

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

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**Confidential**

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STUDENT HEARING OFFICE  
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<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: June 3 , 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 April 15, 2009, parent's counsel filed a Expedited Hearing Request for a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to provide an appropriate educational placement for the past two years and failing to provide the Student's educational records to the Petitioner. The Petitioner stated the Student requires an expedited hearing for safety reasons.

The Petitioner requested the Respondent immediately implement the Student's IEP with appropriate Attention Deficit Hyperactivity Disorder focused services and fund a full time special education private placement. Additionally the Petitioner requested that the Respondent provide a compensatory education plan.

On April 17, 2009, the District of Columbia Public Schools filed a Motion pursuant to 34 C.F. R. §300.510 agreeing to waive the resolution session and requesting that the case proceed to a due process hearing on the merits.

On April 22, 2009, the Hearing Officer was notified of the Complaint and sent a Notice for a Pre-hearing Conference to Counsel for DCPS and the Petitioner. Counsel for DCPS offered Monday, April 27, 2009, Petitioner's Counsel did not offer any dates.

On April 23, 2009, the Request for an Expedited Hearing was denied. The Petitioner failed to allege any facts or circumstances that would allow the Hearing Officer to determine that an expedited process should commence. The Hearing Officer found the claim vague and without sufficient justification to warrant an expedited hearing. The parties were required to participate in a Status Conference Call, on April 27, 2009 at 3:00 PM; Counsel for the Petitioner was not available.

On April 28, 2009, the Respondent filed a Response to the Parent's Administrative Due Process Complaint. The Respondent asserted the Petitioner's claim that the placement at \_\_\_\_\_ is inappropriate is without merit, because "placement," for IDEIA purposes, refers to the educational program, not the location of services.<sup>2</sup> The Respondent argues the parents do not have a right under the IDEIA to participate in site selection because the term "educational placement" refers not to a place, but to a program of services. The Respondent further argues that a parent need only be involved in the development of the IEP, not the location where services will be provided. The Respondent claims that at \_\_\_\_\_ the

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<sup>2</sup> The Respondent alleged that in *White v Ascension Parish School Board*, 343 F. 3d 373, 379 (5<sup>th</sup> Cir 2003), the parents sought to require the school district to place their deaf child in a mainstream classroom in a neighborhood school. The Court held that the parents did not have a right under the IDEA to participate in site selection, because the term "educational placement" referred not to a place, but to a program of services. *Id.*, citing *Sherri A.D. v Kirby*, 975 F. 2d 193 (5<sup>th</sup> Cir 1992) ("educational placement" not a place, but a program of services).

Student's IEP has been implemented and there is no denial of FAPE.

The Respondent asserted the IDEIA only requires that the LEA provide the parent with access to the Student's records. There is no provision under the IDEIA pertaining to the keeping of accurate records. The Respondent contends that the Petitioner's claim of inaccuracies in attendance records while the Student attended \_\_\_\_\_ should be barred. Because, earlier this year Petitioner litigated matters arising from his attendance at \_\_\_\_\_ but the matter of records was not raised and/or was not addressed in the hearing officer decision. As such, the issue should be barred as it should have or could have been raised in the prior hearing. There is no connection between inaccurate attendance records and provision and FAPE.

The Respondent further asserted that the issue of compensatory education was adjudicated in a March 2009 HOD. The Respondent denies that compensatory education is warranted because the IEP has been implemented.

A telephonic pre-hearing conference for the above reference matter was conducted on May 4, 2009 at 3:30 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 reasserted its position.

On May 11, 2009, an Order was issued it required the Petitioner to demonstrate at the May 20, 2009 hearing, why the educational placement is inappropriate, how the Petitioner's choice of placement is appropriate and why the Respondent's proposed placement is not. The Petitioner was also required to demonstrate how a failure to provide attendance record has cause the Student or the Petitioner harm. The Respondent was required to demonstrate that the placement is proper and that the MDT acted appropriately when it made the educational placement decision for the Student. The Respondent was also required to provide evidence that the Petitioner had access to the Student's record and that FAPE was provided.

