

DC Office of the State Superintendent of Education  
Office of Compliance and Review  
Student Hearing Office

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**Confidential**

OSSE  
STUDENT HEARING OFFICE  
2009 APR 29 AM 11:00

<p>STUDENT<sup>1</sup>, by and through Parent Petitioners,  v.  District of Columbia Public Schools  Respondent.</p>	<p><b>HEARING OFFICER'S DETERMINATION</b></p> <p>Date: April 28, 2009</p> <p><b><u>Hearing Officer: Wanda I. Resto, Esquire</u></b></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. PROCEDURAL BACKGROUND

On March 16, 2009, parent's counsel filed a Due Process Hearing Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent") alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to provide an appropriate individualized education program ("IEP") and failing to provide an appropriate placement for the Student.

On March 24, 2009, the Respondent filed a Response to the Parent's Administrative Due Process Complaint. The Respondent argues that the Office of State Superintendent of Education ("OSSE") Standard Operating Procedures ("SOP") requires the Petitioner to sign the Complaint. The Respondent claims that in the absence of the parent's signature the Complaint has resulted in an insufficient notice to the local education agency. The Respondent contends that the IEP is calculated to provide the Student educational benefit and is based on the current evaluations and reports from teachers and parent. Furthermore, argues the Respondent the IEP provides for both specialized instruction and exposure to the Student's non-disable peers. Additionally, the Respondent alleges that a combination setting is the appropriate placement for the Student and can provide the services on the Student's IEP.

The Hearing Officer held a pre-hearing conference call with Counsel for both parties for the above reference matter was conducted March 30, 2009 at 3:00 PM. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. The Respondent reaffirmed its response. The Petitioner offered three witnesses; the Respondent offered three witness and both Counsels provided a synopsis of their witnesses' testimony. The parties stipulated that on January 30, 2009 a multidisciplinary team ("MDT") meeting was held on behalf of the Student. The Respondent withdrew its claim of insufficiency.

An Order was issued on April 1, 2009 scheduling the hearing for April 22, 2009; it required the Respondent by April 2, 2009 to response to how the IEP and placement were appropriate. It Ordered, the Petitioner to demonstrate at the hearing what aspects of the IEP are not appropriate and how the Respondent's proposed placement is inappropriate. The Order also required the Respondent to present evidence to demonstrate the IEP and placement are appropriate.

A hearing was held on April 22, 2009. The Petitioner presented a disclosure letter dated April 14, 2009 to which thirty documents were attached, labeled P-1 through 30 and which listed six witnesses. Two witnesses testified –the Mother and the Education Advocate. The Respondent presented a disclosure letter dated April 15, 2009 identifying eleven witnesses and to which five documents were attached, labeled DCPS 1 through 5 witnesses testified – the Special Education Coordinator, the Social Worker and the Special Education Teacher. The documents were admitted without objections.

The hearing was conducted in accordance with the rights established under the Individuals with Disabilities Education Act of 2004 ("IDEA"), 20 U.S.C. § 1400 et seq. and the implementing regulations, 34 CFR Part 300; and 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").

## II. ISSUE(S)

1. Did the Respondent deny the Student a FAPE by failing to provide an appropriate individualized education program?
2. Did the Respondent fail to provide an appropriate placement for the Student?

