

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>January 21, 2010</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Miguel Hull, Esq.</p> <p>Counsel for DCPS: Kendra Berner, 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 a Complaint on October 15, 2009, which alleged the following three claims against DCPS: (1) inappropriate IEP and placement²; (2) failure to conduct a functional behavioral assessment (“FBA”), develop a behavioral intervention plan (“BIP”) and convene an MDT meeting to review same; and (3) failure to comprehensively evaluate.

On October 28, 2009, DCPS filed its Response to the Complaint, asserting that Student’s IEP is calculated to provide educational benefit, and a combination setting is the LRE. DCPS thereafter stated that an FBA could be conducted and that DCPS could conduct a clinical assessment if Parent wished.

The prehearing conference was scheduled for November 19, 2009, but it did not go forward because Petitioner’s counsel was ill. On December 1, 2009, the hearing officer issued a Pre-Hearing Order based on the pleadings.

Petitioner submitted its Five-Day disclosures on November 30, 2009, December 1, 2009, and January 4, 2010 (“Petitioner’s Exhibits 1 – 20). DCPS submitted its Five-Day disclosures on November 30, 2009 and January 4, 2010 (DCPS-1 through DCPS-8 and DCPS-10). At the subsequent due process hearing, Petitioner’s Exhibits 1 through 15 and 17 through 20 were admitted into the record without objection, while Petitioner’s Exhibit 16 was admitted into the record over objection. DCPS’s disclosed documents were admitted into the record without objection.

The initial due process hearing scheduled for December 7, 2009 did not go forward for lack of a Spanish-speaking interpreter. Although Petitioner’s counsel submitted a December 1, 2009 letter request for an interpreter to the Student Hearing Office (“SHO”), and said document was uploaded into the SHO’s electronic docketing system, the request ultimately fell through the cracks and no interpreter was requested. The hearing officer and the parties agreed to reschedule the hearing for January 11, 2010. The hearing officer then contacted the SHO by telephone and followed up the telephone call with a completed Interpreter Request Form. In addition to granting a continuance, the hearing officer ordered the parties to participate in an IEP meeting to review Student’s February 5, 2009 psychological evaluation prior to the SY 2009/10 Winter Break, and to also review Student’s FBA at said meeting if possible.

² As used in Petitioner’s Complaint, the term “placement” refers to Student’s location of services. This HOD will therefore use the terms “placement” and “location of services” interchangeably.

The rescheduled hearing took place on January 11th, and the requested Spanish-speaking interpreter was present. The parties indicated that the ordered IEP meeting had taken place. And as a result, Petitioner voluntarily withdrew its claims regarding (1) an FBA, BIP and meeting, and (2) evaluations. However, Petitioner reserved its right to challenge Student's FBA at a later date, if necessary.

III. ISSUE(S)

1. Did DCPS fail to provide an appropriate IEP and placement?

IV. FINDINGS OF FACT

1. Student is years old, and he currently attends grade at a DCPS senior high school.³
2. Student has a history of taking medication for a diagnosis of ADHD that extends back more than five years.⁴
3. Student's current IEP is dated November 3, 2009. The IEP identifies Student's primary disability as Specific Learning Disability ("SLD"), and it requires Student to receive 15 hours per week of specialized instruction in a general education setting and 30 minutes per week of behavioral support services. The IEP contains annual goals in the academic areas of mathematics, reading, and written expression, as well as one annual goal in the area of emotional, social and behavioral development. The IEP also contains a post-secondary transition plan.⁵
4. Student's previous IEP is dated December 17, 2008. That IEP also identified Student's primary disability as SLD. However, pursuant to that IEP, Student was only entitled to receive 5 hours per week of specialized instruction and 30 minutes per week of behavioral support services.⁶
5. Student's current IEP, which triples the number of hours of specialized instruction he receives, was developed subsequent to the filing of the Complaint.⁷
6. On February 5, 2009, the Child Guidance Clinic of the D.C. Superior Court issued a psychoeducational evaluation report for Student, which contained the results of Student's performance on the Wechsler Intelligence Scale for Children-4th Edition ("WISC-IV"), the Woodcock-Johnson Tests of Achievement-3rd Edition ("WJ-III"), the Rorschach Inkblat Method (Comprehensive System), the Millon Adolescent Clinical Inventory ("MACI"),

³ See Petitioner's Exhibit 2.

⁴ Petitioner's Exhibit 9.

