.[9]

8. By letter dated August 26, 2009, Student's educational advocate advised various individuals at DCPS that DCPS transportation had informed Parent that Student's transportation would not be set up until September 4, 2009. The advocate noted that Student would miss school for two weeks if he had to wait until the designated date for transportation, and the advocate requested that the situation be remedied immediately.[10]

9. Although school started August 24, 2009, Student did not actually begin attending school during SY 2008/09 until September 4, 2009, when his transportation services became available.[11]

10. When Student began attending school on September 4th of the current school year, DCPS inadvertently placed him in a general education homeroom class and assigned him to the following general education classes: Language Arts 6; World Geography and Cultures; Science Grade 06; Middle School Mathematics 1; Health and Physical Education 6/Spanish Language and Culture/Music 6/Computer Applications MS (one class for each of the four terms during the school year); and Advisory MS. Indeed, when Parent and the advocate visited Student's current school on September 24, 2009, they found that Student was in regular education classes instead of the ED cluster program he was supposed to attend.[12]

11. The administrative record for this case includes an undated and unsigned Compensatory

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[7] Petitioner's Exhibit 2 at 6-7, 11.

[8] Petitioner's Exhibit 2 at 12.

[9] DCPS-6, DCPS-7.

[10] Petitioner's Exhibit 16.

[11] Testimony of Parent; testimony of Student.

[12] Petitioner's Exhibit 20; testimony of Student; testimony of Parent; testimony of advocate.

Education Plan that provides Student with independent counseling and tutoring services in the amounts ordered in the July 30, 2009 HOD. The Plan also states the maximum costs DCPS allows for such services.[13]

12. By letter dated September 24, 2009, DCPS's Compliance Case Manager informed Parent that she had been awarded compensatory education pursuant to the HOD and that said services had to be obtained by the start of the winter break. The letter indicated that Parent should contact the Compliance Case Manager with any questions. DCPS mailed the letter to Parent's current address by Certified Mail. However, Parent did not receive the letter.[14]

13. Although Student's most recent IEP requires him to receive 1.5 hours of behavioral support services every week in a general education setting, the special education social worker at Student's current school did not meet with Student for the first time until September 23, 2009, which was several weeks into the current school year. The social worker's first meeting with Student was an individual meeting. Thereafter, Student began receiving approximately one hour of weekly group counseling from the special education social worker on Fridays. He does not receive any individual counseling. In group counseling, the students work on issues such as anger, frustration, respect, peer and adult relationships. Student is doing well in the group sessions. He follows directions and also helps other students with their spelling. Although he does not do so now, the social worker can provide Student with individual counseling in addition to the group counseling if necessary.[15]

14. On October 1, 2009, Student began attending the ED cluster program that he should have been attending from the start of the school year. There are ten students in the class for most of the day, but there are only 7 students in the class for two periods of the school day when 3 of the students go to inclusion classes for science and social studies. Student receives instruction in the self-contained classroom from 8:45 am through 11:45 am, when he goes to lunch. At 12:30 pm, once lunch is over, Student returns to the self-contained classroom, where he continues to receive his instruction until 2 pm, when he goes to a general education computer class for the last period of the day. Also, on Fridays, Student receives 60 to 65 minutes of group counseling with the rest of his class from the special education social worker.[16]

15. From the special education teacher's perspective, it seems that Student did not want to be in the ED cluster program when he initially arrived. However, he has improved since then, and he does well when he participates in class. The teacher is working with Student to help him control his impulsivity. Moreover, sometimes Student refuses to do his work. This can happen because of something as simple as when someone has said something to Student that upset him. However, the issue of Student not doing his work is no longer as

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[13] DCPS-2.

[14] DCPS-3; testimony of Parent.

[15] Petitioner's Exhibit 8; testimony of Student; testimony of special education social worker.

[16] Testimony of special education teacher; testimony of Student.

big of an issue as it was when Student first joined the class. The special education teacher has been working from Student's May 26, 2009 IEP, and as of the date of the due process hearing in this case, she had not been provided with a copy of Student's June 5, 2009 IEP.[17]

16. Student has received between 2 and 4 in-school suspensions since he began attending the ED cluster program. In-school suspensions require Student to go to a designated classroom and someone brings him work to do. The special education teacher determines how long each suspension should last, which is not necessarily for the whole school day. Although either the special education teacher or the assistant principal is supposed to call Parent when Student is placed in in-school suspension, Parent has not received any phone calls notifying her of Student's in-school suspensions.[18]

17. The special education social worker at Student's current school prepared a BIP for Student during the current school year. To develop the BIP, the social worker used Student's BIP from the previous school year, talked to Student and to one or two staff members at Student's previous school, and reviewed Student's records concerning his behavior. Parent was not involved in the development of the plan, and no meeting was held in connection with the development of the Plan.[19]

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. Alleged Failure to Implement IEP

IDEIA defines a FAPE as special education and related services provided, *inter alia*, in conformity with an IEP. *See* 34 C.F.R. § 300.17(d). Hence, the U.S. Supreme Court has held that the FAPE required by IDEIA is tailored to the unique needs of the handicapped child by means of an IEP. *See Board of Education of the Hendrick Hudson Central School District, Westchester County, et. al. v. Rowley*, 458 U.S. 176 (1982).

In this case, Petitioner has alleged that DCPS failed to implement Student's IEP (1) by placing Student in a regular education 6th grade classroom when his IEP calls for a full-time out-of-general-education placement, and (2) failing to provide Student with the 1.5 hours per week of counseling services required under his IEP.