## II. FINDINGS OF FACT

1. Both parents and the Child are residents of the District of Columbia.
2. The Student is a student with disabilities under the Individuals with Disabilities Education Improvement Act ("IDEIA"). The Student's most recent IEP is dated January 30, 2009 and provides for five hours a week of specialized instruction, one hour per week of speech language pathology in the general education setting and thirty minutes of behavioral support outside of the general education setting. The Student's disability classification is Other Health Impaired -Autism.
3. The Respondent withdrew its allegation of insufficiency of the Complaint.
4. In September 2008 the student began at \_\_\_\_\_ requested during that summer, that the Student be evaluated because he had many suspensions at the prior school. Evaluations were done, an MDT meeting was held and the mother participated via the telephone. The mother did not indicate that she was in disagreement with the IEP, (she understood she had made it clear with her request for evaluations). The Student has delays and speech, gets very emotional, has tantrums and he doesn't take disappointment very well. The mother does not agree that the 1 hour of counseling and 5 hours with specialized instruction is enough for the Student, according to her, he requires between 25 to 50% of the time of specialized instruction. During the beginning of the year there was a classroom-mate (Student-Teacher) in the Student's classroom for approximately six months, and that was very helpful to the Student, however, she left at the beginning of the year. The mother began to receive calls from the school, because of his IEP behavior problem. During a visit to the classroom the mother saw the teacher yelling and upset because the Student at yelled at another student. The Mother believes the placement is not appropriate, is overcrowded, doesn't have a structure, the Student requires two teachers and the current teacher does not know how to communicate with the Student. <sup>2</sup>
5. The Student can be appropriately responsive in a one to one setting for short periods of time returning direct eye contact and appearing to be on target provided that he receives frequent repetition and redirection at to task. It further indicates that the student should be programmed as much as possible within the mainstream of education so as to expose to appropriate behavioral repertoire of his age mates as well as challenging curriculum. If it suggested that the student may be eligible for special education after all reports are

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<sup>2</sup> Testimony of the Mother and P8 Petitioner's Counsel letter of August 18, 2008, requesting re-evaluations.

considered by the team and the impact of his behaviors on his academic program is reviewed. The student may need speech and language therapy and counseling to a system with peer interaction and task production.<sup>3</sup>

6. The parties stipulated that on January 30, 2009 a multidisciplinary team (“MDT”) meeting was held on behalf of the Student. The evaluations reviewed were the social history, functional behavior assessment, a speech and language assessment, and the comprehensive psychological evaluation. The Student was determined eligible under the classification of other health impaired- Pervasive Developmental Disorders (PDD) on the Autism spectrum. The MDT meeting notes indicate that compensatory education was discussed and determined not warranted.<sup>4</sup> The Education Advocate (“EA”) participated in the meeting and did not write in her notes issues that she or the parent were not in agreement with the 5 hours of specialized instruction.<sup>5</sup>
7. The Education Advocate reviewed the Student’s educational file. The Student is two grade levels below in reading and in oral language is at the kindergarten level. The Student is in the second semester of the second grade, his G. E. is 2.5 as of January 2009. The Student’s reading fluency is on grade level however, he is below grade level in recall, and understanding. The Student mimics negative behavior and is her estimate that he requires a setting with one to one attention; small structured setting to address his PDD.<sup>6</sup> The Student needs attention in acquiring social skills, and monitoring to be able to address his academic problem in reading and language. She observed the Student during March 12, 2009 the Student in the general education with the inclusion teacher for approximately 2 hours. The main class was between 20-26 students with a general education and an inclusion teacher. The inclusion teacher was in the class until it was time for Music class. The special education inclusion teacher attended to other Students as and was approximately 30 to 40% of the time with the Student. The Student required prompting to get back on task and it was done mostly by the inclusion teacher. She had to intervene with the Student because he almost left the classroom and during the transition period she had to stop the Student to avoid a physical altercation. She did not observe much structure in the class or that a behavior intervention plan was integrated into the academic program. On March 13, 2009, she sent her March 12, 2009 observation notes and an E-mail to the special education coordinator requesting a change in the Student’s IEP and has not received a response.<sup>7</sup>
8. The Special Education Coordinator (“SEC”) participated in the eligibility meeting in January 2009, where the initial IEP was created. The Student was determined to have

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<sup>3</sup> P13 September 24 and 25<sup>th</sup>, 2008, Comprehensive Psycho-educational evaluation.

<sup>4</sup> P10 - January 30, 2009 -MDT notes.

<sup>5</sup> Testimony of the EA.

<sup>6</sup> Autism Spectrum Disorders (ASDs) (also referred to as PDDs) are brain-based developmental disabilities that affect a child’s ability to communicate, understand language, play and relate to others. (See:

<sup>7</sup> Testimony of the Education Advocate, P10 -her January 30, 2009 meeting notes and P5 her observation notes of March 12, 2009.