Additionally, the Petitioner was reminded that to sustain the request for a compensatory education award the Petitioner must prove (1) that as a result of Respondent's violation of the IDEIA, Petitioner suffered an educational deficiency, (2) that but for the violation, the Student would have progressed to a certain academic level, and (3) that there exists a type and amount of compensatory education services that could bring the Student to the level the Student would have been but for the Respondent's violation. The Petitioner has an obligation to establish the need and reasonableness of the amount of compensatory education requested and how the hours will be integrated into the Student's current educational program

The Petitioner failed to address how the claim of inaccuracies in attendance records while the Student attended \_\_\_\_\_ was not barred. Therefore, the Petitioner was limited to evidence relevant to facts unknown to the Petitioner or misleading information provided by the Respondent.

A hearing was held on May 20, 2009. The Petitioner presented a disclosure letter dated May 13, 2009 to which twenty seven documents were attached, labeled P-1 through 27 and which listed ten witnesses. Four witnesses testified –the Mother, the Education Advocate, and the private school representative. The Respondent presented a disclosure letter dated May 13, 2009 identifying four witnesses and to which two documents were attached, labeled DCPS 1 through 2. No witness testified. The documents were admitted without objections. The hearing commenced and testimony was heard from the Mother and the Education Advocate. Counsel for the Petitioner then requested a continuance because two key witnesses were not available. The Petitioner waived her right to a decision within the statutory 45 days. Counsel for the Respondent did not oppose the request; the Hearing Officer granted the request for a second hearing and it was scheduled for May 27, 2009.

At the May 27, 2008 the Psychologist and the Social Worker testified. The Respondent did not present any witnesses.

The hearings were conducted in accordance with the rights established under the IDEIA 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. Has the Respondent failed to provide an appropriate educational placement for the 2008-2009 school year?
2. Did the Respondent fail to provide the Student’s educational records to the Petitioner?<sup>3</sup>
3. Was the Student denied a FAPE?”

## III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student is enrolled at \_\_\_\_\_ for the 2008/2009 school year.<sup>4</sup>
2. The Student is a student with disabilities under the IDEIA. The Student’s most recent IEP is dated March 6, 2009 and provides 25.5 hours a week of specialized instruction, 30 minutes weekly of occupational therapy, 60 minutes of speech language pathology and 30 minutes of behavioral support services weekly. The Student’s disability classification is Other Health Impaired -Attention Deficit Hyperactivity Disorder (“ADHD”).
3. A March 4, 2009 Hearing Officer Determination ordered the Respondent to inform the Petitioner of the advantages and disadvantages for Petitioner with respect to each school that is discussed at the placement meeting, including any schools proposed by the parent. The Respondent was also to give the reasons for the proposed placement in the MDT meeting notes. It also determined the Petitioner had failed to prove the reasonableness of

<sup>3</sup> The Petitioner withdrew the claim at the hearing.

<sup>4</sup> P#1 Due Process Complaint dated April 15, 2009

compensatory education requested and how the hours would be integrated into the Student's current educational program. <sup>5</sup>

4. The Student is the only grader in his class the other students are fifth graders and he is the smallest student. The mother receives calls from the school because the Student is out of his classroom in the halls, does not go to class, is running off the bus and because he only listens to another Student's dedicated aide. The Student spends most of his classroom time on his own computer playing games, not reading, not doing assignments and he's isolated from other students. <sup>6</sup>
5. The Education Advocate ("EA") conducted an observation of the Student's classroom during May 2009. The Student is in a group with eight students in the class, and he is called "little man". The Student is seated separate from the other students with his own computer. The Student plays games on the computer and not doing the work assigned by the teacher. The EA heard the teacher admonish the Student and turned off the computer, when the teacher went away the Student turned on the computer and return to playing games. The special education students are segregated from the general education students because of rock throwing problems that occurred. The teacher said that the Student was hard to manage. The Student does his work when a dedicated aide that is assigned to another Student helps him. At the March MDT meeting the program at was described and the parent offered a private school setting however the MDT decided that would be an appropriate placement without providing the parent an opportunity to visit. <sup>7</sup>
6. During observations of the Student at the Student was often unsupervised because he would leave his classmates, was running around the office and climbing the gates, hiding in the x-ray machines and the Student's safety is a concern. The Student had to be restrained by the assistant principal before becoming violent. The Student is not participating in class or in the lessons; he is segregated from the class and does not get an opportunity to participate in the same activities. The Student requires a therapeutic setting with staff trained to handle aggressions, with better supervision and one-on-one attention to address the Student's behavioral problems.<sup>8</sup>
7. On March 6, 2009, a MDT discussed evaluations and placement. The parent was present; the Student's diagnosis was changed to OHI. It was determined the Student needs a small self contained learning environment, a behavior plan, repeated directions, simple language with directions, and frequent breaks. The team agreed that the Student should be placed outside of the general education setting. The team discussed the as proposed by the Petitioner. The MDT discussed the program and the range of disabilities in the program. It indicated that the classroom has a special education teacher, one and a half time of aide services for 4 students and a designated aide for one of the students. There are social worker, occupational therapist, physical therapists, and speech and language services available. The notes mention that the program is individualized for each student and has a 20 minute rotation schedule. There is a

