

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

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**Confidential**

OSSE  
STUDENT HEARING OFFICE  
2009 OCT -6 AM 8:43

<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 5, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Georgina Oladokun, Esq.</p> <p>Counsel for DCPS: Candace Sandifer, Esq.</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 23, 2009. By email dated August 6, 2009, the District of Columbia Public Schools ("DCPS") asserted that the Complaint had been filed with the SHO but not served on DCPS. This email was followed by a series of emails between the parties and the hearing officer, as well as a Motion to Dismiss by Petitioner. In the end, however, Petitioner provided proof of service on DCPS, and DCPS filed its Response on August 17, 2009.

The prehearing conference for this matter was held on September 9, 2009, and the Pre-Hearing Order was issued on September 15, 2009.

On September 14, 2009, Petitioner filed a Motion to Compel Attendance, by which Petitioner sought to have the hearing officer issue Notices to Appear to two DCPS employees from Student's present school of attendance. By email dated September 15, 2009, the hearing officer referred Petitioner's counsel to § 800.1(4) of the Standard Operating Procedures, which governs Notices to Appear, provided a detailed explanation of the requirements for obtaining such Notices, and invited a response from Petitioner's counsel. Petitioner's counsel failed to respond or submit the necessary filings, with the result that no Notices were issued.

The due process hearing was convened on September 25, 2009. Petitioner's 19 disclosed documents (hereinafter Petitioner's Exhibits 1 – 19) were admitted into the record without objection. Petitioner objected to the admission of DCPS's seven disclosed documents, on the ground that the documents were submitted one day after the Five-Day disclosure deadline. DCPS-01 was merely DCPS's Response, which was already part of the official record. Pursuant to the discretion afforded hearing officers at 34 C.F.R. § 300.512(b)(2), the hearing officer admitted DCPS-02 through DCPS-04, which were Student's recent evaluations. DCPS's remaining documents were excluded on Petitioner's objection.

DCPS declined to make an opening statement and did not present any witnesses during the hearing. Upon the conclusion of Petitioner's case, however, DCPS made a motion for a directed verdict on the issues of DCPS's alleged failure to implement Student's IEP, compensatory education, and ESY, as well as Petitioner's requested relief of an educational evaluation. The hearing officer granted the motion with respect to Petitioner's claim that DCPS failed to implement Student's IEP, compensatory education, and the requested educational assessment, on the ground that Petitioner presented no evidence whatsoever -- either testimonial or documentary, on those issues. The hearing officer denied the motion with respect to the issue of ESY, on the ground that Petitioner had presented sufficient evidence on that issue to survive DCPS's motion for directed verdict.

At the conclusion of the five-hour hearing, insufficient time remained for the parties to make closing statements. Therefore, the hearing officer allowed the parties until midnight the following Monday, September 28, 2009, to submit written closing statements.

### III. ISSUE(S)

1. Did DCPS fail to convene a placement meeting upon Parent's request?
2. Did DCPS fail to provide an appropriate placement?
3. Did DCPS fail to provide ESY in the Summer of 2009?

### IV. FINDINGS OF FACT

1. On February 16, 2009, Prince George's County Public Schools ("PGCPS") held an eligibility meeting. After reviewing the results of Student's most recent evaluations, PGCPS determined that Student was eligible for special education and related services as a Student with an emotional impairment ("ED"). The team and the family mutually agreed to reconvene within thirty days to develop an IEP for Student.<sup>2</sup>
2. On February 27, 2009, PGCPS prepared a draft IEP for Student. The IEP acknowledges that Student was under the custody of CFSA at the time, and that DCPS was financially responsible for Student. Pursuant to the draft IEP, Student was to receive specialized instruction and behavioral intervention services, as well as other accommodations, classroom aids and supports. At this meeting, the team decided to reconvene to determine a placement for Student and to invite DCPS to the placement meeting.<sup>3</sup>
3. Student's most recent functional behavior assessment ("FBA") and behavior intervention plan ("BIP") were developed by PGCPS on January 28, 2009.<sup>4</sup>
4. At the time of Student's February 2009 PGCPS eligibility meeting and IEP, Student was in the care and custody of his great aunt, who lived in Prince George's County, Maryland, but was a licensed caretaker and provider for DC Government's Child and Family Services Agency.<sup>5</sup>
5. On March 9, 2009, Petitioner's counsel sent a letter to the DCPS Office of Special Education, in which she requested that DCPS schedule a placement meeting for Student.<sup>6</sup>

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<sup>2</sup> Petitioner's Exhibit 5.

