

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Student Hearing Office  
810 First Street, NE, Second Floor  
Washington, DC 20002

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on behalf of

Petitioner,

Hearing Officer: Kimm Massey, Esq.

v

DISTRICT OF COLUMBIA PUBLIC SCHOOLS,

Respondent.

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OSSE  
STUDENT HEARING OFFICE  
2011 SEP -6 AM 10:05

**HEARING OFFICER DETERMINATION**

**BACKGROUND AND  
PROCEDURAL HISTORY**

Student is a \_\_\_\_\_ year-old male student, who is currently attending an ED program at a DCPS public school.

On July 12, 2011, Petitioner filed a Complaint against Respondent DCPS, alleging that DCPS provided Student with an inappropriate school program/placement because the program identified is inappropriate in that it cannot provide Student with the level of academic and behavioral support and structure he requires. As relief for this alleged denial of FAPE, Petitioner requested funding for an appropriate program that can meet the academic and behavioral needs of Student and compensatory education for the period Student was without appropriate services.

On July 26, 2011, DCPS filed its Response to the Complaint, asserting therein, *inter alia*, that Petitioner and her counsel agreed to the location of services at Student's IEP meeting, that DCPS issued a June 10, 2011 prior written notice due to the change in location of the program for middle school students, that Student previously attended the school to which the program is being moved as a general education student at least two years ago, that Student's placement has not changed as only the location of the school has been changed, and that Petitioner is in no position to allege that the program is not appropriate because Student has yet to attend the program.

The parties concluded the Resolution Meeting process by failing to reach agreement on July 20, 2011 and electing to proceed to hearing. Hence, the 45-day timeline for this case started on July 21, 2011 and will end on September 3, 2011, the HOD due date.

On July 29, 2011, the hearing officer convened a prehearing conference and led the parties through a discussion of the issues, defenses, relief sought, and related matters. Petitioner withdrew its request for compensatory education. The hearing officer issued the Prehearing Order on August 2, 2011.

By their respective disclosure letters dated August 18, 2011, Petitioner disclosed five documents (Petitioner's Exhibits 1 – 5), and DCPS disclosed four documents (Respondent's Exhibits 1 - 4).

The hearing officer convened the due process hearing on August 25, 2011.<sup>1</sup> The parties' disclosures were admitted into the record without objection. Thereafter, the hearing officer received opening statements and testimonial evidence from both parties. Petitioner's counsel initially planned to present Parent's testimony in person, but Parent did not appear in person and opted to participate by phone when the hearing officer indicated a disinclination to grant a continuance. DCPS objected to Parent testifying without the documents, but the objection was procedural in nature on the ground that DCPS always has to ensure its witnesses have the documents. The hearing officer overruled the objection and allowed Parent to testify, indicating that if DCPS's attempt to cross-examine Parent was compromised by Parent's lack of access to the documents, the corresponding direct testimony would be stricken; however, this eventuality never arose. After all testimonial evidence had been presented, the hearing officer received closing statements and concluded the hearing.

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. Did DCPS provide Student with an inappropriate school program/placement because the program identified is inappropriate in that it cannot provide Student with the level of academic and behavioral support and structure he requires now that the program has been moved to a different school that Student previously attended with behavioral difficulties?

### **FINDINGS OF FACT**

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

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 attended a DCPS middle school for     and     grade. He took general education and special education classes in an inclusion setting at the middle school, and he ate lunch with general education students. Student exhibited a lot of behavioral problems at the school such as leaving class to be in the halls, not following the rules, and fighting. Student's community support specialist ("CSS") would make weekly visits to the middle school and sometimes the school administrators would call the CSS for extra support in de-escalating Student. Student's main problem at the school was that the unstructured setting affected Student's ability to focus and allowed Student to roam the halls.<sup>2</sup>
2. At the start of SY 2010/11, Student began attending a DCPS school that offered a full-time special education program for learning disabled ("LD") students. However, Student had the same types of behavioral problems at this school that he had at the DCPS middle school. A primary problem at this school was that Student is emotionally disturbed ("ED"), not LD, so he was frustrated with the slow pace at the school.<sup>3</sup>
3. In January 2011, Student was sent to another DCPS school that offered a full-time special education program for ED students. Parent agreed to Student's move to the new school because she thought it would be a good fit for Student. However, Student experienced some problems at the new school as well. He got into a lot of fights at the school, and he also went downstairs, where there was a separate school, and ran the halls and trashed the separate school.<sup>4</sup>
4. On June 10, 2011, DCPS issued a Prior Written Notice assigning Student to attend for SY 2011/12 the ED program at the junior high school he attended for     and     grade.<sup>5</sup>
5. The program Student attended for the second half of SY 2010/11 is actually being moved to the junior high school. The 3<sup>rd</sup> floor of the junior high school was renovated over the summer to accommodate the program, which is the sole occupant of the 3<sup>rd</sup> floor. The program has dedicated aides, a new academy coordinator who was hired from a local full-time private special education school, a company/behavior intervention group that has been contracted to provide social/emotional services, four behavioral specialists on staff, and six new teachers, although only five of the teachers were on board at the time of the due process hearing for this case.<sup>6</sup>
6. The students in the relocated program at the junior high school will only interact with the junior high school students when walking into the school building in the morning. In all other respects, the program is separate from the junior high school. Hence, the students from the program dismiss separately and use the gymnasium at a time when no other

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<sup>2</sup> Testimony of Mother; testimony of CSS.

