

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, NE, Second Floor
Washington, DC 20002

on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

Case No: 2012-0364

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

Room No.: 2006

OSSE
STUDENT HEARING OFFICE
2012 JUL 27 AM 9:19

HEARING OFFICER DETERMINATION

**BACKGROUND AND
PROCEDURAL HISTORY**

Student is a -year old male, who most recently attended a DCPS senior high school where he repeated the grade for the second time during school year 2011/12.

On May 14, 2012, Petitioner filed a Complaint against DCPS, alleging that DCPS failed to provide Student with an appropriate site location/placement. As relief for this alleged denial of FAPE, Petitioner requested (1) a finding in its favor, and (2) that DCPS be ordered to or agree to fund placement and transportation for Student at one of a series of specified private school, award appropriate compensatory education, and provide any other relief deemed appropriate.

The parties concluded the Resolution Meeting process by participating in a resolution session on June 1, 2012. No agreement was reached, but the parties did not shorten the 30-day resolution period. Therefore, the 45-day timeline began on June 14, 2012 and will end on July 28, 2012, which is the HOD deadline.

On June 11, 2012, the hearing officer convened a prehearing conference for this case and led the parties through a discussion of the issues, relief requested, and other relevant topics. On June 13, 2012, the hearing officer issued a Prehearing Order.

On June 22, 2012, DCPS filed its Response, which primarily asserted the following: DCPS provided Student's current location of services pursuant to a December 2011 settlement agreement with Parent that provided Student would remain at the school through the end of SY

2011/12; however, as of June 1, 2012, DCPS agreed to seek an alternate location for Parent and has been doing so since that time.

By their respective letters dated June 29, 2012, Petitioner disclosed twenty-three documents (Petitioner's Exhibits 1 – 23) and DCPS disclosed twelve documents (Respondent's Exhibits 1 – 12).

The hearing officer convened the due process hearing on July 9, 2012, as scheduled.¹ Petitioner's Exhibits 1–19 and 21-21, and Respondent's Exhibits 1-2 and 4-12 were admitted without objection. Petitioner's Exhibit 20 was conditionally excluded but later admitted with appropriate witness testimony, and Respondent's Exhibit 3 was admitted over Petitioner's objection.

As a preliminary matter, while awaiting Parent's slightly delayed arrival, DCPS represented that it had offered prior to July 3, 2012 to fund Student's placement at one of the private schools requested as relief in the Complaint, which was also a school where Student had received an acceptance, but Petitioner's counsel stated that Parent was no longer willing to accept that private school and had a preference for another private school. When Parent arrived and was notified of DCPS's offer, she enthusiastically agreed to have Student attend the offered private school. At that point, Petitioner's counsel stated that she wished to move forward solely on the issue of the requested relief of compensatory education.

Thereafter, the parties made opening statements, and Petitioner presented testimonial evidence but DCPS declined to present any testimony. After the parties made closing statements, the hearing officer brought the hearing to a close.

The due process hearing was convened and this Hearing Officer Determination is written pursuant to the Individuals with Disabilities Education Improvement Act ("IDEA"), 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.").

ISSUE(S)

The issue to be determined is as follows:

1. Is Student entitled to an award of compensatory education due to DCPS's failure to provide a new location of services for Student prior to Summer 2012?

FINDINGS OF FACT²

¹ Counsel for each party and the witnesses for each party are listed in the Appendix that accompanies this decision.

² To the extent that the hearing officer has declined to base a finding of fact on a witness's testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, then the hearing officer has taken such action based on the hearing officer's determinations of the credibility and/or lack of credibility of the witness(es) involved.

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

1. Student is a fifteen year old male, who most recently attended a DCPS senior high school where he repeated 9th grade for the second time during SY 2011/12.³
2. Student began attending the DCPS senior high school in January 2012 pursuant to a settlement agreement.⁴
3. On the second day after Student began attending the DCPS high school, the school's staff began calling Parent and saying they were having a problem getting Student to attend class and do the work, and asking what Parent could do to help them with Student. Parent often received calls three or more times per day from the school. The phone calls continued throughout the school year. Parent also had numerous meetings with the staff at the high school.⁵
4. Student was suspended several times while he was attending the DCPS senior high school, and on some occasions he was sent home without being formally suspended. Student's first suspension at the DCPS senior high school occurred on or about January 27, 2012, within his first month of attendance there.⁶
5. Student's February 2012 independent psychological evaluation revealed that he was performing on a 4th grade level in all academic areas, including reading, math, written language, and academic skills.⁷
6. On March 29, 2012, DCPS convened an MDT meeting to review Student's February 2012 independent psychological evaluation and review Student's DCPS-completed behavior intervention plan. During the meeting, the school social worker reported that Student's behaviors had decreased and calmed down and his anger was reduced, although Student still displayed some negative behaviors such as immaturity, not respecting boundaries of other children, and walking the halls. The social worker stated that a new functional behavior assessment ("FBA") of Student was in progress and his BIP would be revised upon completion of the FBA. Petitioner's then counsel asserted that the DCPS senior high school was inappropriate because Student needed more structure. Parent stated that the school was doing a great job but she agreed Student needed structure. DCPS maintained that the school was appropriate based on Student's IEP.⁸
7. Student's negative behaviors at the DCPS senior high school were essentially the same negative behaviors he demonstrated at his previous DCPS school, such as

³ See Complaint at 1 and 4.

