

*District of Columbia*  
*Office of the State Superintendent of Education*

Office of Review and Compliance  
Student Hearing Office  
810 First Street, NE – Second Floor  
Washington, DC 20002  
Tel: 202-698-3819  
Fax: 202-698-3825

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STUDENT HEARING OFFICE  
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**Confidential**

<p>STUDENT<sup>1</sup>, by and through her Parent Petitioners, v. District of Columbia Public Schools (“DCPS”) Respondent.</p>	<p>HEARING OFFICER’S DETERMINATION</p> <p><u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u></p>
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<sup>1</sup> Personally identifiable information is attached as Appendices A & B to this decision and must be removed prior to public distribution.

## **JURISDICTION:**

The hearing was conducted and this decision was written pursuant to the *Individuals with Disabilities Act* ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the *Individuals with Disabilities Education Improvement Act of 2004*, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5 Charter E30.

## **BACKGROUND:**

Student or "the student" is age [redacted] and has been determined eligible as a child with a disability under IDEA with a disability classification of visual impairment (including blindness). The student attends a District of Columbia Public Schools ("DCPS") elementary school hereinafter referred to as "School A." During the 2010-2011 school year ("SY") the student was in pre-kindergarten and remains in kindergarten for SY 2011-2012. The student's initial individualized educational program ("IEP") was developed March 16, 2011. At the March 2011 IEP meeting and subsequent thereto the parent requested the student be provided a dedicated aide. DCPS did not agree with the request and did not provide the dedicated aide.

Petitioner filed the due process complaint on August 8, 2011, alleging, the student was in need of a dedicated aide. Petitioner seeks as relief: an order directing DCPS to provide the student a full time dedicated aide and (2) compensatory education for the time the student has not had a dedicated aide since the student's initial IEP was developed March 16, 2011.<sup>2</sup>

DCPS filed a written response on August 31, 2011. DCPS asserts the student is not in need of a dedicated aide and pursuant to the student's IEP she receives sufficient services including occupational therapy, orientation mobility services and assistive technology. DCPS asserts there has been no denial of FAPE and there is no compensatory education due.

The resolution meeting was held on September 14, 2011, and the matter was not resolved. The parties agreed to proceed directly to hearing and the 45-day timeline originally ended October 29, 2011. A prehearing conference in this matter was held on September 28, 2011.<sup>3</sup> During the pre-hearing conference the parties agreed to a continuance of the hearing and an extension of the HOD due date to allow for a scheduled IEP meeting to be held prior to the hearing. The parties agreed to a hearing date of November 4, 2011, and on September 30, 2011, submitted a consent motion for continuance which was granted extending the HOD due date to November 21, 2011.

A second pre-hearing conference was held Thursday, October 6, 2011, at 2:00 p.m. to review the outcome of the October 4, 2011, IEP meeting. The meeting IEP meeting was held but the issue

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<sup>2</sup> Petitioner disclosed a compensatory education plan which requested the Hearing Officer grant the student the following: 10 hours of one on one time with a qualified person chosen by the parent who can assist the student learn accommodations she case use in the classroom when working with academics and safe traveling through the class."

<sup>3</sup> Attempts were made by the Hearing Officer to convene the PHC within a week of the resolution session; however, this date was the first date both counsel were available and timely confirmed the date.

alleged in the complaint was not resolved. The Hearing Officer issued a pre-hearing order October 12, 2011.

**ISSUE: 4**

The issue adjudicated is:

Whether DCPS denied the student a FAPE by failing to provide the student a dedicated aide?

**RELEVANT EVIDENCE CONSIDERED: 5**

This Hearing Officer considered the testimony of the witnesses and the documents submitted in the parties' disclosures (Petitioner's Exhibits 1-31 and DCPS Exhibit 1-16) that were admitted into the record and are listed in Appendix A.<sup>6</sup> Witnesses are listed in Appendix B.

**FINDINGS OF FACT: 7**

1. The student was determined to be legally blind at six months of age and has been diagnosed with retinal pigmentary degeneration. However, the student can see some light and colors. In September 2009 when the student was age 2 years, 4 months, a developmental evaluation was conducted. The evaluator determined the student's cognitive, adaptive, social, communication and motor skills were all in the average range. However, the student evidenced a mild developmental delay in the cognitive sub-domain. Because of her blindness the student was unable to perform effectively in the some of the assessments. The DC Office of the State Superintendent of Education ("OSSE") developed an Individualized Family Service Plan ("IFSP") for the student in December 2009. (Dr. Nelson's testimony<sup>8</sup>, Father's testimony, Petitioner's Exhibits 9-1, 10-1, 10-2, 10-3, 10-4, 10-5, 10-6, 10-8, 10-9, 10-10, 10-11, 10-12, 11, 14)

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<sup>4</sup> The issue(s) alleged in the complaint may not directly correspond to the issues outlined here. However, the parties agreed at the hearing that the issue(s) listed here is/are the issue(s) to be adjudicated.