<sup>3</sup> Testimony of Mother; testimony of CSS; testimony of SEC.

<sup>4</sup> Testimony of Mother; testimony of CSS.

<sup>5</sup> Respondent's Exhibit 3.

<sup>6</sup> Testimony of SEC.

students are there. There are two teachers assigned to each grade in the program. There are 2 "ABC rooms" with carpet and air conditioning for de-escalation of students. Padding for the walls has also been ordered for the de-escalation rooms. On the other hand, the relocated program shares the same SEC and principal that the middle school has.<sup>7</sup>

7. In the relocated program, Student would be in an \_\_\_\_\_ grade class with 10 students total, including Student, 1 teacher, 1 aide, and at least 1 dedicated aide for another student. There are presently a total of 29 students on the 3<sup>rd</sup> floor.<sup>8</sup>
8. Student began attending the relocated program at the middle school at the start of SY 2011/12, and he has reported back to Parent that the school is okay and has smaller classrooms with more teachers.<sup>9</sup>
9. The relocated program at the DCPS middle school does not constitute a change in placement for Student.
10. Student's current IEP, dated March 17, 2011, identifies Student's primary disability as other health impairment and requires Student to receive 31 hours per week of specialized instruction outside general education and 60 minutes per week of behavioral support services outside general education. The IEP indicates that Student's disability impacts his ability to experience success in the general education classroom without specialized instruction, and that Student needs social and emotional support in order to access the general education curriculum.<sup>10</sup>
11. The relocated ED program provides the full-time outside of general education environment and social and emotional support required by Student's IEP.

### **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:

#### **Alleged Inappropriate School Program/Placement**

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. However, "educational placement," as used in IDEIA means the educational program, not the particular institution where the program is implemented. *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5<sup>th</sup> Cir. 2003) ("*White*") (citations omitted); see also, *A.K. v. Alexandria City School Board*, 484 F.3d 672, 680

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<sup>7</sup> Testimony of SEC.

<sup>8</sup> Testimony of SEC.

<sup>9</sup> Testimony of Mother.

<sup>10</sup> Respondent's Exhibit 4; Petitioner's Exhibit 2.

(4<sup>th</sup> Cir. 2007) (citing *AW v. Fairfax County School Board*, 372 F.3d 674, 676 (4<sup>th</sup> Cir. 2004)). Hence, school districts are afforded much discretion in determining which school a student is to attend. See *White, supra*.

In the instant case, Petitioner asserts that DCPS has provided Student with an inappropriate school program/placement because the program identified is inappropriate in that it cannot provide Student with the level of academic and behavioral support and structure he requires. At the heart of Petitioner's claim is the assertion that DCPS's decision to keep Student in his current ED program even though the program has been relocated to a DCPS middle school that Student previously attended, and where he previously experienced behavioral problems, constitutes a change in placement. Petitioner maintains that Student's return to the previous middle school is inappropriate because he is familiar with the students and staff at the school and did not previously have a positive experience at the school.

DCPS argues that Petitioner confuses the terms "school" and "placement," because Student's placement has not changed even though the location of his school has been changed. DCPS maintains that Student's previous experience at the DCPS middle school is not a determining factor in this case because back then Student had a totally different IEP with inclusion services and classes and lunch with his non-disabled peers, whereas now his IEP provides him with full-time instruction outside general education and he has been placed in a separate ED program. DCPS further asserts that its undisputed testimonial evidence described exactly what will be available to Student in the new location, and there was no showing by Petitioner that the program cannot meet Student's needs.

Upon a review of the evidence in this case, the arguments of counsel, and applicable law, the hearing officer concludes that Petitioner has failed to meet its burden of demonstrating that DCPS has provided Student with an inappropriate program/placement. In reaching this decision, the hearing officer has taken into account the fact that, despite Petitioner's assertion to the contrary, DCPS's decision to change the location of Student's school did not constitute a change in placement. See e.g., *Mars Area School District v. J.R. and K.R.*, 47 IDELR 290 (W.D. Pa. 2007) (school district's decision to provide Student with inclusion services for the majority of the day instead of the one hour of services in a resource room he previously received did not generate the type of significant substantive impact on Student's education that would constitute a change in educational placement); *J.S. v. Lenape Regional High School District Board of Education*, 102 F.Supp.2d 540 (D. N.J. 2000) (school district's transfer of LD student from one school to another school within same district did not constitute change in placement where the two schools had slightly different student demographics but there was no substantive difference between the two class settings). The hearing officer has also taken into account DCPS's evidence proving that the relocated ED program offers a full-time outside of general education environment with the social and emotional support Student's IEP requires.

**ORDER**

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

1. All claims and requests for relief in Petitioner's July 12, 2011 Complaint are **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: 9/3/2011

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