⁵ Petitioner's Exhibit 2; DCPS-3.

⁶ Petitioner's Exhibit 3.

⁷ Petitioner's Exhibit 5; DCPS-5.

the Child Behavior Checklist (“CBCL”) – Spanish Version, and the Trauma Symptom Checklist for Children (“TSCC”).

On the WISC-IV, Student’s Full Scale IQ score of 75, his Verbal Comprehension Index score was 71, and his Working Memory Index score was 71. Those three scores were in the Borderline range. However, Student’s Processing Speed Index score was in the Low Average range (score = 88), and his Perceptual Reasoning Index score was in the Average range (score = 92).

Student’s performance on the WJ-III resulted in academic achievement scores at the 4th to 5th grade level. Hence, he received the following grade equivalencies (“GE”): Broad Reading – 5.3 GE; Basic Reading – 5.3 GE; Reading Comprehension – 4.3 GE; Math Calculation Skills – 3.9 GE; Broad Math – 4.2 GE; Math Reasoning – 4.4 GE; Broad Written Language – 4.5 GE; Written Expression – 4.2 GE; Academic Skills – 4.9 GE; Academic Fluency – 4.7 GE; and Academic Applications – 4.4 GE.

Finally, based on the results of the Personality/Emotional testing administered, the evaluator concluded that Student suffers from ADHD, Predominantly Inattentive, and Oppositional Defiant Disorder.

The evaluator ultimately recommended, *inter alia*, that Student continue receiving special education services, that he receive a psychiatric consultation to determine if he should resume taking his ADHD medication, and that he be provided an opportunity to develop independence and assertiveness skills through pro-social activities. The evaluator also indicated that Student would benefit from receiving individual therapy and family counseling.⁸

7. Previous psychological and educational testing administered to Student by DCPS in 2008 resulted in Borderline scores on the Wechsler Abbreviated Scale of Intelligence – Verbal IQ score of 70, Performance IQ score of 79, and Full Scale IQ score of 71; and GEs on the WJ-III ranging from 1.7 to greater than 18.0. However, given that the 2008 educational evaluation results are inconsistent with Student’s 2008 psychological evaluation results and his 2009 psychoeducational evaluation results, it is highly probable that the 2008 educational evaluation does not present an accurate picture of Student’s academic achievement levels.⁹
8. Two educational advocates have been involved with Student’s case. However, both advocates only became involved with Student in November 2009, which was after the filing of the instant Complaint.¹⁰
9. At Student’s November 3, 2009 meeting, where his IEP hours were increased from 5.5 to 15.5, DCPS acknowledged that Student’s class schedule did not reflect the 5 hours of specialized instruction he was entitled to receive under his previous IEP, and DCPS agreed to develop an FBA to address Student’s truancy issues. Parent, Student’s probation officer, and the educational advocate, who had just become involved with Student’s case, asserted that Student needed a small, structured environment based on the

⁸ Petitioner’s Exhibit 18.

⁹ DCPS-1 and DCPS-2; Petitioner’s Exhibits 7 and 8; testimony of educational advocate 2.

¹⁰ See testimony of educational advocates 1 and 2.

results of his 2009 psychoeducational evaluation and his attendance problems. However, DCPS asserted that Student's services were adequate and that he could succeed if he would make himself available.¹¹

10. In December 2009, DCPS developed an FBA to address Student's poor school attendance. The FBA indicates that between August 17 and December 3, Student attended only 22 days of school during 66 days of membership. As a result, the FBA did not include a Classroom Observation component because Student was absent on each of the three days when an observation was attempted. The evaluator noted that Student's poor school attendance may be an indication that Student is frustrated or has anxiety regarding his educational and skills deficit. The evaluator ultimately concluded that Student's IEP team needs to consider reviewing Student's specialized instructional goals to determine whether Student's current class schedule is designed to meet his educational needs.¹²
11. On December 11, 2009, DCPS convened another MDT meeting to review Student's February 5, 2009 psychoeducational evaluation and to review Student's FBA. The team also discussed Student's attendance, and DCPS offered to provide Student with an attendance card.¹³
12. On December 16, 2009, DCPS convened another MDT meeting to review Student's BIP and discuss the prior discrepancy in his scheduling. The team acknowledged that Student goes to school but does not attend class. The team discussed whether the Truancy Prevention program would be a good support for Student. They also discussed whether the reentry program at a _____ could help Student. The reentry program would include consistent meetings with Student and home visits. However, the program requires a 6-month commitment and Student has failed to demonstrate the requisite interest in the program. DCPS offered to refer Student to a staff person at his DCPS school, who would be the point-person for attendance and also provide Student with food incentives, such as cheese and crackers or fruit snacks. No other formal interventions were offered by DCPS or suggested by Parent and the advocate. The team discussed compensatory education, but the DCPS team members noted that although Student's initial schedule did not provide him with his IEP hours, the schedule had since been corrected. The DCPS team members ultimately determined that no compensatory education was warranted because Student did not suffer any harm as he was not present at school.¹⁴
13. Prior to attending his current DCPS senior high school, Student attended a public middle school in Maryland, where he received special education services all day in a class of 10 to 11 students with 2 teachers. Student liked this school because he understood the work