<sup>5</sup> Although not evidence, the Hearing Officer also considered the written closing arguments submitted by both counsel on November 7, 2011.

<sup>6</sup> Petitioner's counsel objected to the admission of Respondent's Exhibits 1 through 4 and Exhibit 6. Respondent's counsel objected to the admission of documents created after complaint was filed and correspondences from Petitioner's counsel to DCPS. However, neither counsel presented their objections two days prior to the hearing as was required by the pre-hearing order. Thus, the objections were noted for the record but overruled. The only document not admitted was Petitioner's Exhibit 32 that was filed after the 5-day deadline.

<sup>7</sup> The evidence that is the source of the finding of fact is noted within a parenthesis following the finding. The second number following the exhibit number denotes the page of the exhibit from which the fact was extracted. When citing an exhibit that has been submitted by both parties separately the Hearing Officer may only cite one party's exhibit.

<sup>8</sup> This witness was designated an expert witness in the field of clinical psychology.

2. The student began attending School A at the start of SY 2010-2011 in pre-kindergarten. In November 2010 DCPS Early Stages conducted a psychological evaluation of the student. The student's adaptive and personal social skills were determined to be accelerated and advanced respectively. (Petitioner's Exhibits 12 & 13)
3. The student's father and an older sister have the same medical condition and blindness. The student's father attended and graduated from DCPS. The father had a dedicated aide while he attended DCPS. The student's older sister currently attends a DC public charter middle school. The older sister also attended School A and when she attended there she had a dedicated aide. The parent's request that the student have a dedicated aide is in part based on what the parent believes is his and his other daughter's school success as a result of having a dedicated aide. (Father's testimony)
4. The student was first determined eligible for special education services on March 3, 2011, when she was age three years, 10 months, with a disability classification of visual impairment (including blindness). The student is now age four and remains in kindergarten for SY 2011-2012. The student is in a general education inclusion classroom with approximately twenty students. The parent desires for the student to be in the least restrictive environment and remain in the inclusion classroom but requests the student have a dedicated aide. DCPS denied the student a dedicated aide during her initial IEP because of what the DCPS staff believed to be her independence in the classroom. (Father's testimony, Respondent's Exhibit 10-1, Petitioner's Exhibits 6-1, 7-1)
5. The student operates quite independently because she has been trained to do so by her parents in the home. However, the parent believes the student still requires an aide to assist her in traveling to and from school and on field trips and to some extent in the classroom to assist her in effectively gaining instruction. In some instances the student was denied some field trips during SY 2010-2011 because she did not have an aide to go with her. The student lost out on valuable experience and learning as a result. In some instances because the student cannot see in the classroom she does not know when the teacher is showing objects and the student misses out because she is not provided the additional description that a dedicated aide might provide. (Father's testimony)
6. The student's initial IEP was developed March 16, 2011. The IEP prescribed the following services: 1 hour per week of specialized instruction outside of general education, 1.5 hours per week of specialized instruction inside general education and the following related services: 60 minutes per week of Orientation and Mobility and 2 hours per month of Occupational Therapy ("OT"). The IEP included goals in the following areas: Adaptive/Daily Living Skills, Vision, Motor Skills/Physical Development. The IEP also included the following classroom accommodations: Presentation - Braille, Repetition of Directions, Instructional Braille Response - Dictated Response to Examiner, Oral Responses to Tests. The student's initial IEP also included extended school year ("ESY") services. (Petitioner's Exhibit 6-1, 6-2, 6-3, 6-4, 6-7, 6-9)
7. At the student's initial IEP meeting on March 16, 2011, the student's parent requested the student be provided a dedicated aide. DCPS did not include the aide in the IEP but

agreed to refer the request to DCPS Central Office. As result DCPS conducted classroom observations of student. On April 29, 2011, the DCPS social worker who conducted the observations recommended that the student did not be provided a dedicated aide but continue to be provided opportunities to be as independent as possible. Progress reports were issued by DCPS recounting the student's progress relative to her IEP goals during the remainder of SY 2010-2011 (Petitioner's Exhibit 6-7, Respondent's Exhibit 15-1, 15-4, 19, 20)

