

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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OSSE
STUDENT HEARING OFFICE

<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>November 6, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Miguel Hull, Esq.</p> <p>Counsel for DCPS: Daniel McCall, 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 September 10, 2009, which alleged four claims against DCPS, and DCPS filed its Response and Motion to Dismiss on September 23, 2009. The prehearing conference for this matter was held on October 9, 2009, at which time (1) Petitioner voluntarily withdrew one of its claims, and (2) the hearing officer denied DCPS’s Motion to Dismiss. The hearing officer issued the Pre-Hearing Order on September 12, 2009.

The initial due process hearing for this matter was held on October 16, 2009. The matter was continued to October 27, 2009 for the purpose of allowing testimony from one additional witness for DCPS. Once the hearing officer convened the second hearing, however, DCPS indicated that its witness was unavailable. The hearing officer concluded the second hearing after receiving closing arguments.

III. ISSUE(S)

1. Did DCPS fail to provide an appropriate IEP?
2. Did DCPS fail to provide an appropriate school?
3. Is Student entitled to compensatory education?

IV. FINDINGS OF FACT

1. Student is [REDACTED] years old, and he attends [REDACTED] grade at a DCPS Charter School (“the Charter”). Student also attended the Charter for [REDACTED] grade during the previous school year, SY 2008/09.²
2. Student’s most recent IEP indicates his primary disability is specific learning disability (“SLD”), and the IEP calls for Student to receive 15 hours per week of specialized instruction and 60 minutes per week of behavioral support services. This IEP is dated September 30, 2009, and it was developed at the resolution session for this case. The IEP contains goals for Student in the academic areas of reading, mathematics, and written

² Petitioner’s Exhibits 3 and 10; Testimony of Parent.
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expression, as well as in the area of emotional, social and behavioral development.³

3. Student's previous IEP, which was dated December 18, 2007, also required him to receive 15 hours of specialized instruction per week and classified his disability as SLD. However, instead of including 1 hour of behavioral support services, the previous IEP required Student to receive 1 hour of speech-language services per week.⁴
4. Student's current educational evaluation report is based on WJ III Tests of Achievement administered on October 7, 2009. Student's performance on the educational assessment indicated that he is performing at the third grade level in basic reading skills (GE = 3.1), reading comprehension (GE = 3.0), and academic skills (GE = 3.8), while he is performing at the fifth grade level in math reasoning (GE = 5.2).⁵
5. Student's previous educational evaluation report was based on WJ III Tests of Achievement administered on October 28, 2008. Student's performance on that assessment indicated that he was performing at the second grade level in basic reading skills (GE = 2.6) and reading comprehension (GE = 2.5), at the third grade level in academic skills (GE = 3.3), and at the fourth grade level in math reasoning (GE = 4.3).⁶
6. Student's February 16, 2009 Comprehensive Psychological Evaluation report indicates that Student's general cognitive ability is within the Borderline to Extremely Low range of intellectual functioning (FSIQ = 71), with the result that Student "may experience difficulty in keeping up with his peers in a wide variety of situations that require age-appropriate thinking and reasoning abilities." The evaluator noted that Student's test scores indicated considerable difficulties with language and that that Student has a Reading Disorder that is phonemically based. The evaluator recommended, *inter alia*, "full-time programming so that his individual needs can be addressed by teachers who are specially trained to work with students with language and learning disabilities."⁷
7. On September 28, 2008, the educational advocate conducted a classroom observation of Student at the Charter during his Math (inclusion) class. The class normally consisted of 14 general education students, 10 special education students, 1 general education teacher, and 1 special education teacher, although one of the special education students was not present on the day of the observation. The advocate felt that Student looked lost during the math lesson that was being taught by the general education teacher with the use of the blackboard. The advocate also noted that when the general education teacher asked questions about the lesson, all the students in the class except Student raised their hands. The special education/inclusion teacher told the advocate that Student was shy and did not always understand.⁸

³ Petitioner's Exhibit 10.

⁴ Petitioner's Exhibit 12.

⁵ Petitioner's Exhibit 20.

⁶ Petitioner's Exhibit 21.

⁷ Petitioner's Exhibit 16.

⁸ Petitioner's Exhibit 26.