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<sup>5</sup> P 21 - March 4, 2009, Hearing Officer Determination.

<sup>6</sup> Testimony of the mother.

<sup>7</sup> Testimony of the education advocate.

<sup>8</sup> Testimony of the social worker.

designated calming center and adapted physical education opportunities. The MDT determined that the \_\_\_\_\_ has that therapeutic structured to meet the Student's needs. The parent requested documentation about the placement of \_\_\_\_\_ and an opportunity to visit school. The MDT changed placement from \_\_\_\_\_ to \_\_\_\_\_ out of the general education setting in a self contained environment.<sup>9</sup>

8. The Student requires a structured educational environment with a low student-teacher ratio that focuses on OHI (ADHD) and provides an anger management program. The program that \_\_\_\_\_ provides is a structured program that has a reward system for behavior management and provides all related services in one building which is what the Student needs. The Student is operating at a kindergarten level in reading and math although he's in the third grade. It the opinion of the Psychologist the Student requires between 110- 150 hours in reading for remedial purposes and a one-on-one aide as compensatory education because he has not been in an appropriate educational placement since March 16, 2009.<sup>10</sup>
9. The parent and a physician have authorized medication for the Student; however the authorization is not for medication at school.<sup>11</sup>
10. The Student's records were reviewed and it was determined that the Student needs intensive academic, related services and behavior management. There is a classroom for the Student which combines a group of eight students from first through third grade with one teacher. The students have various disabilities from emotional disturbance, to multiple disabilities and other health impairment. The school has a reading intervention program with a special education teacher and a reading specialist that would provide one-on-one specialize attention if the Student's IEP or if a referral process requested it for the Student. The school has a behavior intervention program focused on ADHD it provides a points system and levels of incentives. The school also provides a crisis intervention program and a fulltime nurse to provide a medication management program for the Student if necessary. The tuition rates are based on the services the Student needs, the range is \_\_\_\_\_ a day.<sup>12</sup>
11. The question of whether a compensatory education award for the lack of occupational therapy services from September through December 2008 was adjudicated in the March 4, 2009 HOD. <sup>13</sup>
12. The Respondent did not present any witnesses.

#### IV. CONCLUSIONS OF LAW

##### **FAPE Determination**

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

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<sup>9</sup> DCPS 2- March 6, 2009, Multidisciplinary Team meeting notes.

<sup>10</sup> Testimony of the psychologist.

<sup>11</sup> P12- October 15, 2008 DC Department of Health-Medication Authorization of 27miligrams -not at school.

<sup>12</sup> Testimony of the Admission Director of the private school.

<sup>13</sup> P 21 - March 4, 2009, HOD

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”).”

### **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. It requires that 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 FAPE.

The Respondent did not meet its legal obligation under the IDEIA. Here is why.

### **Educational Placement**

Under the IDEIA, all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs. 20 USC section 1400 (a)(1)(A)

34 C.F.R. § 300.116 of the IDEIA regulations requires that when determining the educational placement of a child with a disability, each public agency must ensure that the placement decision 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. 20 U.S.C. 1412(a)(5).