¹¹ DCPS-5; Testimony of educational advocate 1; testimony of SEC.

¹² DCPS-8; Petitioner's Exhibit 18.

¹³ Testimony of educational advocate 1; testimony of SEC.

¹⁴ DCPS-10; Testimony of SEC; testimony of advocate 1.

and the teachers gave him lots of help. Although Student still had issues with arriving late and leaving classes, the school was small with a total of only approximately 300 students, and the teachers were able to redirect him.¹⁵

14. When Student began attending his current DCPS high school, he was placed in classes of 25 to 26 students with 1 teacher. He did not have any special education classes at all, but there was a teacher who would come to help him in English every other day, which made his English class easier for him. However, the teacher who helped him stopped coming to his English class after 3 to 4 weeks.

Student initially attended classes at the beginning of the school year, but he stopped going during the third to fourth week of class because the classes were hard. He started walking the halls, and going into other classes and being told to get out. He also started leaving the building a lot.

When Student's schedule changed in mid-November, his counselor began talking to him about his attendance and perhaps taking a recovery class. Student told the counselor that his classes were too hard, and then the counselor switched him to some easier classes. As it stands now, Student takes the following classes: (i) Biology, which has between 18 to 20 students and which Student finds difficult because there are too many Students for the teacher to help him; (ii) English, which has about 20 students and which presents the same problem as Biology; (iii) Algebra I, which includes general education and special education students, and which includes an inclusion teacher for Student and the other special education students; (iv) which is a special education class with 5 Student and which Student likes because the teacher helps him more; (v) Internet/Computer, which Student enjoys and which has approximately 17 kids; and (vi) French, in which Student believes he was earning a C even though he had no inclusion teacher. Student feels he needs someone to come into his English and Biology classes and help him with the work. Student is not receiving counseling, and he has never received counseling at his current DCPS school.

Student has been going to school since Winter Break, and he is trying to correct his poor attendance. However, Student feels that his current DCPS school is not as good for him as his previous MD public school because it is harder to focus on the work at the DCPS school. Student does not want to stay at his current DCPS school because the classes are hard there. To him, easier classes would mean that he could learn the work faster.¹⁶

15. Parent is of the opinion that Student needs smaller class sizes so that he can be more focused. He seems frustrated at his current DCPS school, and it does not appear that he is receiving all of his services there.¹⁷
16. Student's probation officer has been working with him since he attended the middle school in Maryland. The probation officer can see that Student is not functioning well at his current DCPS school. He's frustrated, and he needs more help. The DCPS school is

¹⁵ Testimony of student; testimony of probation officer.

¹⁶ Testimony of Student.

¹⁷ Testimony of Parent.

a good school, but it's not good for Student because he needs more structure and a smaller setting. The school is overwhelming for Student. The probation officer went to visit Student's current school a week before the due process hearing. When she saw Student, he was in tears and said he did not want to attend school there. The probation officer talked to Student's instructional aide in math, who said that Student has inconsistent attendance and when he does attend, he is behind, unfocused, and does not know what is going on. The probation officer also met Student's learning lab teacher when she took Student to the class; however, the teacher said that she did not know who Student was. The probation officer had previously met Student's English and math teachers, who gave a similar report to the math instructional aide.

Student's failure to go to school has caused the probation officer to file a petition to revoke his probation. School attendance is the only area where he's not in compliance with the terms of his probation, as there are no issues with drugs or curfew. If the petition is granted, Student will be committed to the Department of Youth and Rehabilitation Services. Student is fearful of being locked up, so he is trying to go to school now.¹⁸

17. The SEC at Student's current DCPS school believes that Student can succeed in high school general education classes because his inclusion teacher can modify the core curriculum to the fourth grade level for Student. Moreover, the school has various after school programs, such as tutoring and math lab, and all Student would have to do is show up to participate.

