

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

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**Confidential**

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STUDENT HEARING OFFICE

<p>STUDENT<sup>1</sup>, 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>October 15, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Fatmata Barrie</p> <p>Counsel for DCPS: Daniel McCall</p> <p><u>Hearing Officer:</u> Kimm H. Massey, Esq.</p>
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<sup>1</sup> 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 July 2, 2009, and DCPS filed its initial Response on July 10, 2009. DCPS also filed a Supplemental Response on August 27, 2009. The prehearing conference for this matter was held on August 25, 2009, and the hearing officer issued the Pre-Hearing Order on August 25, 2009.

The due process hearing was continued from September 4, 2009 to September 22, 2009 on Petitioner's written motion based on Parent's unavailability. The September 22, 2009 hearing was continued to October 5, 2009 to allow the hearing officer to receive the remaining testimonial evidence.

## III. ISSUE(S)

1. Did DCPS fail to convene a placement meeting and provide an appropriate placement?
2. Did DCPS fail to comply with a March 21, 2009 HOD by failing to discuss and determine placement?
3. Did DCPS fail to provide an appropriate IEP?
4. Did DCPS err in failing to provide compensatory education for the denial of FAPE found in the March 21, 2009 HOD?

## IV. FINDINGS OF FACT

1. Student is [REDACTED] years old. On March 21, 2009, the below hearing officer issued an HOD, in which the hearing officer determined that DCPS had violated Child Find by failing to identify, locate and evaluate Student as a student who potentially was in need of special education and related services. As relief for this violation of IDEIA, the hearing officer ordered DCPS to fund two independent evaluations of Student, and to thereafter conduct an eligibility meeting to, *inter alia*, determine Student's eligibility for special education services, and if Student was found eligible, develop an IEP for Student and discuss and determine an appropriate placement for implementation of the IEP.<sup>2</sup>

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<sup>2</sup> DCPS-01.

2. Student's April 2, 2009 independent Comprehensive Psychological Evaluation Report indicates that his cognitive ability is in the Average range of functioning, that his reading, oral language and written language skills are in the Average range, and that his mathematics skills are in the Low Average range. The report notes Student's diagnoses of Major Depression, ADHD Combined Type, and Bipolar Disorder NOS, all "by history," and states that Student takes several types of medication, including Abilify and Concerta. The report recommends for Student, *inter alia*, 1) individual and/or family therapy to address prior sexual abuse, prior domestic violence in the home, social skills to learn to accept others even when Student does not like them, and increased ability to recognize and verbalize hurt and angry feelings; and 2) the following classroom interventions to address his ADHD: positive reinforcers or rewards, the teaching of self-control strategies to delay aggressive behaviors, and the teaching of effective problem-solving skills. The report also states that an FBA and a BIP should be developed for Student. However, the FBA was recommended for diagnostic purposes because a student must be observed in at least two settings before a diagnosis of ADHD can be made, and a BIP will be necessary only if the FBA reveals that physical behaviors are present.<sup>3</sup>
3. Student's ADHD tends to manifest in the educational environment through behavioral issues and memory problems.<sup>4</sup>
4. On May 27, 2009, DCPS held an eligibility meeting for Student and determined him eligible for special education and related services as an emotionally disturbed ("ED") student. At the May 27<sup>th</sup> eligibility meeting, the DCPS school psychologist recommended ED and OHI classifications for Student, as well as a small, structured, therapeutic setting; however, the IEP team decided to classify Student as ED only, to provide him with 27.5 hours of services, and to recommend a full-time therapeutic setting for him. The team explicitly determined that the DCPS middle school Student was attending at the time was an inappropriate setting for him. The team agreed to reconvene in August to determine Student's school site since the site would not be implemented until the start of the 2009/20 school year. Therefore, the middle school SEC forwarded Student's information to DCPS headquarters with a request for a new site.<sup>5</sup>
5. Student's initial and current IEP is dated June 5, 2009. DCPS developed the IEP subsequent to the May 27<sup>th</sup> eligibility meeting and called Parent to come to the school and sign it. Parent did so. The IEP identifies Student's primary disability as ED, requires him to receive 25 hours per week of specialized instruction and 1.5 hours per week of behavioral support services, and indicates that Student "needs instruction in a small group therapeutic setting. The IEP contains annual goals in the academic areas of mathematics, reading and written expression, as well as the following annual goals in the area of emotional, social and behavioral development: Student will 1) "reduce depression by expressing his feelings in the appropriate setting and working with his therapist"; 2) "discuss his feelings of home violence and learn how to understand and work through

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<sup>3</sup> Petitioner's Exhibit 7; Testimony of Petitioner's expert psychologist.

<sup>4</sup> Testimony of Petitioner's expert psychologist.