Once developed, the IEP is then implemented through appropriate placement in an educational setting suited to the student's needs. *See Roark ex rel. Roark v. District of Columbia*, 460 F. Supp. 2d 32, 35 (D.D.C. 2006). The placement decision, in addition to conforming to a student's IEP, should also consider the least restrictive environment and a setting closest to the student's home. 34 C.F.R. §300.116(a), (b)

A March 4, 2009 HOD ordered the Respondent to inform the Petitioner of the advantages and disadvantages of each school offered for placement of the Student, including any schools proposed by the parent and it required the reasons be provided in the MDT meeting notes. The Respondent was to issue a prior notice of placement within seven days school days if Petitioner were placed in a public facility or within 20 school days if the Petitioner were placed in a private facility. The Respondent complied with the Order by including the information on the MDT notes.

The Respondent asserted it as the LEA has the discretion to determine the appropriateness of the location of the educational placement to provide the Student’s program.

The Respondent is correct in its assertion that it has discretion in the location decision as recent judicial decisions confirm.<sup>14</sup>

Concurrently, the Respondent also has the obligation to implement a program and secure that the location is appropriate. The Respondent alleged the school has been trying to determine what works best for the Student. However the Respondent failed to put forth any evidence beyond a statement from the attorney. Because placement decisions implicate equitable considerations, courts may also consider the parties' conduct.<sup>15</sup>

The uncontroverted testimony was that the Petitioner continues to get calls about the Student roaming the school halls at school. The Student has been segregated from classmates, his self esteem has been affected and he is not participating in the curriculum. The Petitioner asserted the program was not providing the Student with the educational program for his unique needs, and that for the past two years it has failed to provide appropriate services and the Respondent did not provide any witnesses to refute the claim. The Petitioner proved that is an inappropriate program for the Student.

The core of the IDEA is whether the child will receive FAPE, an appropriate education with an educational benefit. For the reasons set forth above, because the Student needs require a full time coordinated program. I find the Student needs a small setting in a full time special education program with individualized attention that is not being provided by the Respondent.

Under 5 DCMR § 3015.1 a "student who is eligible for admission to DCPS ...and for whom no adequate special educational program is provided by DCPS, shall be considered for placement in a private school." (*Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 11 (1993)). DCPS is responsible for paying the costs associated with the provision of a Free and Appropriate Public Education. 5 DCMR Section 3015.2 states that, "the D.C. Public Schools shall pay the cost of tuition for special education and related services for every student placed in a private facility by the Public Schools." 34 CFR Section 300.24 states that "the term related services means transportation and such .....services as are required to assist a child with a disability to benefit from special education.."

In determining the appropriate placement for a child, preference given to the least restrictive environment and the appropriate schools nearest the child's home. *Id.*; see also 20 U.S.C. ? 1412(a)(5). Further, mainstreaming of children eligible for special education services under the IDEA is "not only a laudable goal but is also a requirement of the Act." *Roark v. District of Columbia*, 460 F. Supp.2d 32, 43 (D.D.C. 2006) (*quoting DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 786, 878 (4th Cir. 1989)); *Rowley*, 458 U.S. at 201 ("The Act requires

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<sup>14</sup> While there are recent cases addressing the meaning of "Placement" Versus "Location of Placement" Both state and federal regulations require placement in the Least Restrictive Environment ("LRE"), whenever possible, but, with some exceptions, leave it up to the discretion of the educational agency as to the particular site (location) where the educational services will be provided. Location is one of the components of an educational placement. See: *Melodee H. and Jon H., v. Department of Education, State of Hawaii*, 108 LRP 29421 U.S. District Court, Hawaii -(May 13, 2008)

<sup>15</sup> See: *Reid*, 401 F.3d at 524.

participating States to educate handicapped children with nonhandicapped children whenever possible.""). If no public school can accommodate the student's needs, the government is required to place the student in an appropriate private school and pay the tuition. 20 U.S.C. ? 1412(a)(10)(B)(I); see also *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985).

The Respondent did not provide any evidence that the program it has offered the Student is providing the Student with the services to meet his unique needs. The evidence demonstrated that the private placement offered by the Petitioner has accepted the Student and that it can provide the services on the Student's IEP.

### **Compensatory education**

The Respondent has denied the Student a FAPE. The Respondent's violation entitles the Petitioner to a compensatory education award determination to be made by the Hearing Officer. When there is a denial of FAPE a compensatory award should be granted.<sup>16</sup>

The law requires the Petitioner to demonstrate the Student's specific educational deficits resulting from a loss of FAPE and the specific compensatory measures needed to best correct those deficits, if any.