If Student needs more special education, the school can offer him English, math and reading resource classes, as well as Learning Lab, with smaller class sizes of 14 to 20 students. The ones with 20 students, such as English resource, will be broken down into two smaller classes. Student could also take a resource class for World History. The school does not offer an inclusion class for science, and Student seems to have already taken the environmental science resource course the school offers. He would also continue to take Internet, French and PE general education classes.

Student's current DCPS school is not presently implementing his IEP, because the IEP calls for 15 hours of inclusion, but Student is presently receiving 8 hours of inclusion per week in Algebra I and English I and 4 hours of pullout services each week in Learning Lab. Nevertheless, the SEC at the school asserts that the school can provide Student with all pullout services every day if necessary. However, there is no such program in place at this time, and Student would not have other full-time special education students attending classes with him.¹⁹

18. Student's current DCPS school has 1700 students ranging in age from 13 to 22, and it has 3 floors.²⁰
19. Student has been accepted for admission at a full-time special education school in Maryland that has the capacity to accommodate 40 to 46 students, but is only has 25

¹⁸ Testimony of probation officer.

¹⁹ Testimony of SEC.

²⁰ Testimony of SEC.

students physically on campus at this time. The school also serves “community support students,” who are picked up from home and taken to a library or bookstore to receive educational instruction. The school occupies part of the second floor of a Baptist church. It serves ED and LD students, as well as a couple of MR students. The majority of the students there have ADHD.

The school has five classrooms, including one self-contained classroom that is for lower functioning students who receive academics and functional life skills. Student would be placed in the self-contained classroom, which presently has 6 students, but the goal would be to transition him back into the classrooms where he would change classes from period to period. The school has 2 crisis intervention specialists and four therapists, as well as a consulting psychiatrist. The teachers at the school are Maryland-certified in special education. The school has 13 District of Columbia students, and it follows the DC curriculum for those students.

The school keeps its doors closed. If Student walked out of his classroom, a staff member would tail him and engage him in conversation while refraining from getting so close as to aggravate Student. If Student left school altogether, then the police would be called, and the police would not bring him back to the school. Last year, Students were taken to a local hospital for evaluation.

Student has visited the private school. He likes the school, because it offers even smaller class sizes than his Maryland public middle school offered and the teachers are able to give the students more attention there.²¹

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). As Petitioner failed to present any evidence in support of its request for compensatory education, the hearing officer will not analyze that request for relief herein.

Appropriateness of Current IEP and Location of Services

Special education means “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.” 34 C.F.R. § 300.39. Hence, a child’s “individualized education program,” or IEP, must be based upon the strengths, academic, developmental and functional needs, and evaluation results of the particular child, as well as the parents’ concerns for the child’s education and certain special factors that may affect the child’s academic progress. *See* 34 C.F.R. § 300.324(a). Moreover, to the maximum extent appropriate, children with disabilities should be educated with children who are nondisabled. 34 C.F.R. § 300.114(a)(2)(i). Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should only occur if the nature or severity of the child’s disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. § 300.114(a)(2)(ii).

²¹ Testimony of private school representative; testimony of Student.
HO Decision/Case

In this case, Petitioner argues that Student needs full-time out-of-general education special education help because, as a ninth grade student who is functioning at a fourth to fifth grade level and has ADHD, he needs a structured setting with small classes that offer instruction on his level. Petitioner also surmises that Student routinely failed to attend his classes at his current DCPS school because his academic skills are below the level required to function in his general education classes.

On the other hand, DCPS is of the opinion that Student can succeed with the 15 hours of inclusion prescribed by his current IEP if he would simply attend his classes. DCPS believes that Student has become trapped in a cycle, because he stopped going to class and then began attending again, by which time he had fallen behind, which caused him to become frustrated and to stop attending classes again. Nevertheless, DCPS asserts that there are people at Student's current DCPS school who can help Student through programs such as after-school tutoring. DCPS further asserts that even if Student requires more services than his current IEP provides, his current school can meet those needs by providing Student with a combination of inclusion and pullout services.