<sup>5</sup> See Petitioner's Exhibits 4, 5; Testimony of middle school SEC; Testimony of educational advocate.

such issues”; 3) “recognize and verbalize hurt feelings and anger. He will learn strategies on how to control his acting out”; and 4) “develop better social skills when dealing with others even when he is frustrated by others.”<sup>6</sup>

6. By an August 5, 2009 letter to the SEC at the DCPS middle school Student attended in SY 2008/09, Student’s educational advocate requested, on Parent’s behalf, an MDT/Placement meeting for Student. By an August 10, 2009 letter to the SEC at the middle school, the educational advocate “memorialized” the following: an MDT/Placement meeting was to be held for Student on August 10<sup>th</sup>, but said meeting did not take place due to the SEC’s unavailability, the SEC failed to notify Parent beforehand of his unavailability, and the SEC’s office made no attempt to reschedule the meeting.<sup>7</sup>
7. At the end of the summer of 2009, the middle school SEC received a new site for Student from the SEC’s supervisor at DCPS headquarters. The supervisor indicated that the chosen site, which is a therapeutic educational center for students who have a primary disability classification of ED, could meet Student’s needs. DCPS prepared a Prior Notice of Placement to the educational center (“EC”), and then convened a meeting for Student. The meeting took place on the Friday immediately before the Monday that was the first day of school, and DCPS indicated that Student would be attending the EC. However, DCPS did not describe the EC to Parent and the educational advocate, Parent was not invited to visit the school, and no one from the EC attended the meeting. Parent was told that Student had to go to a DCPS school and to give the situation at least 30 days. Parent agreed to allow Student to attend the school for 30 days and then to have a 30-day review.<sup>8</sup>
8. Student began attending the EC at the start of the 2009/10 school year. Student has not been receiving any one-on-one counseling services at the EC. The EC only provides behavioral support and does not provide individual counseling unless a particular student shows a need for such counseling. According to the SEC at the EC, Student has not shown a need for individual counseling.  
Student does not like the school, primarily because the students there fight frequently, run around and do not do their work, and the behavioral aide assigned to Student’s class has threatened to “put his hands on” Student if Student defends himself against a female student who has been hitting Student.<sup>9</sup>
9. Parent has to make Student go to the EC each school day, because Student does not want to go. Student looks sad, tries to miss his school bus, or makes excuses about being sick to try to avoid going to school. The week before the due process hearing, Parent went to the EC and asked for a meeting with the Principal and Student’s teacher, but the request was denied. Parent specifically mentioned the behavioral aide’s threatening behavior toward Student and the Assistant Principal said he would look into the matter and call

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<sup>6</sup> Testimony of middle school SEC; Petitioner’s Exhibit 4.

<sup>7</sup> Petitioner’s Exhibit 14.

<sup>8</sup> Testimony of middle school SEC; Testimony of Parent; Testimony of educational advocate.

<sup>9</sup> Testimony of Student; Testimony of SEC from EC.

Parent back; however, Parent had not heard anything from the Assistant Principal as of the date of the hearing.<sup>10</sup>

10. At the EC, Student has been placed in a 7<sup>th</sup>/8<sup>th</sup> grade classroom geared toward moving the students out of special education because of academic and/or behavior improvements. Student has very strong academic skills, and a classroom-based assessment administered to Student at the EC indicated that he is above grade level in both math and reading. When he first began attending the EC, he was soft-spoken and very compliant. Student later began exhibiting some behavior problems when he began copying the behaviors of some of his classmates. One of the SECs at the EC monitors Student's class because she is aware that there are some problems with that class. Indeed, when Parent and Student's educational advocate visited the EC during the last week of September, half of the students in Student's class had been sent to in-school suspension for the day, one of the remaining students had been placed in the "quiet chair," and another student was being disruptive. This student became so disruptive that the student in the quiet chair left the chair and began acting out, and Student also became agitated and began talking back to the teacher in a dismissive tone.<sup>11</sup>
11. Student has been accepted for admission at a private, full-time special education, therapeutic day program ("private school"). The private school provides a behavior management program to all students, and it offers a low student/teacher ratio, counseling and other related services, behavioral counselors and two behavior centers. The classrooms are set up so as to reduce distractions, to afford proximity control by aides and teachers, and to include multi-sensory presentation and language-based instruction presented in more than one way. Although the private school has a letter of approval from the DCPS Chancellor's Office, DCPS recently notified the private school that the DCPS students attending the school are not receiving a proper education because their IEPs are not being implemented. The private school challenged the accusation on the ground that it was unfounded. DCPS subsequently withdrew its claims and indicated that the parents who want their children to remain at the private school will be allowed to keep their children there, while the parents who want to explore other options will be allowed to send their children elsewhere.<sup>12</sup>
12. Although Petitioner's "compensatory education witness" has a Master's degree with a concentration focusing on ED students and four years of experience serving as a special education teacher at a non-public school for ED students, she has worked one-on-one with ADHD students for only approximately 1½ years, and in that "coach" position she primarily guides and monitors student performance on a computer program designed for students with ADHD. Moreover, although 60 to 70% of the students at the non-public school for ED students also had ADHD, the witness never wrote any social/emotional/behavior goals for the students, as those goals were always written by the social worker. Finally, the witness developed a compensatory education plan for Student based on

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<sup>10</sup> Testimony of Parent.