PPD –autism spectrum and entitled to receive 5 hours of specialized instruction in a general education setting, 30 minutes of behavioral support in a “pull-out” session and a behavior intervention plan was created. The Student is receiving assistance from the social worker and since April 6, 2009 there is an educational aide in the classroom. The education aide is assisting in redirecting the Student. The Student has progressed significantly, he has calmed down and recently only once has she had to bring the Student into her office. She believes that with the continue support from the social worker, the special education teacher and now the educational aide the placement is appropriate for the Student.<sup>8</sup>

9. The social worker worked with the Student prior to his special education eligibility determination. Now she provides the Student 30 minutes per week of counseling and more as needed. She is helping the Student learn relaxation, self control, breathing techniques, and other strategies for behavior modification. The Student is receptive to counseling and the strategies once given he does well. There’s been progress in the Student since January; he now comes to her office less. There were times when she had to sit with the Student in his classroom and she no longer does. The Student now has eye contact with other people. There is an education aide in the classroom and the Student requires less support from her. The Student had problems with interaction with peers, and that has been adjusted, now the student has friends in the general education. If you remove the student from the general education setting it will be very disruptive for the student because it’s important for him to develop friendships from the general education and the student can do the work in the general education. <sup>9</sup>
10. The special education teacher provides the Student assistance with reading, math, and spelling, the Student is doing well, he can now focus longer and academically he has improved. There and less confrontations with others. The Student has learned techniques to use to help him ignore when he is being teased and now has strategies to help them stay on task. The Student does not require full time services it would be too severe for his needs and could be very harmful socially. She provides the Student’s with 35 to 45 minutes of services it varies from day to day, she also assists another student in the same classroom. The Student has increased awareness of social cues, and his peers are more accepting of him. The student has demonstrated great improvement in the general education setting. <sup>10</sup>

#### IV. CONCLUSIONS OF LAW

##### **Burden of Proof:**

Pursuant to 5 D.C.M.R. § 3030.3, “The burden of proof shall be the responsibility of the party seeking relief; in this case the parent. Based solely upon the evidence presented at the

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<sup>8</sup> Testimony of the Special Education Coordinator.

<sup>9</sup> Testimony of the social worker.

<sup>10</sup> Testimony of the special education teacher.

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).”

### **FAPE Determination**

The Respondent is required to make a FAPE available to all children with disabilities within the jurisdiction of the District of Columbia.

The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as “special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP).”

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

### **Individualized Education Program**

In accordance with 20 U.S.C. § 1414 (d)(1)(A)(i)(II)(aa), (bb), Individualized Education Programs or IEP “means a written statement for each child with a disability that includes a statement of measurable annual goals, including academic and functional goals, designed to—

- aa. Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
- bb. Meet each of the child’s other educational needs that results from the child’s disability.”

Whereas in 34 C.F.R. Section 300.320(a)(4) , the local and state educational agency is required to ensure that each student with a disability in need of services within its jurisdiction is provided with an IEP that contains:

“ A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child--

- (i) to advance appropriately toward attaining the annual goals;
- (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;”

Pursuant to 34 C.F.R. Section 300.324 requires that in the development of the IEP, certain factors be taken into account; "The IEP team must consider:

- (i) The strengths of the child;
- (ii) The concerns of the parent for enhancing the education of their child;
- (iii) The results of the initial or most recent evaluation of the child; and
- (iv) The academic, developmental and functional needs of the child."

The evidence is that the Respondent convened an IEP/MDT in January and neither the Mother nor the EA rejected the IEP. The IEP was created after a review of the same information the Petitioner is relying on today. The Student's January 30, 2009 IEP entitles him to 5 hours per week of specialized instruction, one hour per week of speech language pathology in the inclusion setting and 30 minutes of behavioral support outside of the general education setting. The parent has an obligation to participate in the process to form a plan and program designed to meet the unique needs for her child. However, because the development of the IEP is a multi-person responsibility, the parent does not have the last word. When the parent believes the IEP is inappropriate she must demonstrate what the insufficiencies are. In the present case the EA and the parent believe the Student requires additional hours of specialized instruction to address his PPD. The current evaluations, social worker and teachers indicate the Student will benefit from continued instruction in the regular education environment with peers at his grade level and the current level of support and services. Providing the Student with 25-50% out of the general education as requested by the Petitioner is not what has been recommended for this Student.