1. Appropriateness of IEP

The evidence in this case proves that Student is presently in the 9th grade, but he is functioning at the 4th to 5th grade level. Student's current IEP requires him to receive 15 hours per week of specialized instruction in an inclusion setting; however, Student has consistently failed to attend his classes, so it is impossible to determine with certainty whether or not the 15 hours of specialized instruction are sufficient to meet his needs. There is evidence which suggests that some combination of pullout and inclusion services could be sufficient to meet Student's needs, because Student is of the opinion that he can function in his current Learning Lab class, which is an out-of-general education class, and his current Algebra I class, where he is provided with inclusion support, and Student is also of the opinion that he can perform sufficiently in his current Internet/Computer and French classes, even though he does not receive inclusion support in those general education classes. On the other hand, the evidence also tends to suggest that more inclusion may be all Student requires to succeed in school, as Student is of the opinion that if he were provided with inclusion support in his English and Biology classes, he would be able to function properly in those classes as well. In any event, because of Student's excessive absences, there is insufficient evidence to determine whether or not his current IEP provides an appropriate level and form of services. The hearing officer also notes that Student's most recent psychoeducational evaluation does not recommend full-time special education services for him. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proof on its inappropriate IEP claim.

2. Inappropriate Placement/Location of Services Claim

The evidence in this case proves that Student's current DCPS school has failed to fully and properly implement his IEP. Hence, at the beginning of SY 2009/10, Student's IEP provided that he was to receive 5 hours per week of inclusion services and 30 minutes per week of behavioral support services. Although Student testified that he received inclusion help in English every other day for the first three to four weeks of school, the SEC testified that

Student's schedule did not provide him with the 5 hours of inclusion services he was supposed to receive each week. In any event, the evidence is undisputed that Student has not received any counseling at all since he began attending his current DCPS school. Moreover, by the third or fourth week of school, Student was not receiving any inclusion support at all either.²²

Thereafter, Student's IEP was revised on November 3, 2009 to require him to receive 15 hours per week of inclusion services, as well as the 30 minutes per week of behavioral support services he was previously supposed to receive. Although DCPS modified Student's class schedule in mid-November, the modified schedule did not provide Student with the services required by his IEP. According to Student's testimony, he has been receiving inclusion services in one class and pullout services in one class; whereas according to the SEC, Student is presently being provided with 8 hours of inclusion services in Algebra I and English I and 4 hours of pullout services in Learning Lab. In either event, however, Student is not receiving the 15 hours per week of inclusion services called for by his IEP. Moreover, Student's testimony that he still is not receiving any counseling services is uncontroverted.

The evidence in this case also proves that Student's excessive absences are affecting his ability to access the curriculum being offered to him at his current DCPS school, but the school is not structured enough to provide the level of attention and monitoring that were successful in addressing Student's attendance issues at his previous school. Moreover, a comparison of Student's performance at his previous school, which served a total of approximately 300 students, with his performance at his current school, which serves a total of approximately 1700 students and where he seems to be overwhelmed, suggests that Student requires a smaller environment as well as a more structured environment.

For the reasons set forth above, the hearing officer concludes that Petitioner has met its burden of proving its inappropriate location of services claim. The hearing officer is not persuaded that Student requires the extremely small, 25-student private school setting that Petitioner is requesting to succeed academically, but the hearing officer concludes on the basis of the evidence presented that the requested private school can implement Student's IEP and provide him with educational benefit. As DCPS has failed to propose any alternative school sites for the hearing officer's consideration, the hearing officer will award Student funding for the remainder of the 2009/10 academic at the requested private school.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner failed to meet its burden of proof on its inappropriate IEP claim but met its burden of proof on its inappropriate placement/location of services claim.

²² The hearing officer notes that although Student did not link his attendance problems to the lack of special education services at his current school, Student's testimony revealed that he began skipping his classes once the three or four weeks' worth of inclusion services he received in his English class ceased.

VII. ORDER

1. DCPS shall fund Student's placement at the full-time, private special education school in Maryland that recently accepted Student for admission. Said funding shall be provided for the remainder of SY 2009/10, and DCPS shall also provide or fund the transportation services necessary for Student to attend the school.
2. At Student's 30-day review meeting at the private school, DCPS shall either provide or participate in the development of a full-time IEP for Student. In the interim, the private school may provide Student with such full-time special education services as it deems appropriate.
3. Petitioner's claim for compensatory education is hereby **DISMISSED**.

/s/ Kimm H. Massey

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

Dated this 21st day of January, 2010.

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).