

DCPS filed its Response on January 10, 2011, which asserts that DCPS has not violated the IDEA and the Student is not being denied a FAPE.

A resolution meeting was held on or about January 11, 2011, which resulted in a disposition form signed by DCPS stating that there was “no agreement” and “the case should proceed to a due process hearing.” Petitioner participated by telephone and thus did not sign the disposition form. However, Petitioner’s counsel sent an email to DCPS and the Hearing Officer on 1/11/2011 stating that parent would like to proceed to a due process hearing on that basis, with the 45-day timeline commencing January 11.

A Prehearing Conference (“PHC”) was then held on January 21, 2011, at which the parties discussed and clarified the issues and requested relief. *See Prehearing Order*, issued Jan. 31, 2011), ¶¶ 7-8. It was further agreed at the PHC that the resolution period ended by written agreement as of January 11, 2011, and that the case should proceed to a due process hearing.

Disclosures were filed by both parties, as directed, by February 3, 2011, and the Due Process Hearing was held in Room 2006 on February 10, 2011. Petitioner elected for the hearing to be closed. During the hearing, the following Documentary Exhibits were admitted into evidence without objection:

Petitioner’s Exhibits: P-1 through P-22.

Respondent’s Exhibits: DCPS-01 through DCPS-16.²

In addition, the following Witnesses testified on behalf of each party:

Petitioner’s Witnesses: (1) Parent; (2) Student; and (3) Student’s Educational Advocate.

Respondent’s Witness: Special Education Coordinator.

² There were a total of 17 DCPS exhibits, because the exhibits also include an Exhibit “DCPS-01A” (August 2010 Independent Psychological Evaluation).

II. JURISDICTION

The due process hearing was held pursuant to the IDEA, 20 U.S.C. §1415 (f); its implementing regulations, 34 C.F.R. §300.511; and the District of Columbia Code and Code of D.C. Municipal Regulations, *see* DCMR §§ 5-E3029, E3030. This decision constitutes the Hearing Officer's determination ("HOD") pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513, and Section 1003 of the *Special Education Student Hearing Office/Due Process Hearing Standard Operating Procedures ("SOP")*. The HOD deadline is February 25, 2011.

III. ISSUES AND REQUESTED RELIEF

A discussion at the PHC of the issues and requested relief raised by Petitioner resulted in the following issue being presented for determination at hearing:

Failure to Implement IEP (Dedicated Aide) — Did DCPS deny the Student a FAPE by failing to implement his IEP by not consistently providing him with a dedicated aide as required by the IEP during the 2010-11 School Year?

Petitioner requests that DCPS be ordered to: (a) fund an independent dedicated aide of the parent's choice, to be assigned solely to the Student for the entire school day; and (b) provide compensatory education for the Student's loss of educational benefit during the 2010-11 School Year.

IV. FINDINGS OF FACT

1. The Student is a -year old student who resides in the District of Columbia. He has been determined to be eligible for special education and related services under the IDEA as a child with Multiple Disabilities. *See P-7 (10/27/2010 IEP); DCPS-9 (same).*
2. The Student's disabilities include certain orthopedic impairments, which affect his ability to coordinate body movements and ambulate when at school. The Student has been diagnosed with Cerebral Palsy and Spastic Diplegia. *See, e.g., DCPS-2 (8/24/10 OT evaluation), p.1; DCPS-6 (9/29/10 independent assessment review), p. 2.* He also had spinal surgery at the age of three and hip surgery at the age of *See Parent Testimony; P-5 (Due Process Complaint), ¶¶ 3-4.*