<sup>11</sup> Testimony of SEC from EC; Testimony of educational advocate.

<sup>12</sup> Testimony of private school's Assistant Educational Director.

assessments she administered to Student, but those assessments contradicted the results of Student's independent comprehensive psychological evaluation by indicating that Student is performing several levels below grade level in reading, writing and math.<sup>13</sup>

## 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 Conduct Placement Meeting/Appropriateness of Placement

#### a. Placement Meeting

Petitioner has alleged that DCPS failed to conduct a placement meeting for Student. However, the evidence demonstrates that DCPS held a placement meeting for Student on the Friday immediately preceding the Monday that was the first day of school for DCPS for SY 2009/10. Although the placement meeting was held subsequent to the filing of the Complaint, the evidence in this case demonstrates that the team agreed at Student's May 27, 2009 eligibility meeting to reconvene in August to determine Student's school site. Yet, Petitioner filed its Complaint on July 2, 2009. Under these circumstances, the hearing officer concludes that Petitioner has not met its burden of proving that DCPS failed to convene a placement meeting for Student.

#### b. Appropriateness of Placement

Petitioner has also alleged that DCPS failed to provide an appropriate placement for Student. 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. §§ 300.114-300.120. In this case, Student's IEP team decided at his eligibility meeting that he requires a full-time therapeutic setting. Although Student's current DCPS placement purports to be a therapeutic educational center for students who have a primary disability classification of ED, the students there are running out of control without proper staff supervision and control, there staff is aware of problems with Student's class in particular, and Student has begun to exhibit behavior problems that mimic the inappropriate behaviors of some of his classmates. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS has failed to provide an appropriate placement for Student.

Petitioner has asked the hearing officer to award Student a placement at the private, full-time special education, therapeutic day program that recently accepted him for admission. The evidence in this case demonstrates that the school provides a behavior management program to all students and offers a low student/teacher ratio, as well as counseling and other related services. The school has a letter of approval from the DCPS Chancellor's Office. However, DCPS recently accused the school of failing to implement the IEPs of DCPS students who attend the school, but then DCPS withdrew its claims and indicated that it would not insist on the

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<sup>13</sup> Testimony of Petitioner's compensatory education witness.  
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removal of all DCPS students from the school. Under these circumstances, the hearing officer is reluctant to award Student a placement at the private school. On the other hand, the evidence is clear that Student's current placement is inappropriate, neither party has provided the hearing officer with another potential school site, and but for the controversy that has recently surrounded the private school, the hearing officer would not be concerned about the private school's ability to provide Student with educational benefit. After weighing these opposing considerations, the hearing officer has determined to provide Student with an interim placement at the private school and to require the parties to attend a placement meeting for Student within 90 days of the issuance of this HOD to determine an appropriate full-time therapeutic placement for Student. *See Florence County School District Four v. Shannon Carter*, 510 U.S. 7 (1993) (court authorized to grant such relief as it determines appropriate upon finding the public placement violated IDEA, but court must consider all relevant factors in fashioning discretionary equitable relief under IDEA).

## **2. Alleged Failure to Comply with March 21, 2009 HOD**

Petitioner has alleged that DCPS failed to comply with the March 21, 2009 HOD by failing to discuss and determine a placement at Student's eligibility meeting. However, the evidence in this case demonstrates that the team discussed placement when it determined that the DCPS middle school Student was attending at the time of the eligibility meeting was an inappropriate setting for him. The evidence further demonstrates that the team agreed to reconvene in August to determine Student's school site since the site would not be implemented until the start of the 2009/10 school year, and that DCPS forwarded Student's information to DCPS headquarters with a request for a new school site. Upon consideration of this evidence, the hearing officer concludes that, although DCPS did not technically determine Student's school site at the time of the eligibility meeting, DCPS addressed the issue of Student's placement to an extent that was sufficient to constitute compliance with the hearing officer's directive to discuss and determine a placement for Student at the eligibility meeting. As a result, Petitioner has failed to meet its burden of proof on this issue.

