

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 7, 2009</p> <p><u>Representatives:</u></p> <p>Counsel for Petitioners: Olekanma Ekekwe, Esq.</p> <p>Counsel for DCPS: Kendra Berner, 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 its Complaint on August 25, 2009, alleging that DCPS denied Student a free appropriate public education (“FAPE”) by failing to conduct evaluations as requested by Parent, failing to provide appropriate educational services, failing to provide appropriate related services, and failing to provide an appropriate placement. DCPS filed its Response on September 16, 2009, in which DCPS disputed each claim in the Complaint.

The prehearing conference for this matter was scheduled for October 9, 2009, but did not go forward due to the hearing officer’s inability to reach both party representatives at the same time. The hearing officer issued a Pre-Hearing Order based upon the pleadings on September 12, 2009.

The parties submitted their Five-Day disclosures on October 22, 2009, with Petitioner submitting eight documents (Petitioner’s Exhibits 1 - 8) and DCPS submitting seven documents (DCPS-1 through DCPS-7).

The due process hearing for this matter was originally scheduled for October 28, 2009, and the parties’ documents were admitted without objection. During the course of Petitioner’s case-in-chief, Petitioner’s counsel attempted to introduce the testimony of an undisclosed psychiatric fellow as the designee of a previously disclosed neurologist. DCPS objected on the ground that the proffered witness was not the neurologist’s designee, and the hearing officer instructed Petitioner’s counsel to ask the witness relevant preliminary questions on the record so that the hearing officer could make a ruling as to the admissibility of the testimony. After the witness testified that he was not familiar with the neurologist at issue, Parent abruptly jumped up from her seat and released a stream of profane language as she walked out of the hearing room. Petitioner’s counsel quickly left to retrieve her client, and upon the return of Parent and counsel, the hearing officer issued several stern warnings on the record about appropriate behavior at administrative due process hearings. The hearing proceeded without further inappropriate behavior on Parent’s part. The hearing officer allowed Petitioner to elicit a limited amount of testimony from the witness so as to preserve the testimony for the record. However, the hearing officer indicated that absolutely none of the testimony would be taken into account in deciding this case, and DCPS declined to cross-examine the witness as his testimony had essentially been excluded from the record.

Upon the conclusion of Petitioner’s case, DCPS made a motion for a directed verdict. The hearing officer granted the motion with respect to Petitioner’s claim regarding evaluations but otherwise rejected the motion. Thereafter, DCPS presented its witness testimony and the hearing officer concluded the hearing after receiving closing statements.

III. ISSUE(S)

1. Did DCPS fail to provide appropriate educational services to Student?
2. Did DCPS fail to provide appropriate related services to Student?
3. Did DCPS fail to provide an appropriate placement for Student?

IV. FINDINGS OF FACT

1. Student is ██████ old, and she presently attends a DCPS elementary school. Student has attended her current DCPS elementary school since kindergarten. She was determined eligible for special education services in August 2008.²
2. Student's most recent academic evaluation was conducted on May 30, 2008, when Student was in second grade and prior to her special education eligibility determination. Based on Student's performance on the Woodcock Johnson III Test of Achievement, the evaluator concluded that Student was more than a grade level behind in math and reading, and the evaluator recommended specialized instruction in the areas of reading and math for Student.³
3. Student's most recent comprehensive psychological evaluation report was issued on September 15, 2008, when she was in third grade and shortly prior to her special education eligibility determination. Student was on medication for ADHD during the evaluation. Based on Student's performance on the assessments administered, the evaluator determined that Student's cognitive functioning fell in the Low Average range, and she exhibited significant weakness in reading decoding, fluency and comprehension, math reasoning/word problems and spelling. Nevertheless, the evaluator concluded that "[w]hile in the classroom [Student] is challenged with the difficulty of grade level work she is able to function within the local classroom provided there is structure, consistent behavior management techniques employed and redirection." The evaluator listed five recommendations for Student, none of which involved a change in school sites or increased IEP hours.⁴
4. Student's initial IEP was dated September 18, 2008. It identified Student's primary disability as other health impairment ("OHI"), it required Student to receive 7.5 hours per week of specialized instruction and 1 hour per week of speech-language services, and it contained annual goals in the areas of mathematics, reading, written expression, and

² Testimony of Parent.

³ DCPS-6.