<sup>3</sup> Petitioner's Exhibits 11 and 4.

<sup>4</sup> Petitioner's Exhibits 9 and 10.

<sup>5</sup> Petitioner's Exhibit 14.

<sup>6</sup> Petitioner's Exhibit 16.

6. Student began attending a DCPS elementary school at approximately the end of March or early April. The school called Parent on a routine basis to come pick up Student due to behavioral issues such as cursing and acting out. Student received several suspensions from the school, and if he was not suspended, then Parent was being called to come pick him up. On occasion, Student remained at school until noon before Parent was called to pick him other. Other times, Parent would be called to pick up Student before noon.<sup>7</sup>
7. After Student began attending the DCPS school, PGCPs held a placement meeting for Student, and a DCPS representative attended the meeting. However, after being advised that Student had been transferred to the DCPS school, the DCPS representative declined to identify a placement and advised Parent to seek a new IEP from the DCPS/neighborhood school.<sup>8</sup>
8. In the meantime, Parent had given Student's PGCPs IEP to the SEC at the DCPS school on the first day she registered Student there. On May 6, 2009, DCPS developed a DCPS IEP for Student. That IEP identified Student's primary disability as ED, and it required Student to receive 26.5 hours of specialized instruction, 1 hour of behavioral support services, and an extended school year ("ESY"). During the meeting, the team determined that Student required a more restrictive setting with full-time special education services. The SEC indicated that he would request a placement for Student from the officials at DCPS headquarters. The SEC advised Parent of the possibility that a placement would not be awarded until the following school year because the 1008/09 school year was almost over.<sup>9</sup>
9. Even as Parent was attending the May 6, 2009 MDT meeting for Student, Student's teachers called up to the meeting and asked Parent to come get Student because he was cursing and misbehaving. Parent went to get Student and brought him back up to the meeting with her.<sup>10</sup>
10. Approximately 2 weeks after SY 2008/09 ended, the SEC from Student's DCPS school called Parent and instructed her to send Student to summer school. Parent took Student to summer school the next day. Student informed Parent that he was not doing any work in summer school, and he never brought any homework home. Instead, he was participating in activities such as swimming and skating, and going to movies, parks/playgrounds, and museums. Parent had to pay for the activities and/or for lunch when an activity, such as the museum, was free. Student was able to attend for approximately two weeks, but then the program ended. The school secretary told Parent that summer school for special education was over, but Parent could send Student to regular summer camp at school, which started at 1 pm.<sup>11</sup>

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

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

<sup>9</sup> Testimony of Parent; Petitioner's Exhibit 12.

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

<sup>11</sup> Testimony of Parent.

11. On August 13, 2009, Petitioner's counsel sent a letter to the SEC at the DCPS school Student attended during the latter portion of SY 2008/09. The letter stated that the MDT had determined that Student required a full-time special education placement, and that DCPS had failed to provide such a placement for student even though the new school year was fast approaching. Petitioner's counsel also requested a placement meeting and appropriate placement within 10 days and indicated that if DCPS failed to comply with the request, Parent would make a unilateral placement at DCPS's expense.<sup>12</sup>
  
12. Parent unilaterally placed Student at the middle school campus of a local full-time special education private school, and Student began attending the school at the start of the 2009/10 school year. Student meets the profile of the typical student at the private school with ADHD and ED, in that he is squirmy, fidgety, has a low attention span, and demonstrates offensive behavior. However, Student has exhibited more behavior issues than the typical student at the school, and he requires lots of verbal redirection. Nevertheless, the school is of the opinion that Student can be managed with a little more attention and effort than usual, and the school staff continues to feel the school is appropriate for Student.

The school is DCPS certified and specializes in servicing student with ED. The staff constantly monitors and addresses behavior issues. The school has a social worker, who provides wraparound services for all students, behavioral specialists, an intervention specialist, a 1-on-1 therapist, and psychological consults. The school provides all related services listed on a student's IEP and always includes a behavior intervention plan ("BIP") with its IEPs. The school can also conduct an FBA for Student.