In *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982) a two-part test to determine whether a school has fulfilled its duty to provide a FAPE was established: (1) has the school district complied with the procedures provided by the IDEA; and (2) is the student's IEP reasonably calculated to provide educational benefits. If the school district fails either part of the Rowley test, the student's right to a FAPE has been denied.

There was no evidence that the Respondent violated its procedural obligation under the IDEIA. The IEP created in January 2009 continues to be calculated to provide an educational benefit to the Student. There was no evidence that the Respondent denied the Student services.

In *Oberti v. Clementon Sch. Dist.*, 995 F.2d 1204, 1215 (3d Cir. 1993) the Court stated "in determining whether a child with disabilities can be educated satisfactorily in a regular class with supplemental aids and services (the first prong of the two-part mainstreaming test we adopt today), the court should consider several factors, including: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class."

If, after considering these factors, the court determines that the school district was justified in removing the child from the regular classroom and providing education in a segregated, special education class, the court must consider the second prong of the

mainstreaming test whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate. *Id* 1215

### **Education Placement**

In an accordance with 34 C.F.R. § 300.116 of the IDEIA regulations when determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that— (a) The placement decision— (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. It also states that the determination of the educational placement of a child with a disability must be based on a child's IEP and in conformity with the LRE provisions in 34 C.F.R. § 300.114.<sup>11</sup>

Specifically, Section 300.114, requires each public agency to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. The placement should be as close as possible to the child's home and made in conformity with the least LRE provisions. A student or parent must have an opportunity to demonstrate that a disability requires some other arrangement, the child is educated in the school that he or she would attend if non-disabled; and in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that the students needs.

The IDEIA further provides that States must have in place procedures assuring that, "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily

It's the position of the Petitioner that the Student's IEP is inappropriate because the Student requires a higher level of services including more specialized instruction hours in a special education setting as opposed to the general education or inclusion setting.

Inclusion is undefined in the IDEIA itself or by the United States Department of Education (ED). However it is generally understood as the placement of a child with a disability with his or her chronological age peers in a regular education class.

"In implementing IDEA's LRE provisions, the regular classroom in the school the student would attend if not disabled is the first placement option considered for each disabled student before a more restrictive placement is considered. If the IEP of a student with a disability can be implemented satisfactorily with the provision of supplementary aids and services in the regular classroom in the school the student would attend if not disabled, that placement is the LRE placement for that student. However, if the student's IEP cannot be implemented satisfactorily in that environment, even with the provision of supplementary aids and services, the regular

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<sup>11</sup> See: 20 U.S.C. 1412(a)(5).

classroom in the school the student would attend if not disabled is not the LRE placement for that student.”<sup>12</sup>

In the present case the evidence was that the Student is receiving the 5 hours of specialized instruction, the counseling service is provided and the credible evidence is that the Student is progressing and obtaining an educational benefit. This Hearing Officer determines that an inclusion program is what the evidence demonstrated this Student requires.

“Although the IDEA guarantees a Free Appropriate Public Education, it does not, however, provide that this education will be designed according to the parent’s desires. The primary responsibility for formulating the education to be accorded a [child with a disability] and for choosing the educational method most suitable to the child’s needs, was left by the Act to state and local educational agencies in cooperation with the parent or guardian of the child. Thus proof alone that loving parents can draft a better program than a state offers does not, alone, entitle them to prevail under the Act.” *Shaw v. The District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002).

## V. SUMMARY OF DECISION

The Petitioner did not meet the burden of proof in this case because the Student. The Petitioner did not prove that the Respondent failed to provide an appropriate individualized education program or an appropriate placement for the Student.

Upon consideration of Petitioner’s request for a due process hearing, reviewing the documents in the record, the case law, and the above findings of fact, this Hearing Officer determines that the DCPS has not denied the Student a FAPE and issues the following:

## VI. ORDER

**ORDERED**, the Complaint is **Dismissed**.

This order resolves all issues raised in the Petitioner’s March 16, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

## NOTICE OF RIGHT TO APPEAL

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order’s issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516

/s/WI Restorres  
Wanda I. Resto - Hearing Officer

Date: April 28, 2009

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<sup>12</sup> See: OSEP Memorandum 95-9, 21 IDELR 1152 (OSEP 1994),