8. On April 14, 2009, a DCPS Certified School Psychologist conducted a classroom observation of Student at the Charter during his resource language arts class that was being held in a computer lab. Student and his classmates were typing up their respective essays. Student's essay was entitled, [REDACTED] Student's pace was slow and methodic. Although Student did not display any attention issues during the observation, the teacher stated that in her opinion, Student did have attention problems and he benefited from smaller classroom environments. The teacher also indicated that modifications such as staggered work completion requirements, seating proximity, and peer-assisted learning had been implemented for Student in the classroom.⁹
9. On September 30, 2009, the advocate conducted another observation of Student. This observation was conducted in the current school year during Student's current math class, which consisted of 19 students and 2 teachers. A special education teacher was working one-on-one on a quiz with Student at a separate table from the other students. The teacher went through each step of the problems and wrote down the answers, with Student merely providing the answers to equations such as " $13 + 3$ ", " 9×3 " and " $16 - 6$ ". Even still, however, the inclusion teacher had to write down " $12 + 6$ " for Student to provide the answer, and Student could only add the first column and then add the second column in two separate steps instead of simply providing the answer. The general education teacher told the advocate that although Student has good behavior, the class is difficult for Student in that he cannot follow the instructions to answer the questions and he does not understand the steps for solving word problems. The teacher said Student usually looks lost and is in his own world.¹⁰
10. By email dated September 24, 2009, Student's current math teacher advised the SEC at the Charter that Student rarely completes math problems on his own, knows very few multiplication facts, and needs constant guidance. The teacher noted that although Student is pleasant and respectful, he likes to get out of his seat and wander, and the teacher often has to redirect him back to the task at hand often.¹¹
11. By email dated September 24, 2009, a Science Mentor Teacher advised the SEC at the Charter that Student is respectful but works at a slow pace, does not complete his tasks on time, usually needs extra support to complete his work, and does not seek extra help when he does not understand until it is made mandatory. As modifications/ accommodations, Student receives modifications and extended testing times, and he often has his assessments read aloud to him and is allowed to respond verbally.¹²
12. By email dated September 25, 2009, Student's World History teacher advised the SEC at the Charter that Student struggles academically, and although the teacher is providing "much one-on-one attention" to Student, it does not seem to be helping very much.

⁹ Petitioner's Exhibit 24.

¹⁰ Petitioner's Exhibit 25.

¹¹ Petitioner's Exhibit 28.

¹² Petitioner's Exhibit 29.

Moreover, although Student is not disruptive during class, he is not focused. Student usually answers correctly when called on in class, but he does not otherwise participate in class.¹³

13. Student is struggling academically in school because inclusion is not working for him. When a student is 3 or more years below grade level, inclusion is not helpful because the curriculum is a general education curriculum that does not focus on the student's IEP goals and objectives. Student needs to receive services that focus on his specific needs.¹⁴
14. Student has not done well at the Charter and he continues to struggle academically. He has taken advantage of tutoring in social studies and English, but he still failed those classes in 2008/09. Student passed his remaining classes with low Cs, but that was because the teachers gave him extra leeway, and the school does not offer Ds. Student went to tutoring three days per week and did everything asked of him, but he still did not do well in his classes because he simply does not know how to do the work.¹⁵
15. The teachers and the SEC at the Charter previously advised Parent that Student was struggling and that the Charter might not be the best fit for him. Parent did not initially believe the SEC and teachers. She wanted Student to remain at the Charter because the teachers there go the extra mile to help the students. However, after learning of Student's evaluation scores, Parent realized that she had been in denial and that Student needs more help in a smaller setting.¹⁶
16. Student was accepted for admission at a local, private, full-time special education school on June 12, 2009, pending referral and funding by the local school system. The admission letter states that Student appeared to be in need of "highly intensive remedial strategies." All of the teachers at the private school are certified in special education, the school provides 1 teacher and 1 aide in each class, and class sizes range from 5 to 9 students. The school has two speech/language therapists and a full-time counselor, in addition to other related services providers. The school is accredited in Maryland, and it is recognized by the District of Columbia OSSE. It follows the Maryland voluntary state curriculum, but provides District of Columbia students with the few extra courses required to obtain a District of Columbia diploma as well as a diploma from the school. Student fits the typical profile of the school's students, because the school attracts students who are functioning significantly below grade level and brings those students' skills up to close the gap in performance. The school would put Student in a very small reading group, with perhaps a 1-to-1 or 2-to-1 ratio because reading is a significant area of need for him. The school offers an 11-month, 32.5 hour per week program, with no interaction with non-disabled peers. Student's annual tuition at the school would be approximately \$37,000.¹⁷

¹³ Petitioner's Exhibit 27.

¹⁴ Testimony of advocate.

¹⁵ Testimony of Parent.

¹⁶ Testimony of Parent.

¹⁷ Petitioner's Exhibit 33; testimony of private school Associate Director.

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 compensatory education claim, the hearing officer will not analyze that claim herein. Moreover, as Petitioner's two remaining claims questioning the appropriateness of Student's IEP and current school are interrelated, the hearing officer will consider them together.

Appropriateness of Current IEP and School Site

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, under IDEIA, separate schooling or other removal of children with disabilities from the regular educational environment is permissible where 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. *See* 34 C.F.R. § 300.114(a)(2)(ii).

In this case, Petitioner argues that Student needs full-time out-of-general education special education help because, as a seventh grade student who is functioning at a third to fourth grade level and is only receiving 15 hours of inclusion services per week, Student is floundering in the classes in which he receives no special education services, and he is only getting by in the classes in which he receives inclusion help. On the other hand, DCPS argues that Student is receiving an appropriate level of services, as indicated by his recent academic testing which shows meaningful progress in practically all areas, and that a full-time program would be inappropriate.