Student has been placed in a class with 7 students and 1 teacher. His class shares 1 behavior technician and 1 intervention specialist with three other classrooms. Based on Student's prior educational documents and his behavior since he has began attending the private school, the staff at the private school would like to assign an aide to work with Student, and the aide has already been selected and introduced to Student. However, an aide will not be assigned to Student unless and until funding is provided by DCPS, as Student is currently on a scholarship that will end in December 2009.<sup>13</sup>
  
13. Student has been placed on a point system at the private school. He has made some progress in terms of behavior, although such progress tends to be slow. Parent is of the opinion that Student reads better now that he has been at the school, and he tries to calm down and stay on his behavior plan. Although the school calls Parent to inform her of incidents, such as when Student has gotten into a fight, they do not call her to come pick up Student and take him home. Indeed, the school does not issue out-of-school suspensions but instead utilizes time outs and after-school detentions.<sup>14</sup>

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<sup>12</sup> Petitioner's Exhibit 18.

<sup>13</sup> Testimony of Parent; Testimony of private school Admissions Coordinator.

<sup>14</sup> Testimony of Parent; Testimony of private school Admissions Coordinator; Testimony of private school clinical therapist.

## V. CONCLUSIONS OF LAW

There are three claims to be decided in this case. As the party seeking relief, 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).

### a. Placement Meeting and Allegedly Inappropriate 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. §§ 300.114-300.120. In this case, Petitioner has alleged that DCPS failed to convene a placement meeting upon Parent's request and failed to provide Student with an appropriate placement. A review of the evidence confirms that despite Petitioner's written requests for a placement meeting, DCPS has yet to convene a placement meeting and assign Student to a school that can implement his IEP. In its written closing statement, DCPS argues that Student was not harmed by DCPS's failure to convene a placement meeting because the meeting "would have occurred during the summer months," and DCPS requests that the hearing officer allow DCPS to convene a placement meeting to determine an appropriate placement. According to DCPS, Parent should have sent Student back to the same neighborhood school that repeatedly suspended him the year before to wait for DCPS to convene a placement meeting and assign an appropriate placement.

The hearing officer rejects DCPS's argument. DCPS has failed to provide any explanation whatsoever for its failure to convene a placement meeting for Student between May 6, 2009, when it determined Student required a full-time special education placement, and the start of the 2009/10 school year. Moreover, as Petitioner points out in its written closing, even after Petitioner's August 13, 2009 letter informing DCPS of Petitioner's intent to make a unilateral placement at DCPS's expense if no placement meeting was held within 10 days, DCPS still made no attempt whatsoever to convene a placement meeting and provide Student with an appropriate placement. The harm to Student is obvious: At the beginning of the 2009/10 school year, DCPS had failed to assign Student to a school that could implement his IEP, with the result that Parent had to choose between sending Student back to the neighborhood school that suspended him repeatedly the previous school year, keeping Student home, or making a unilateral private placement. Under these circumstances, the hearing officer concludes that Petitioner has met its burden of demonstrating that DCPS denied Student a FAPE by failing to convene a placement meeting upon Parent's request and failing to provide an appropriate placement.

### b. ESY

Pursuant to IDEIA, ESY services are special education and related services that are provided to a child with a disability beyond the normal school year, in accordance with the child's IEP, and at no cost to the child's parents. 34 C.F.R. § 300.106(b)(1). In this case, Petitioner has alleged that DCPS failed to provide Student with ESY services during the summer of 2009.

The evidence demonstrates that Parent was instructed by DCPS to bring Student in for summer school after the program had already begun, and Student attended the program for approximately two weeks before the program ended. Although the school secretary stated the program was summer school for special education, the only evidence of record indicates that Student did no class work, received no homework, and spent the bulk of his time in outdoor activities such as swimming, skating, museum trips, and visits to parks/playgrounds. Under these circumstances, the hearing officer concludes that Petitioner met its burden of proving that DCPS failed to provide Student with ESY services, within the meaning of IDEIA, during the summer of 2009.

### **5. Relief to be Awarded**

As relief in this case, Petitioner has requested placement and funding at the private school Student presently attends, including transportation, an independent FBA and an independent BIP, as well as a meeting to review the FBA and BIP, develop an appropriate IEP with all related services, discuss and determine placement, and develop a compensatory education award.