⁴ Testimony of advocate; testimony of licensed professional counselor.

⁵ Testimony of Parent.

⁶ Testimony of Parent; see Respondent's Exhibit 6.

⁷ Respondent's Exhibit 8.

⁸ See Respondent's Exhibit 12.

noncompliance, defiance, walking out of class and walking hallways. However, at the DCPS senior high school he also began physically fighting with peers. Student's behaviors began to escalate at or about the end of March 2012. As a result, he had a violent outburst on April 12, 2012 that involved acting aggressively toward staff, and he had a violent confrontation with a classmate on May 1, 2012.⁹

8. On April 13, 2012, the DCPS senior high school developed an Action Plan for Student that included having either of two named behavior specialists respond first when Student was in crisis, notifying the school social worker, and making Parent aware of behaviors that led to Student's removal from the classroom.¹⁰
9. On May 14, 2012, Petitioner filed the instant Complaint.
10. On or about June 1, 2012, DCPS determined that Student required a different location of services.¹¹ On or about July 3, 2012, shortly before the due process hearing in this case, DCPS offered to fund Student's attendance at one of the private schools requested as relief in the Complaint.
11. Student received all Fs at the DCPS senior high school at the end of SY 2011/12, so he has been retained and will have to repeat 9th grade for the third time in SY 2012/13.¹²

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Compensatory Education

Under the theory of compensatory education, courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. 2005). Hence, a hearing officer may award compensatory education where a disabled child has been denied FAPE, and such compensatory awards should aim to place the disabled children in the position they would have occupied but for the school district's denial of FAPE. *D.W. v. District of Columbia*, 2010 WL 2990282 (D.D.C. July 26, 2010) (*quoting Reid* at 518). Alternatively, where there has been no denial of FAPE, there is no authority for an award of compensatory education for the disabled child.

In the instant case, Petitioner seeks an award of compensatory education on the ground that DCPS denied Student a FAPE by providing him with an inappropriate placement/location of services ("school") from the time of his March 29, 2012 MDT meeting forward, because at the

⁹ Testimony of advocate; testimony of independent tutor; *see* Petitioner's Exhibit 20 at 4, para. 19; *see* Petitioner's Exhibits 15-18.

¹⁰ Petitioner's Exhibit 14.

¹¹ *See* DCPS Response.

¹² Testimony of Parent; testimony of advocate.

time of the meeting it was apparent that Student required a more structured and therapeutic school. DCPS disagrees, noting that Student arrived at the school with a set of negative behaviors that continued while he was there, and it was not until much later in April or May of 2012 that DCPS began to see more red flags and ultimately determined to provide Student with another school.

A review of the evidence in this case confirms that when Student arrived at the DCPS senior high school pursuant to a settlement agreement in January 2012, he began displaying the same negative behaviors he demonstrated at his previous DCPS school, such as noncompliance, defiance, walking out of class and walking hallways. Ultimately, Student only attended the DCPS senior high school for one semester and during that time, DCPS worked with Student to address his negative behaviors. By the time of Student's March 29, 2012 MDT meeting, the school social worker reported that Student's behaviors had decreased and his anger was reduced, and Parent stated that the school was doing a great job. However, Student's behaviors began to escalate over time, and on April 12, 2012 and May 1, 2012 he exhibited violent behavior. The school developed an Action Plan for Student on April 13, 2012 to address his escalating behaviors, but by the end of the school year DCPS had determined to find another school for Student.

Based on the evidence summarized above, the hearing officer concludes that Petitioner has failed to meet its burden of proving a denial of FAPE that entitles Petitioner to an award of compensatory education in this case. In short, DCPS complied with its obligation to put measures in place to address Student's pre-existing negative behaviors when he arrived at the DCPS senior high school. Those measures resulted in some initial successes, but ultimately DCPS's efforts proved unsuccessful and DCPS has now agreed to fund Student's attendance at a full-time private special education school where he will have an opportunity to receive the academic and behavioral support he needs to thrive. Under these circumstances, an award of compensatory education is not warranted. *Compare DW v. District of Columbia, supra* (where DCPS denied Student a FAPE by providing Student with an inappropriate placement but later remedied its mistake by providing funding for a private school placement, no award of compensatory education was warranted).

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

1. Petitioner's request for compensatory education is **DENIED AND DISMISSED WITH PREJUDICE.**

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety

(90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

Date: 7/26/2012

/s/ Kimm Massey
Kimm Massey, Esq.
Hearing Officer