

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> Floor  
Washington, D.C. 20003

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STUDENT,<sup>1</sup>

Petitioner,

v

District of Columbia Public Schools,

Respondent.

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Date Issued: March 27, 2011

Wanda I. Resto Torres, Hearing Officer

Case No:

Hearing Date: March 17, 2011, Room 2003

**BACKGROUND**

On December 16, 2010, a due process complaint ("Complaint") was filed against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"). The Petitioner claimed the DCPS failed to provide the Student special education and related services in conformity with his individualized education program ("IEP") when it did not ensure he had accessible transportation to and from school during November 15, 2010 through December 10, 2010. The Petitioner alleged the Respondent has denied the Student a Free Appropriate Public Education ("FAPE"). As relief she requested a compensatory education.

On December 23, 2010, the Respondent filed its response and alleged that the transportation of the Student was not in its control. The Respondent asserted that the Student was not denied a FAPE, and no relief is warranted.

The jurisdiction for the due process hearing, and for a decision in this matter is conferred by the IDEIA, 20 U.S.C. §§1400 et seq., its implementing regulations, 34 C.F.R § 300 et seq., the District of Columbia Municipal Regulations, Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures ("SOP").

On February 15, 2011, a hearing was convened that hearing was rescheduled.<sup>2</sup> On March 15, 2011, a second closed hearing was convened; participating in the hearing were: Petitioner's counsel,

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<sup>1</sup> Personal identification information is provided in Appendix A.

<sup>2</sup> The due process complaint was reassigned on February 8, 2011 to the undersigned Hearing Officer. Upon review of the Complaint the Hearing Officer noticed Petitioner's Counsel Roberta Gambale did not request Spanish language interpreter services upon filing the due process complaint. There was also no mention of the need of an interpreter in the pre-hearing

Roberta Gambale; and Respondent's counsel, Linda Smalls. The Petitioner presented documents labeled P-1 through 22 and two witnesses testified on behalf of the Petitioner; the Petitioner, and the Tutor-Supervisor. The Respondent presented documents labeled DCPS 1 through 6; No witness testified on behalf of the Respondent. The documents were admitted without objections. The hearing was conducted in accordance with the rights established under the IDEIA and the implementing federal and local regulations, and the SOP. No written closing arguments or briefs were submitted.

The jurisdiction for the due process hearing, and for a decision in this matter is conferred by the Individuals with Disabilities Education Improvement Act ("IDEIA" 20 U.S.C. §§1400 et seq.), its implementing regulations, 34 C.F.R § 300 et seq., the District of Columbia Municipal Regulations, Title 5-E, Chapter 30, Education of the Handicapped, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures.

### ISSUES

Did the DCPS in during November 15, 2010 through December 10, 2010 fail to provide the Student transportation services to school as required by his IEP during? Has the Student been denied a FAPE?

### FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsels, this Hearing Officer's Findings of Fact are as follows:

1. The Student's Individualized Educational Program ("IEP") dated April 26, 2010 classifies the Student's disability as an intellectual disability. The Student is to be provided 19 hours weekly of specialized instruction outside the general education setting and 30 minutes weekly of behavioral support services. The IEP identifies transportation as a service to be provided for the Student. The Student is also eligible to receive extended school year serves because of slow progression

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order. The Hearing Officer consulted with Counsel for the Petitioner and sent a request for Spanish language interpreter services; the Student Hearing Office ("SHO") made the request on 2/9/11. On February 15, 2011, when the hearing was convened Counsel for the Petitioner had a language barrier with her client and asked for the Hearing Officer who is a fluent Spanish speaker to serve as her translator and speak to her client on the telephone. The Hearing Officer decided it was improper for an Attorney to request that the Hearing Officer serve as the vehicle for communication between her and the client; that request that was denied. The Petitioner arrived late at the hearing and the Spanish language interpreters did not show up for the hearing. The SHO was informed that the interpreter services company inadvertently canceled the interpreters' services. Counsel for the Petitioner (Gambale) proposed the hearing move forward, and that the Petitioner provide testimony in her native language of Spanish. The request was denied since neither Petitioner's nor Respondent's Counsels spoke or understood Spanish. Counsel for the Petitioner requested a continuance. The request to continue the hearing was denied because the parties could not agree on a date within 75 days of filing the Complaint, and because there was a communication gap with a limited English proficient Petitioner. The undersigned found that given the circumstances of the case there was a lack of good cause to continue the hearing. As a result of the denial of the continuance, the parties agreed to waive the resolution session and for the hearing date to be set on an expedited calendar. The hearing was adjourned; within minutes of adjourning Counsel for Petitioner spoke with the Chief Hearing Officer (Merced), and he decided and granted for the hearing date to be continued. As a result, the hearing was convened for a second day on March 17, 2011, date agreed by the parties. The Petitioner waived the right to receive a decision within 75 days of filing the Complaint.