In light of the hearing officer's conclusions that Petitioner met its burden of proving that DCPS denied Student a FAPE by failing to convene a placement meeting and determine an appropriate placement for Student, and failed to provide Student with ESY during the summer of 2009, the hearing officer further concludes that it would be appropriate to order DCPS to fund Student's attendance at his current private school for the 2009/10 school year and provide transportation services to Student. *See Burlington School Committee, et al. v. Massachusetts Department of Education*, 471 U.S. 359 (1985) (tuition reimbursement and/or prospective injunction placing child in private school proper where court finds parents' private placement is proper but IEP calling for placement in public school was inappropriate); *Florence County School District Four, et al. v. Shannon Carter*, 510 U.S. 7 (1993) (once court determines public placement violated IDEIA, court authorized to grant such relief as it determines is appropriate); 34 C.F.R. § 300.343 (related services include transportation).

With respect to Petitioner's remaining requests for relief, however, the hearing officer has been unable to find support in the record for an award of an independent FBA and BIP. There is no evidence tending to demonstrate the appropriateness or inappropriateness of the FBA and BIP PGCPD developed for Student in January 2009. Hence, the hearing officer will order DCPS to convene a meeting to review the existing FBA and BIP and either adopt them if it determines they remain appropriate, or develop and implement a new FBA and BIP for Student upon a finding that such a course of action is necessary. *Compare* 34 C.F.R. 300.323(e)-(f) (where disabled child transfers from another public agency within the State or from another State, the new public agency must implement existing IEP until it either adopts same or develops, adopts and implements new IEP if appropriate).

Although the hearing officer is granting Petitioner's request for a private placement during SY 2009/10, the hearing officer will not preclude DCPS from discussing and determining an appropriate placement for Student, as requested by Petitioner. However, the hearing officer rejects Petitioner's request that DCPS be required to develop an appropriate IEP and develop a compensatory education award at the meeting held in connection with the FBA and BIP because

there has been no evidence that the current IEP is inappropriate, and Petitioner has wholly failed to meet the *Reid* standard for an award of compensatory education.<sup>15</sup>

## VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proof on the three claims that survived DCPS's motion for a directed verdict.

## VII. ORDER

1. DCPS shall fund Student's placement at his current private school for the 2009/10 school year and provide Student with necessary transportation services to and from the school.
2. Within 30 days of the issuance of this Order, DCPS shall review Student's existing FBA and BIP and either adopt same or develop and implement a new FBA and BIP for Student. In the interim, DCPS shall implement Student's existing FBA and BIP. DCPS is not precluded from discussing and determining an appropriate placement for Student at the meeting held to review the FBA and BIP. Moreover, if DCPS fails to conduct a review of Student's existing FBA and BIP within the 30-day period, the private school shall have the right to do so and develop a new FBA and BIP, if appropriate, at DCPS's expense.
3. Petitioner's remaining requests for relief are hereby **DENIED**.

/s/ Kimm H. Massey

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

Dated this 5th 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).

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<sup>15</sup> See *Reid v. District of Columbia*, 401 F.3d 516, 523 (D.C. 2005).  
HO Decision/Case # 2009-1077

APPENDIX A

INDEX OF NAMES

In the MATTER OF "Student" v. DCPS

Placement Specialist Monitor	
Principal	
DCPS School Psychologist	
Third Grade Teacher	
Special Education Coordinator, [REDACTED]	
Special Education Specialist, Cluster IV	
Occupational Therapist	
Physical Therapist	
Private Psychologist	
Child and Child's DCPS ID # or SSN (insert ID # or Case Number on each page of the HOD vice child's name)	[REDACTED]
Child's Parent(s) (specific relationship)	[REDACTED]
Child/Parent's Representative	[REDACTED]
School System's Representative	[REDACTED]
Observer/School System's Co- Representative	[REDACTED]
Name of School	[REDACTED]
Student's Cousin	
Admissions Coordinator, [REDACTED]	[REDACTED]
Clinical Therapist, [REDACTED] Campus	[REDACTED]
Educational Advocate	