An examination of the evidence in this case reveals that Student has SLD in the area of reading, and he is presently in the seventh grade. Although Student is functioning at the third grade level in basic reading skills, reading comprehension, and overall academic skills, and at the fifth grade level in mathematics, his current IEP provides him with only 15 hours per week of specialized instruction, and that specialized instruction is delivered in an inclusion setting at his current school. As a result, Student is expected to access the [redacted] grade general education curriculum, despite his limited reading and academic skills. He is provided with special education inclusion services in the academic areas of mathematics, reading and written expression, but in all other academic areas, including Student's [redacted] grade science and world history classes, he is expected to function on his own and without any special education assistance.

The result of a similar arrangement while Student was in the 6th grade at the Charter during SY 2008/09 was that Student failed social studies and English at the end of SY 2008/09, even though he participated in tutoring for both classes during the school year. Moreover, he barely passed

his remaining classes with low Cs in light of the Charter's policy of giving only As, Bs, Cs and Fs, with no Ds.

The general consensus among the teachers and staff at the Charter, as well as Parent and the advocate, is that Student is struggling academically at school and cannot do the work without assistance. He needs constant guidance in math and, as a general rule, cannot complete the work on his own. He works at a very slow pace in science and usually needs extra support to complete his work. Indeed, his assessments in science are often read aloud to him and he is allowed to respond verbally. In world history, Student is struggling academically and the extensive one-on-one attention the teacher is providing does not seem to be helping Student.

Student's recent educational assessments reveal that he made academic progress between October 2008 and October 2009. Hence, Student's basic reading, reading comprehension and academic skills all improved by approximately .5 grade level, and his math reasoning skills improved by approximately .9 grade level. This is meaningful progress for a student with SLD. However, said progress does not negate the fact that Student is still functioning 3 or more grade levels below his [redacted] grade classmates in almost all academic areas. Moreover, despite the 15 hours per week of inclusion services he is receiving, Student continues to struggle academically in school where he is studying the [redacted] grade general education curriculum. Indeed, Student's current Comprehensive Psychological Evaluation report predicts that, in light of Student's Borderline to Extremely Low range of intellectual functioning, it is likely that he will experience difficulty performing in situations that require age appropriate thinking and reasoning abilities. To address this deficiency in cognitive ability, the psychological evaluator recommended full-time special education programming for Student so that his individual needs can be addressed by teachers who are specially trained to do so.

Student recently has been accepted at a full-time, private special education school that specializes in bringing students who are functioning significantly below grade level up to the appropriate grade level. The administrators at the school recognize that Student is in need of highly intensive remedial strategies, especially in reading, and they are prepared to place Student in a very small reading group since reading is such a significant area of need for Student. Petitioner has requested that the hearing officer award Student funding for this school. However, DCPS's position is that the school would be inappropriate for Student because his IEP does not call for full-time services. Indeed, DCPS maintains that because Student has progressed academically since the previous school year, his current school is an adequate site for delivery of services and his current IEP is appropriate. As a result, DCPS failed to propose any alternative site locations for Student.

Based on the foregoing examination of the evidence and party arguments in this case, the hearing officer concludes that Student's current IEP and school program are inappropriate because they do not provide Student with a sufficient amount of special education assistance and with an out-of-general education environment. In making this determination, the hearing officer has relied upon the uncontradicted evidence in this case tending to prove that Student is struggling academically in his current school program, that he cannot adequately perform in his [redacted] grade general education classes without constant guidance and extra support, and that even in classes where he receives inclusion services he is unable to perform at the required level.

Based on the hearing officer's conclusion that Student's current IEP and school site are inappropriate, as well as the fact that the only options presented to the hearing officer at the due process hearing were either the current school's inclusion program or a full-time, private special education program, the hearing officer will award Student funding for the remainder of the 2009/10 academic at the private school. To facilitate Student's academic success at the private school, DCPS will be ordered to either provide or participate in the development of a full-time IEP for Student at his 30-day review meeting at the private school.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner met its burden of proof on its inappropriate IEP and inappropriate school site claims.

VII. ORDER

1. DCPS shall fund Student's placement at the full-time, private special education school that conditionally accepted Student for admission by letter dated June 12, 2009. 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 6th day of November, 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).

APPENDIX A

INDEX OF NAMES

In the MATTER OF "Student" v. DCPS

Placement Specialist Monitor	
Principal	
DCPS School Psychologist	
Third Grade Teacher	
DCPS Psychologist	[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	Daniel McCall
Parent's Advocate	[REDACTED]
Name of School	[REDACTED]
Student's Cousin	
Associate Director,	[REDACTED]
Clinical Therapist	
Spanish Language Interpreter	