3. The Student currently attends his DCPS neighborhood elementary school (the "School"), and he has attended the School throughout the 2010-11 School Year. *See P-5; Parent Testimony.*
4. The Student's current IEP is dated October 27, 2010. It provides for 7.5 hours per week of specialized instruction in reading, 30 minutes per week of adaptive physical education, 60 minutes per week of physical therapy services, and 60 minutes per week of speech-language pathology services, all in a setting outside general education. *See P-7, p. 9.* In addition, the IEP requires the support of a dedicated aide. *Id.* The previous IEP dated January 8, 2010, contained the same dedicated-aide requirement. *See DCPS-8, p. 6 (R Pg-000035).*
5. Both the January 8, 2010 and October 27, 2010 IEPs include Motor Skills/Physical Development as an area of concern for the Student. The IEPs indicate as the Student's present level of performance ("PLOP") in this area, *inter alia*, that the Student "is able to ambulate *with his walker* on level surfaces 100% of the school day independently," that he "is able to ascend 2 flights of stairs with the support of 1 rail while using a reciprocal gait pattern *with close supervision*," and that he "is able to descend 2 flights of stairs with the support of 2 rails using a reciprocal gait pattern *with close supervision*." *DCPS-8, p. 4 (R Pg-000033); DCPS-9, p. 7 (R-Pg-000049).*
6. Pursuant to the IEPs, DCPS has assigned one individual to serve as a dedicated aide for the Student on a regular basis. This individual is only assigned dedicated-aide duties for the Student, and not for any other students. *SEC Testimony.* The Student's present dedicated aide has been in place since approximately December 2009. *See Parent Testimony.*
7. On several occasions during the fall of the 2010-11 School Year, it appears that the DCPS employee or agent assigned to be the Student's regular dedicated aide has been absent or tardy. For example, on or about September 15, 2010, the regular dedicated aide was absent from school due to a personal emergency; on or about October 19 and 27, 2010, she was approximately 20-25 minutes late to school; on or about October 25 and 26, 2010, she was again absent; and on or about December 10, 2010, she arrived by the afternoon. *See Parent Testimony; P-5, ¶¶ 15-23; P-15 through P-21 (parent's incident logs). See also DCPS-15 (dedicated aide sign-in sheets).*
8. On the occasions when the Student's regular dedicated aide has been absent or tardy during the 2010-11 SY, DCPS has generally taken steps to provide alternative coverage. On these occasions, the Student's needs have been met by re-assigning an available substitute

dedicated aide or through the temporary assistance of other school personnel (including teacher aides or other paraprofessionals) assigned by the Special Education Coordinator (SEC) at the School. *See SEC Testimony*. On at least one occasion, the SEC has personally provided the substitute assistance. *Id. See also Parent Testimony*.

9. The Student appears to have been deprived of dedicated-aide assistance only for very brief periods of time on a few occasions, usually in the early morning before classes begin at approximately 9:00 AM. *See SEC Testimony; Parent Testimony*. Additionally, on one occasion (October 25, 2010), Petitioner decided to take the Student home for the day due to the lack of an available substitute aide. *See P-5, ¶ 19; P-17; Parent Testimony*.
10. The evidence shows that any failure to provide dedicated-aide services to the Student for all or a portion of the school day during the 2010-11 School Year was not substantial or significant, and did not constitute more than a *de minimus* failure to implement the requirements of the Student's IEPs. The evidence shows that DCPS has materially complied with the dedicated-aide requirements of the Student's IEPs.
11. The evidence shows that the Student has not suffered educational harm and was not deprived of educational benefits by any failure to provide dedicated-aide services to the Student for all or a portion of any school day during the 2010-11 School Year.
12. The evidence shows that the Student has been able to access the educational curriculum and has obtained meaningful educational benefit under the IEPs during the 2010-11 School Year.

V. DISCUSSION AND CONCLUSIONS OF LAW

The burden of proof in a special education due process hearing is on the party seeking relief. DCMR 5-3030.3; *see Schaffer v. Weast*, 546 U.S. 49 (2005). This burden applies to any challenged action and/or inaction, including failures to implement a student's IEP. Based solely upon the evidence presented at the due process hearing, an impartial hearing officer must determine whether the party seeking relief presented sufficient evidence to prevail. *See DCMR 5-E3030.3*. The recognized standard is preponderance of the evidence.³

³ *See, e.g., N.G. v. District of Columbia*, 556 F. Supp. 2d 11 (D.D.C. 2008); *Holdzclaw v. District of Columbia*, 524 F. Supp. 2d 43, 48 (D.D.C. 2007); 20 U.S.C. §1415(i)(2)(C)(iii).

For the reasons discussed below, the Hearing Officer concludes that Petitioner has failed to meet her burden of proof on the sole issue presented in this case. The claim that DCPS denied the Student a FAPE by failing to implement his IEP by not consistently providing him with a dedicated aide during the 2010-11 School Year is not supported by a preponderance of the evidence and the applicable law.

The IDEA requires that all students be provided with a Free Appropriate Public Education ("FAPE"). FAPE means:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA...include an appropriate preschool, elementary school, or secondary school education in the State involved; and are *provided in conformity with the individualized education program (IEP)*..." 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; DCMR 5-E3001.1 (emphasis added).