**DC OFFICE OF THE STATE  
SUPERINTENDENT OF EDUCATION**

**Office of Compliance and Review  
*State Enforcement & Investigation Division***

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

**Confidential**

 Student )  
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Petitioner, )  
 )  
vs. )  
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**The District of Columbia Public Schools,** )  
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Respondent )  
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STUDENT HEARING OFFICE  
2009 OCT -6 AM 8:44

**PRE-HEARING ORDER**  
**(Case No. 2009-1077)**

At approximately 12:30 p.m. on September 9, 2009, the below Hearing Officer convened a pre-hearing conference in this matter. Candace Sandifer, Esq., counsel for DCPS, and Georgina Oladokun, Esq., Petitioner's counsel, participated by telephone. This Order summarizes the results of the pre-hearing conference, including the rulings and determinations made by the hearing officer, as well as the agreements and representations made by the parties. This Order also requires the parties to proceed at the due process hearing in accordance with said rulings, determinations, agreements and representations.

**Parental Attendance at the Hearing:**

Petitioner's counsel represented that Student's parent ("Parent") will attend the hearing in person.

**Issue(s) to be Addressed at the Hearing:**

1. Alleged failure to implement the IEP
2. Alleged failure to convene a placement meeting upon Parent's request
3. Alleged failure to provide an appropriate placement
4. Alleged failure to provide ESY in Summer 2009

**DCPS's Response/Defenses:**

1. Student arrived at [REDACTED] in April of 2009 with a February 2009 IEP from Maryland. DCPS provided 7 hours instruction and 1 hour related service from April through May 6<sup>th</sup>.

(Petitioner's position: Student arrived at [REDACTED] neighborhood school, in March with a full-time IEP from Maryland, but Student was under DCPS's umbrella in February and March.)

2. On May 6<sup>th</sup>, DCPS developed an IEP for 26.5 hours of specialized instruction (inclusion in a general education setting) and 1 hour of behavioral counseling with a dedicated aide. The aide worked with Student from May 18<sup>th</sup> through the end of the school year, and all other IEP services were also provided.

3. Parent attended the May 6<sup>th</sup> meeting and did not request a placement meeting thereafter.

4. [REDACTED] ES can implement the IEP for SY 2009/10.

5. ESY was made available; Student missed some days but began to attend after numerous calls were made to Parent.

(Petitioner's position: ESY was not provided – only regular summer school, and that was only after Parent indicated her intent to file a Complaint.)

**Relief Requested:**

1. Prior Notice and funding of an appropriate placement  
(Note: Parent has unilaterally placed Student at [REDACTED], so reimbursement and future funding will be at issue.)
2. Independent educational assessment and independent FBA
3. A meeting to review evaluations and revise the IEP
4. Dedicated aide

5. Compensatory education, including funding of an independent tutor to implement same

(Note: The hearing officer instructed Petitioner to be prepared to prove what compensatory would be appropriate.)

**Pre-Hearing Motion(s):**

1. DCPS's previous motion to dismiss or for voluntary withdrawal of the Complaint was resolved and withdrawn by DCPS.

**Five-Day Disclosure Deadline:**

September 18, 2009

**Stipulations:**

DCPS will investigate, determine whether there are facts appropriate for stipulation, and advise the hearing officer accordingly. Petitioner promised to do the same.

**Anticipated Witnesses:**

Petitioner: Expects to call three to six witnesses – Parent; a representative from [REDACTED] Mr. [REDACTED] and one or more of the following three possible witnesses – [REDACTED] Harris, Parent's aunt; [REDACTED] compensatory education expert; and Mr. [REDACTED] psychologist at [REDACTED] Petitioner anticipates needing 2 hours to present its case.

DCPS: Expects to call four witnesses – Mr. [REDACTED] the SEC; Student's dedicated aide (if possible); Mr. [REDACTED] the psychologist; and Ms. [REDACTED] special education teacher. DCPS anticipates requiring 3 hours to present its case.

**DATE AND TIME OF DUE PROCESS HEARING:**

Date: **September 25, 2009** Time(s): **9:00 a.m. to 2:00 p.m.**<sup>2</sup>

Location of Hearing: 1150 5<sup>th</sup> Street, SE, Washington, DC 20003

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<sup>1</sup> Petitioner indicated an intent to file Notices to Appear for the SEC and psychologist from Kenilworth; however, upon being advised by the hearing officer and opposing counsel of Petitioner's duty to seek the voluntary appearance of those witnesses prior to filing said Notices (*see* SOPs, § 600.1(4)), Petitioner's counsel agreed to work with DCPS counsel first. As of this writing, the hearing officer has not received any Notices to Appear from Petitioner.