⁴ DCPS-5; Petitioner's Exhibit 3.
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communication/speech and language.⁵

5. Student's January 28, 2009 special education Progress Report for 1st and 2nd quarter listed 22 IEP goals for Student and indicated that by second quarter, she was progressing with respect to 10 goals, that 6 goals had just been introduced, and that the remaining 6 goals had not yet been introduced.⁶
6. Student's report card for the 1st and 2nd quarters of SY 2008/09 indicated that Student primarily received grades of 2 (Basic) for the 1st and 2nd quarters, although her grades in reading and math dropped to 1 (Below Basic) for the second quarter. The Teacher Comments for the second quarter indicated that Student needed to work on timetables and regrouping in math, and common spelling patterns in reading. The Comments further indicated, however, that Student's behavior was "very good" when she was on medication.⁷
7. DCPS developed a Functional Behavioral Assessment and a Behavior Intervention Plan for Student on March 12 and 13, 2009, respectively.⁸
8. Student's March 13, 2009 Neurology Clinic Letter indicates that Parent took Student to the Neurology Clinic at Children's Hospital on March 9, 2009 for an evaluation of ADHD and behavioral problems. At the clinic, Parent reported, *inter alia*, that Student's ADHD medicine was not controlling her hyperactivity and inattentiveness, that Student was not behaving and concentrating in class, and that Student was not doing well academically in class. The Letter indicates that a review of Student's systems had been completed and all results were negative, a general examination had been completed and all results were normal. Moreover, Student's neurological examination revealed alertness, intact language, equal pupils that were reactive to light, full visual fields, a symmetric face, intact cranial nerves and finger-to-nose coordination, and normal gait, muscle tone and strength. Nevertheless, the Letter lists impressions of attention deficit disorder with hyperactivity and behavioral problems, the physician recommended a structural small class with constant special education for Student, and the physician referred Student to psychiatry due to behavioral problems and prescribed Concerta.⁹
9. Student's current IEP is dated April 8, 2009. It identifies Student's primary disability as OHI, it requires Student to receive 7.5 hours per week of specialized instruction, 1 hour per week of speech-language services, and 1 hour per week of behavioral support services, and it contains goals in the areas of mathematics, reading, written expression, communication/speech and language, and emotional, social and behavioral development.¹⁰

⁵ DCPS-1; Petitioner's Exhibit 2.

⁶ Petitioner's Exhibit 6.

⁷ Petitioners' Exhibit 6.

⁸ DCPS-4.

⁹ Petitioner's Exhibit 7.

¹⁰ DCPS-3.

10. Student's May 20, 2009 Clinical Progress Report indicates, *inter alia*, that Student had made great strides within the social-emotional domain, that she exhibited excellent behavior within the small group counseling domain, and that she exhibited outstanding leadership qualities and confidence. The Report further indicates that Student had no problems verbalizing her feelings, that the implementation of her BIP had been successful according to teacher reports, and that Student was working towards the mastery of the social-emotional goals outlined in her IEP for 2009.¹¹
11. Student's June 12, 2009 special education Progress Report for the 4th quarter of 2008/09 listed 26 IEP goals for Student and indicated that she was progressing with respect to 20 of the goals, that 1 of the goals had just been introduced, and that the remaining 5 goals had not yet been introduced.¹²
12. Student's current special education teacher for SY 2009/10 has nine years of experience as a special education teacher. The teacher primarily supports Student in the classroom, but she sometimes provides Student with pullout services. Student works on reading comprehension, reading fluency, word recognition, math, and written expression with the teacher. Student has improved in all areas. She struggles most with reading comprehension, but has still shown improvement in that area. Student has made the greatest improvement in word recognition, and she is solidly on level in math. Student's behavior is now fine, as she's very cooperative. The teacher has not seen any signs of distress such as hair pulling or nail biting from Student. Moreover, Student has never told the teacher that any work was hard and has never shown any frustration with the work, although Student will sometimes ask the teacher to check her work or sit with her. Student interacts wonderfully with her non-disabled peers, which interaction benefits her greatly. Student enjoys being included with her non-disabled peers, and she enjoys the fact that no difference is made between her and others in terms of literacy groupings. Student's current school is more than adequate for her, as she is doing very well there. A more restrictive environment would probably have a negative emotional and academic impact on Student, especially as she does not appear to be a child with emotional disturbance.¹³
13. Despite Student's written Progress Reports, Parent continues to believe that Student is struggling academically and needs a full-time day special education setting. Parent also believes that Student is very depressed and has anxiety issues. The SEC and teachers at Student's current school have informed Parent that they disagree with her opinion because Student's IEP and services are more than adequate for her. Indeed, they have told Parent that it would not be right to pull Student out of classes with her non-disabled peers. Nevertheless, Parent has obtained an acceptance for Student at a full-time private school for students who have Emotional Disturbance as their primary disability. The school focuses on students with hyperactivity/behavior issues, it offers very small class

¹¹ DCPS-7.