in the acquisition of academic skills. The severity of the Student's disability places him at risk of regressing in his current skills if he does not receive instruction during the summer. <sup>3</sup>

2. The Student broke a leg on November 5, 2010, and his regular bus service was interrupted because he required a wheelchair accessible bus. The Petitioner called the transportation services on November 8, 2010, and requested the new bus services to commence services on November 15, 2010. The Petitioner was informed that she would have to wait until after the Thanksgiving holiday recess November 29, 2010.<sup>4</sup> The transportation request was processed on November 29, 2010.<sup>5</sup>
3. DCPS admitted the Student did not attend classes during November 16 through 19, 23<sup>rd</sup>, 24<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup>, 2010. There was no evidence that transportation was provided for the Student during November 15 through 19, 23<sup>rd</sup>, 24<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup>, for a total of 10 days of classes.
4. The Petitioner testified that her twenty-year old son, responsible for taking the Student to wait for the bus, told her that he and the Student waited outside various days and the bus did not come. According to the Petitioner's son the bus pickup services began on December 13, 2010.
5. The bus logs from December 1 through 15, 2010 show pickup time at the Student's address ranging between 8:05 A.M. and 8:10 A.M. <sup>6</sup> On December 7, 2010, the Student arrived to school late because the bus was late. There is no indication that the Student had absences during December 8 through 10, 2010.<sup>7</sup>
6. Gladiste Auguste (Tutor) worked with the Student on one goal of the three on the Student's IEP. The tutor was not able to provide more information because she hung-up the telephone during her testimony. The tutor became not available for cross examination by the Respondent's Counsel or to answer questions from the Hearing Officer. As a result her testimony was stricken from the record.
7. During November 2010 when the Student was home without classes he required more repetitions of skills taught. In December 2010 the Student was progressing in writing his first and last name. The Student was progressing very slowly. In January 2011 the Student showed more progress in counting, sorting, ordering and matching numbers. The Student's enthusiasm and interest improved when he returned to his regular routine at school. <sup>8</sup>

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<sup>3</sup> P 3 IEP April 26, 2010, and DCPS 3 August 24, 2010- Transportation Form.

<sup>4</sup> DCPS 2010-2011 School Calendar - No school for students, teachers, & staff

<sup>5</sup> DCPS 4 November 29, 2010. Transportation Form, testimony of the Mother, and P 1 -Letter from National Children's National Medical Center.

<sup>6</sup> DCPS 6 December 1- 15, 2010- Bus logs

<sup>7</sup> DCPS 5 Attendance Summary

<sup>8</sup> P 19 -21 Newlen educational services -tutor notes.

8. The tutor's Supervisor received monthly reports from the Student's tutor informing her of the focus of the month, results or concerns. The tutor mentioned she was working on number recognition and helping the Student with writing his first and last name. The tutor told her that during November when the Student was home without classes he required more reinforcement to stay on task. The witness had no experience working directly with the Student.<sup>9</sup>
9. The Student's third grade report card for school year 2010 reveals that in the first and second terms the Student is beginning or developing skills in all subject core areas. In the first term the Student was showing improvement in all the assigned areas. In February 2011 during the second term the teachers comments indicate "because of the Student's injury and subsequent use of a wheelchair, he has lost some time at school, however since he came back he has adjusted very well and is performing above average".<sup>10</sup>
10. The Petitioner Counsel after various telephone calls and messages could not get the testimony of the witness who drafted the proposed compensatory education plan.

### CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsels, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

The IDEIA requires that a free appropriate public education must be available to all children between the ages of 3 and 21 who are residing in the District of Columbia.<sup>11</sup> Free appropriate public education ("FAPE") means special education and related services that are provided at public expense, under public supervision, and without charge; meets the standards of the State Education Agency, include an appropriate school; and are provided in conformity with an individualized education program ("IEP") that meets the requirements of §§300.320 through 300.324.<sup>12</sup>

Pursuant to 5 D.C.M.R. § 3030.3, "The burden of proof shall be the responsibility of the party seeking relief; either the parent/guardian of the child or the LEA. Based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a Free Appropriate Public Education (FAPE)." Similarly, in Schaffer v. Weast, 546 U.S. 49(2005), the Court held that the burden of persuasion in a hearing challenging the validity of an IEP is placed on the party on which this burden usually falls—on the party seeking relief—whether that is the parent of the child with a disability or the school district.

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<sup>9</sup> Testimony of the Supervisor at Newlen and Associates.

<sup>10</sup> P 22 Report Card - February 1, 2011.

<sup>11</sup> 34 C.F.R. § 300.101(a) and DCMR. 5§3002.1

<sup>12</sup> 20 U.S.C. §1400(d)(1)(A), §1401(9), 34 C.F.R. §300.17, and 30 DCMR §3001.1.

The DCPS met its legal obligation under the IDEIA. Here is why.

Transportation is a related service if necessary for student to access education. See: 20 U.S.C. § 1401 (26); 34 C.F.R. § 300.34.

The evidence was that the Student's school bus transportation services were interrupted when he broke his leg in early November 2010; he was to return to classes on November 15, 2010. There was conflicting evidence between the bus logs and the testimony of the Petitioner who relied on information from her son on when the bus services resumed. The credible evidence from the documents and Petitioner was that there was no transportation provided for the Student during November 15 through 19, 23<sup>rd</sup>, 24<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup>, for a total of 10 days. Therefore, assuming that the Student did not receive any transportation during 10 days of classes, the Petitioner had to demonstrate what educational harm was suffered by the Student. However, the evidence was the Student was showing improvement with the tutor and at school.

The DCPS violated its procedural obligations by failing to provide the Student with transportation to school as required by his IEP. However, an IDEIA claim based on procedural violations is viable only if those procedural violations affected the student's substantive rights. See, e.g., Kruvant v. District of Columbia, 99 Fed. App. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error")

The IDEIA at 20 U.S.C. § 1414 (E) (ii), and as provided in 34 C.F.R. § 300.513(a) regarding hearing officer decisions on procedural issues, "[I]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education [FAPE] only if the procedural inadequacies—

- i. impeded the child's right to a free appropriate public education;
- ii. significantly impeded the parent's opportunity to participate in the decision making process regarding the provisions of a FAPE to the parent's child; or
- iii. caused a deprivation of educational benefits."

The Petitioner did not demonstrate that the Student suffered an educational harm or was affected by a procedural violation the DCPS committed. The Petitioner did not prove that a failure to provide the Student with ten days of a school bus service denied the Student's right to a FAPE or deprived the Student of educational benefit or that the Petitioner was impeded of an opportunity to participate in the decision making process. Particularly when according to the teacher notes in February 2011; after the absences in November 2010 the Student had adjusted very well and is performing above average. The Student was not denied a FAPE because of a procedural violation.

### **Compensatory Education Award**

The Petitioner failed to present evidence to establish a denial of FAPE. Therefore a compensatory education award is not warranted.

Upon consideration of Petitioner's request for a due process hearing, the documentary evidence, the testimony presented at the hearing, and the applicable laws and regulations, DCPS did not deny the Student a FAPE: IT IS HEREBY ORDERED,

### **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

**ORDERED, Petitioner's request for relief is denied and the Complaint is dismissed.**

This order resolves all matters presented in the Petitioner's December 16, 2010, due process hearing complaint; and the hearing officer makes no additional findings.

### **NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision may bring a civil action in any state 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 USC §1415(i)(2)(B).

Dated: March 27, 2011



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Wanda I. Resto Torres -Hearing Officer