## **3. Appropriateness of IEP**

Petitioner has alleged that DCPS failed to provide Student with an appropriate IEP because Student has been diagnosed with ADHD, which allegedly affects him academically, but DCPS did not classify Student as OHI and include that classification on Student's IEP. The hearing officer notes that a child's disability classification should not drive a child's IEP programming, because the programming must to be based on the individual needs of the particular child. Hence, IDEIA requires LEAs to conduct evaluations that are sufficiently comprehensive to identify all of a child's special education and related services needs, whether or not such needs are commonly linked to the child's disability classification. *See* 34 C.F.R. § 300.304(c)(6). Similarly, IDEIA provides that in developing a child's IEP, the IEP team must consider that particular child's strengths, as well as the child's academic, developmental, and functional needs. *See* 34 C.F.R. § 300.324(a)(1). In light of these provisions, the hearing officer concludes that DCPS's failure to include OHI on Student's IEP did not render that IEP inappropriate.

On the other hand, to the extent that Student's ADHD may actually affect his academic progress, the IEP should include appropriate services to address the effects of the ADHD, regardless of whether or not Student has been classified as OHI. In this case, however, the evidence does not definitively prove that Student's ADHD is affecting his academic progress. Hence, although Petitioner's expert testified that Student's ADHD manifests in the educational environment through his behavioral issues and memory problems, there is other convincing testimonial evidence which tends to prove that Student is presently performing above grade level in both math and reading, and that Student's only behavioral problems in his current school have resulted from him copying the behaviors of others who are misbehaving. As a result, the hearing officer is not persuaded that Student's ADHD is presently affecting his academic progress, and the hearing officer concludes that Petitioner has failed to meet its burden of proving that Student's IEP is inappropriate for failure to address Student's ADHD.

#### **4. Alleged Error With Respect to Compensatory Education**

Petitioner has alleged that DCPS failed to provide Student with compensatory education to address the denial of FAPE found by the instant hearing officer in the March 2, 1 2009 HOD. However, compensatory education is a form of equitable relief that may be awarded by a court or a hearing officer upon a finding of a violation of IDEIA. *See Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. 2005). Hence, an IEP team has no authority to award the equitable remedy of compensatory education, and the hearing officer is unwilling to hold DCPS liable for failing to do so.<sup>14</sup>

Nevertheless, given the prior finding of a denial of FAPE, it is within the hearing officer's discretion in this case to award compensatory education to redress that denial of FAPE. However, in every case where compensatory education is to be awarded, the inquiry must be fact-specific and the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Reid*, 401 F.3d at 524. Unfortunately, in this case, Petitioner proposed a compensatory education plan for Student that is based on assessment results which contradict the results of Student's independent comprehensive psychological evaluation, as well as the results of informal testing administered to Student at his current placement. Under these circumstances, the hearing officer is not persuaded that Petitioner's proposed compensatory education plan is reasonably calculated to provide the educational benefits that likely would have accrued to Student had DCPS provided the services it should have supplied in the first place. Hence, the hearing officer declines to exercise her discretion to grant an award of compensatory education in this case.

#### **5. Petitioner's Request for an FBA and a BIP**

Petitioner has requested both an FBA and a BIP as relief in this case, asserting that Student is entitled to the requested relief because of his ED disability classification. However, Petitioner's

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<sup>14</sup> The hearing officer does not intend to suggest that DCPS may not (or should not) take into account that it failed to provide past services to a student in fashioning that Student's IEP or awarding extra services to that student over and above the services provided in the IEP; however, the hearing officer declines to characterize such an award of extra services as "compensatory education," which is a term used to describe an equitable remedy that may be awarded by a judicial officer.

evidence demonstrates that Student's independent evaluators recommended an FBA for him for diagnostic purposes, and Petitioner's expert psychologist testified that a BIP will be necessary only if the FBA reveals that physical behaviors are present. Under these circumstances, the hearing officer concludes that it would be inappropriate to order DCPS to provide an FBA and a BIP for Student because Petitioner has not met its burden of proving that the items are necessary to enable Student to advance appropriately toward his IEP goals and make progress in the general education curriculum. See 34 C.F.R. § 300.320(a).

## VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proving that DCPS failed to provide Student with an appropriate placement but otherwise failed to meet its burden of proof in this case.

## VII. ORDER

1. Petitioner is hereby awarded an interim private placement for Student at the private, full-time special education, therapeutic day program that recently accepted him for admission. However, within 90 days after Student begins attending the private school, DCPS shall convene a placement meeting to determine an appropriate full-time therapeutic school site for Student, and Petitioner shall participate in the meeting. The parties shall consider Student's success or lack of success at the private school, as well as the pros and cons of moving Student during the middle of the school year, in determining an appropriate site for Student. In the event DCPS fails to conduct the placement meeting ordered herein, DCPS shall fund Student's placement at the private school for the remainder of the 2009/10 school year.
2. Petitioner's remaining requests for relief are hereby **DENIED**.

/s/ Kimm H. Massey

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

Dated this 15th day of October, 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).