During the due process hearing for this case, DCPS conceded that it failed to place Student in his full-time out-of-general-education ED cluster program at his current school when he first began attending school during the current school year. Moreover, the evidence in this case proves: (1)

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[17] Testimony of special education teacher.

[18] Testimony special education teacher; testimony of Parent.

[19] Testimony of special education social worker.

that Student missed the first 9 days of school because DCPS failed to provide him with required transportation services, (2) that although Student began attending his full-time ED cluster program on October 1, 2009, he is only receiving approximately 22.5 hours per week of specialized instruction, instead of the 26 hours called for by his IEP, because he attends a general education computer class for the last period of each school day; and (3) Student did not begin receiving counseling services until September 23, 2009, and now that he is receiving counseling, he receives only approximately 1 hour of group counseling per week instead of the 1.5 hours of counseling services per week required under his IEP. Based on this evidence, the hearing officer concludes that Petitioner has met its burden of proving that DCPS has failed to fully implement Student's IEP during the current school year.

As relief for this and any other violations of IDEIA in this case, Petitioner has requested a private placement at Accotink Academy. However, the hearing officer previously found in the July 30, 2009 HOD that the ED cluster program at Student's current school is an appropriate school site for him, and the hearing officer concludes below that Petitioner has failed to prove in this case that the ED cluster program is no longer an appropriate site for Student. Under these circumstances, the hearing officer concludes that it would be inappropriate to remove Student from his current ED program. Hence, the hearing officer will order DCPS to fully implement Student's current IEP in his current ED cluster program by providing him with an additional 3.5 hours of specialized instruction per week, for a total of 26 hours per week, and by providing him with the full 1.5 hours of counseling services required by his IEP.

Although DCPS conceded at the due process hearing that it failed to put Student in his ED cluster program at the beginning of the school year, at the prehearing conference in this matter, DCPS insisted that Student failed to begin attending school until the end of September and that all services described in the prior hearing were available to Student at his current school. As a result, Petitioner was not prepared to present the hearing officer with the necessary evidence concerning the amount and form of compensatory education that Student should receive to compensate him for missed services during the school year. *See Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005) (hearing officers may award educational services to be provided prospectively to compensate for a past deficient program, but inquiry must be fact-specific and ultimate award must be reasonably calculated to provide educational benefits that likely would have accrued from special education services school district should have supplied in first place.) Under these circumstances, the hearing officer will preserve for three months following the issuance of this HOD Petitioner's right to seek (and prove its entitlement to) a compensatory education award as a result of the violations of FAPE found in this case.

2. <u>Appropriateness of School Site</u>

Petitioner has alleged that DCPS failed to provide Student with an appropriate school site. However, this hearing officer ruled in the July 30, 2009 HOD that the ED cluster program at Student's current school is an appropriate site location for Student, and Petitioner has failed to present any evidence about the ED cluster program that would justify a different conclusion in this case. (Although, as noted above, Petitioner has met its burden of proving that DCPS has not fully implemented Student's IEP at his current school site.)

3. Alleged Failure to Provide Compensatory Education

The parties resolved this claim at the due process hearing for this case by agreeing that Petitioner would be allowed until the end of SY 2009/10 to obtain the compensatory education services that were awarded to Student in the July 30, 2009 HOD.

4. Alleged Violation of HOD with respect to BIP

Under IDEIA, in the case of a child whose behavior impedes the child's learning or that of others, the child's IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 C.F.R. § 300.324(a)(2)(i). Moreover, the IEP team must include the child's parents, at least one of the child's regular education teachers, and at least one of the child's special education teachers, among others. *See* 34 C.F.R. § 300.321. Although the child's IEP may be revised after the annual IEP team meeting without convening another team meeting, the parent and the public agency must agree to such an arrangement, and the public agency must ensure that the IEP team is informed of the changes made to the IEP. *See* 34 C.F.R. § 300.324(a)(4).

During the due process hearing for this case, DCPS agreed that Petitioner could raise for the first time the issue of whether DCPS had developed a current BIP for Student, as required by the July 30, 2009 HOD. As the issue had not been raised prior to the hearing, no BIP was included in DCPS's Five-Day disclosure. However, the evidence in this case demonstrated that the special education social worker has developed a current BIP for Student based on information contained in Student's previous BIP and educational records, as well as information gleaned from conversations with Student and staff member(s) from Student's previous school. However, the evidence also reveals that the social worker developed the BIP without any input from Parent or the other members of Student's IEP team, and there is no evidence that Parent agreed to such an arrangement. Under these circumstances, the hearing officer concludes that although Petitioner failed to meet its burden of proving that DPCS failed to develop a BIP for Student, the evidence does demonstrate that DCPS failed to include all necessary parties in the development of Student's BIP. As a result, the hearing officer will order DCPS to convene an IEP team meeting for the purpose of sharing Student's current BIP with the members of his IEP team and allowing the team members to provide input regarding the BIP.

VI. SUMMARY OF DECISION

The hearing officer determined (1) that Petitioner met its burden of proving that DCPS has failed to fully implement Student's IEP, (2) that Petitioner failed to meet its burden of proving that DCPS has provided Student with an inappropriate school site, and (3) that although Petitioner failed to meet its burden of proving that DPCS failed to develop a BIP for Student, the evidence proves that DCPS failed to include all necessary parties in the development of Student's BIP. A ruling on Petitioner's claim that DCPS failed to provide previously awarded compensatory education was rendered unnecessary by the parties' agreement to extend the deadline for the provision of those services.