¹² DCPS-2.

¹³ Testimony of special education teacher.

sizes, and it is a 100% out of general education setting.¹⁴

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).

In this case, Petitioner has alleged that DCPS denied Student a FAPE by failing to provide Student with appropriate educational and related services, and with an appropriate placement. *See* 34 C.F.R. 300.17 (FAPE means special education and related services that, *inter alia*, include an appropriate school placement). At the due process hearing, Petitioner argued that Student is struggling academically and behaviorally, that she's below grade level in reading, writing and maybe math, and that Student needs a full-time school and a full-time IEP. Indeed, Petitioner has secured an acceptance for Student at full-time private special education school that serves students who have Emotional Disturbance as their primary disability.

DCPS disagrees with Petitioner. DCPS asserted at the due process hearing that Student is below grade level because she has a disability; however, she is improving in all areas, and there is no evidence that a full-time special education program for Emotionally Disturbed students is needed.

Upon a review of the evidence in this case, the hearing officer is persuaded by DCPS's position. The evidence shows that Student received an educational evaluation in May 2008, which revealed that Student was below grade level in math and reading, and which recommended specialized instruction in math and reading for Student. Then, in September 2008, a comprehensive psychological evaluation report was issued for Student, and the report indicated that although Student's cognitive functioning fell in the Low Average range and she exhibited significant weakness in reading and math, she could function in the local classroom with structure, consistent behavior management techniques, and redirection. A few days later, on September 18, 2008, DCPS determined Student eligible for special education services and developed an initial IEP that required Student to receive 7.5 hours per week of specialized instruction in math, reading, and written expression, and 1 hour per week of speech-language services. DCPS later developed an FBA and a BIP for Student.

Once DCPS began implementing Student's IEP, she began making progress. Her special education progress reports for January 28, and June 12, 2009 indicated that Student was making progress on the majority of her IEP goals. Her May 20, 2009 Clinical Progress Report indicated that she was making significant progress behaviorally and that the implementation of her BIP had been successful. Moreover, Student's current special education teacher has indicated that although Student still struggles with reading comprehension, she has made improvement in all areas, she is solidly on grade level in math, and her behavior is no longer a problem.

¹⁴ Testimony of Parent; testimony of private school Admissions Director.
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Hence, to the extent that Parent remains concerned that Student is struggling academically and behaviorally in school, and said concerns on Parent's part may have influenced the physician who prepared a March 2009 Neurology Clinic Letter for Student to recommend constant special education for Student, Parent's concern and the physician's recommendation are not supported by the evidence of record. Moreover, given that Student has not been diagnosed with ED, and according to her current special education teacher, Student does not appear to suffer from ED, the hearing officer has been unable to find support in the record for Petitioner's request for a placement for Student at a full-time special education school that serves children who have ED as their primary disability. Under these circumstances, the hearing officer concludes that Petitioner has failed to meet its burden of proof on its claims that DCPS failed to provide appropriate educational and related services, and an appropriate placement to Student.

VI. SUMMARY OF DECISION

The hearing officer determined that Petitioner failed to meet its burden of proof on all claims asserted.

VII. ORDER

1. Petitioner's August 25, 2009 Complaint is hereby **DISMISSED**, and its requests for relief therein are hereby **DENIED**.

/s/ Kimm H. Massey

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

Dated this 7th 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	
Special Education Teacher, [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	Olekanma Ekekwe
School System’s Representative	Kendra Berner
Parent’s Advocate	
Name of School	[REDACTED]
Student’s Cousin	
Admissions Director, [REDACTED]	[REDACTED]
Child Psychiatry Fellow, Children’s National Medical Center	[REDACTED]
Spanish Language Interpreter	

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