To be sufficient to provide FAPE under the IDEA, an "IEP must be 'reasonably calculated' to confer educational benefits on the child, but it need not 'maximize the potential of each handicapped child commensurate with the opportunity presented non-handicapped children.'" *Anderson v. District of Columbia*, 109 LRP 18615 (D.D.C. 2009), slip op. at 6, quoting *Board of Education v. Rowley*, 458 U.S. 176,200,207 (1982). See also *Kerkam v. McKenzie*, 862 F.2d 884 (D.C. Cir. 1988); *J.G. v. Abington School*, 51 IDELR 129 (E.D. Pa. 2008), slip op. at 8 ("while the proposed IEP may not offer [the student] the best possible education, it is nevertheless adequate to advance him a meaningful educational benefit. ").

As reflected in the statutory language, a failure to provide services in conformity with a Student's IEP may constitute a denial of FAPE to the Student. See 34 C.F.R. §300.17(d). However, to amount to a denial of FAPE, the aspects of an IEP not followed by the LEA generally must be "substantial or significant," and "more than a *de minimus* failure"; in other words, the deviation from the IEP's stated requirements must be "material." *Catalan v. District of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007), quoting *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341,349 (5th Cir. 2000). See also 34 C.F.R. §300.513 (a) (2) (hearing officer may find denial of FAPE where procedural inadequacy caused deprivation of educational benefit).

In this case, Petitioner claims that on several occasions during the 2010-11 School Year, the Student has not been provided with a dedicated aide as called for in his IEP, and that without the assistance of his dedicated aide he is not able to access the educational curriculum. P-5, p. 8.

However, as noted above, the evidence shows that, at most, the Student has not been provided dedicated-aide assistance only for very brief periods of time on several school days (and possibly for one full school day), due to his regular aide's being absent or tardy. On most occasions, DCPS has been able to provide adequate alternate coverage for the Student. This evidence was insufficient to prove any material failure to implement IEP requirements. Moreover, Petitioner has failed to show any educational harm resulting from the small handful of situations.

Under these circumstances, the Hearing Officer concludes that these very limited gaps in coverage do not constitute a denial of FAPE to the Student. *Cf. Gwinnett County School Dist. v. J.B.*, 398 F. Supp. 2d 1245 (N. D. Ga. 2005) (finding that rotation of multiple providers would be sufficient to address the dedicated-aide needs of a -year old student with cerebral palsy); *Central Dauphin School District*, 110 LRP 26498 (PA SEA 2009) (where school district's program is reasonably calculated to provide meaningful educational benefit, administrative assignments of qualified personnel to provide specific services, including one-to-one dedicated aide services, are left to discretion of district); *DCPS*, 110 LRP 39081 (D.C. SEA 2009) (HO concluded that petitioner failed to meet her burden of proving that student suffered any educational harm as a result of the lack of a dedicated aide for an "admittedly extended period of time"). Accordingly, the Hearing Officer concludes that DCPS prevails on this issue.

Because Petitioner has not established a denial of FAPE to the Student, there is no basis on which to grant the Student compensatory education or any other form of relief. Moreover, even assuming *arguendo* that a material failure to implement IEP requirements had been shown in this case, no compensatory education relief would be warranted because Petitioner failed to present evidence of (a) any educational harm to the Student, and (b) how any proposed award would be reasonably calculated to provide the educational benefits that likely would have accrued if there had been no interruption in dedicated-aide services. *See Reid v. District of Columbia*, 401 F. 3d 516, 521 -24 (D.C. Cir. 2005).

VI. ORDER

Based upon the above Findings of Fact and Conclusions of Law, and the entire record herein, it is hereby **ORDERED**:

1. All requests for relief in Petitioner's December 29, 2010 Due Process Complaint are hereby **DENIED**, and the Complaint is **DISMISSED, With Prejudice**; and
2. This case shall be, and hereby is, **CLOSED**.



Dated: February 25, 2010

Impartial Hearing Officer

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by the findings and decision made herein has the right to bring a civil action in any District of Columbia court of competent jurisdiction or in a District Court of the United States, without regard to the amount in controversy, within ninety (90) days from the date of the Decision of the Hearing Officer in accordance with 20 U.S.C. §1415(i)(2).