<sup>2</sup> The hearing was initially set for 3 hours, but the hearing officer extended the hearing to 5 hours based upon the parties' estimates of the amount of time needed. However, the hearing officer instructed the parties that **redundant** and **irrelevant** evidence **WILL NOT** be allowed at the hearing. Therefore, the parties should prepare their respective cases and witnesses accordingly.

In accordance with the foregoing, **IT IS HEREBY ORDERED:**

1. The parties shall attend the scheduled due process hearing and proceed in accordance with all rulings, determinations, agreements and representations made at the pre-hearing conference, as outlined above. Petitioner will proceed first at the hearing and carry the burden of proof.
2. Any and all changed circumstances, emergency situations, and similar matters shall immediately be brought to the attention of both the hearing officer and opposing counsel.

/s/ *Kimm H. Massey*  
Kimm H. Massey, Esq.  
Impartial Due Process Hearing Officer

9/15/09  
Date

cc: Student's File  
Petitioner c/o G. Oladokun, Esq.  
DCPS c/o C. Sandifer, Esq.



6 AM 8:43  
HEARING OFFICE

*Kimm H. Massey, Esq.*

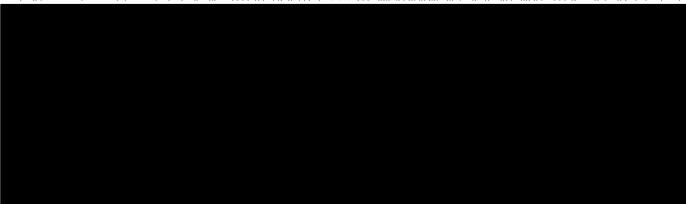
Due Process Hearing Officer

[Kimm.Massey@dc.gov](mailto:Kimm.Massey@dc.gov)

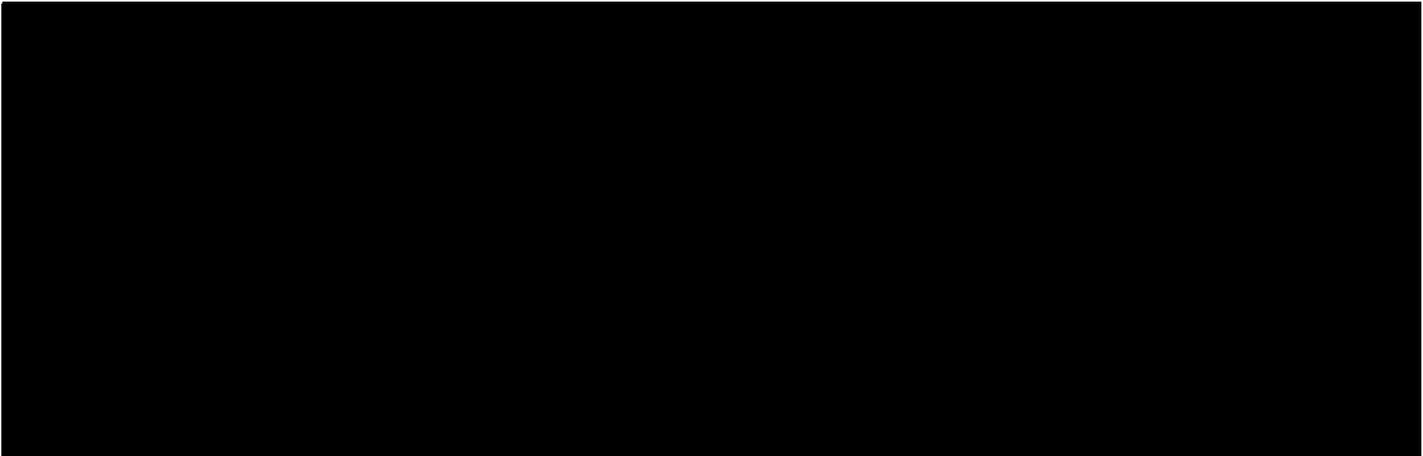
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