This jurisdiction requires a compensatory award that would place the student in the same position he/she would have occupied but for the LEA's violation of the IDEA. *Reid v. District of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005) "In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." Id. at 524.

Whichever path the court chooses, the parties must have some opportunity to present evidence regarding [the student's] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits. It rejected arbitrary approaches to the award of compensatory education.

At the hearing for purposes of establishing whether compensatory education is warranted, and if so, what type and amount of compensatory education is most appropriate. The Petitioner had also an obligation *inter alia* to argue the need and reasonableness of the amount of compensatory education requested and how the hours would be integrated into the Student's current educational program.

The evidence consisted of the testimony of the Psychologist who testified that because there was not an appropriate educational placement since March 16, 2009; the Student was entitled to a compensatory education award. The Psychologist suggested the Student requires between 110- 150 hours in reading for remedial purposes and a one-on-one aide as compensatory education plan. She calculated that the Student has missed services since March of 2009. The witness' testimony failed to sufficiently support – under the standards of Reid, the calculation of

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<sup>16</sup> *Mary McLeod Bethune Day Academy Public Charter School v. Bland* Civil Action No. 07-1223 (D.D.C. February 20, 2008)

the number of hours of compensatory education, what the compensatory plan would consist of, and what program, if any, would be used to get the Student to where he should be. Furthermore there was insufficient evidence to demonstrate where academically the Student is as compared to where he should be. The request for a dedicated aide is denied the mere assertion that the Student does his work when a dedicated aide assists him is insufficient to warrant such a relief.

The Petitioner had the burden of showing (1) that as a result of Respondent's violation of IDEIA, Petitioner would have progressed to a certain academic level, and (2) that there exists a type and amount of compensatory education services that would bring Petitioner to the level Petitioner would have been but for the Respondent's violation.

The Reid decision demands substantial evidence of a link between the compensatory education sought and the expected educational benefit. The Petitioner had to offer an informed and reasonable exercise of discretion regarding what services the Student needs to elevate him to the position he would have occupied absent the school district's failures." The Petitioner failed to provide the hearing officer with the fact specific requirements establish in the pre-hearing order and *Reid*.

A Hearing Officer cannot determine the amount of compensatory education that a student requires unless the record provides her/him with "insight about the precise types of education services [the student] needs to progress." *Branham v. D.C.*, 427 F.3d 7, 12 (D.C. Cir. 2005).

## V. SUMMARY OF DECISION

The uncontested evidence provided by the Petitioner proved the program was not providing the Student with the educational program for his unique needs, and that for the past two years the Respondent has failed to provide an appropriate educational program.

The Petitioner failed to establish the reasonableness of the amount of compensatory education requested. The Petitioner failed to provide the hearing officer with the evidence to meet the qualitative standard imposed by the Reid case.

Upon consideration of the 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 Respondent has denied the Student a FAPE and issues the following:

## VI. ORDER

**ORDERED**, the Respondent will by June 30, 2009 issue a Prior Notice of Placement to the Respondent shall fund the placement of the Student at the with transportation and related services for the 2009-2010 school year.

**IT IS FURTHER ORDERED**, upon the Student attending the School for 30 consecutive days a MDT will be convened by the Respondent to review the Student's progress and make adjustments as necessary.

**IT IS FURTHER ORDERED**, that any delay in meeting any of the deadlines in this Order because of Petitioner's absence or failure to respond promptly to scheduling requests, or that of Petitioner's representatives, will extend the deadlines by the number of days attributable to Petitioner or Petitioner's representatives. The Respondent shall document with affidavits and proofs of service for any delays caused by Petitioner or Petitioner's representatives.

**IT IS FURTHER ORDERED**, in the event that the Respondent should fail to comply with the terms herein, and an issue arises out of the noncompliance the Petitioner may file a request for a hearing and the hearing will be scheduled within 20 calendar days.

This order resolves all issues raised in the Petitioner's April 15, 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/ WIRestorres  
Wanda Iris Resto Torres - Hearing Officer

Date: June 3, 2009