8. The student attended ESY during Summer 2011. Progress reports were developed to track the student progress relative to her IEP goals during the ESY session. (Petitioner's Exhibit 18)
9. During SY 2010-2011 the student had some difficulties navigating some of the obstacles in her classroom and getting to the restroom and around school. The student received training using her cane to navigate her school environment during ESY and this training has continued during SY 2011-2012. Her ability to navigate with the cane has improved greatly in the current school year. The student receives mobility training with the use of her walking cane twice per week. (testimony)
10. The student's IEP was reviewed and revised at an IEP meeting held October 4, 2011. The student's parents and their educational advocate attended the meeting. The DCPS attendees included, the student's regular education teacher, the special education teacher, the mobility specialist, the vision teacher, occupational therapist, a special education specialist, and the director of visions services. The purpose of the meeting was to revise the IEP and discuss the parent's request for a dedicated aide. The team members discussed the student future use of Braille as her primary means of reading. Because the student can still see shadows and some colors she attempts to read with her sight by putting objects very close to her face. The student likes to be up close to the teacher and uses her hands to guide her way around the classroom often touching other students to find her way and to determine who she is near and within whom she is interacting and talking. (Petitioner's Exhibit 7-1)
11. The team noted in the student's IEP that she can eat and toilet independently and she fairs well in an inclusion setting using the buddy system to access the general education curriculum. The student's vision goals indicate that the student needs to use her fingers more than she uses her eyesight to learn Braille. "For her safe travel she needs to learn orientation and mobility ("O&M") skills and techniques for indoor travel with her hands and arms as well as with long cane. She has also learned to use her other senses such as auditory and tactual sense for her travel to compensator her vision loss." (Petitioner's Exhibit 7-3)
12. At the October 4, 2011, meeting the student's IEP was revised to prescribe that she be provided 1 hour of specialized instruction per week in general education, 30 minutes of specialized instruction per day in general education, and 30 minutes per day outside general education. The IEP also provided the following related services: 1 hour per week of orientation and mobility service per week outside general education and 240 minutes of occupational therapy per month outside general education. The IEP includes goals in

the following areas that were updated from the previous IEP: Adaptive/Daily Living Skills, Vision, Motor Skills/Physical Development. The IEP also includes the following assistive technology which was added: Braille Writer, Braille Paper, APH Patters Series, Touch pad with appropriate applications, 2 walking canes (home and school), 2 set of protective lenses (home and school), slate and stylus, raise line, bold line paper, 20/20 bold line pen, mini light box. The IEP includes the following classroom accommodations: repetition of directions, Response – pointing response, pencil grip, preferential seating, taped stories, lighting in the room, room free from [clutter], dictated response to examiner, oral responses to tests. The student IEP no longer includes ESY services. The team agreed to reconvene in February 2012 to discuss ESY services. (Petitioner's Exhibits 7-1, 7-2, 7-3, 7-4, 7-5, 7-6, 7-7, 7-8, 7-10, 8-4)

13. The student has been provided the tactile instruction to prepare her to eventually be able to read Braille. The student has made significant and steady progress with her vision instruction and the student's classroom teacher has been provided assistance from the vision teacher in adapting the curriculum for the student. The DCPS members of the student's IEP team at both the March 16, 2011, and October 4, 2011, meeting disagreed with the parent that the student was in need of dedicated aide given her progress and her independence in the classroom. testimony)
14. The student receives specialized instruction both in the general education setting and outside the general education setting. The student's special education teacher sits with the student on occasion giving her directions to follow so she can keep up with the other students and to help her become more socially adept with her non-disabled peers. testimony
15. On September 20, 2011, and October 17, 2011, the parent's educational advocate conducted classroom observations of the student. The student was actively engaged in the class during the observation and followed directions. The student appeared to have some difficulty with some of the classroom activities including making her way to and from the bathroom. She did not always maneuver around objects in the classroom successively. The student touched other students to assist her in navigating the classroom and during classroom activities to assist her in perceiving the environment and to identify who the other students were with whom she working. The student got frustrated on one occasion because she had to wait on the teacher to tell her what was written on board while other students were immediately able to know what was being displayed and begin the activity immediately. The student at the time did not have a cane or any assistive technology to assist her in accessing all the instruction being provided in the classroom. testimony, Petitioner's Exhibits 15 & 16)
16. The student is operating on grade level with her non-disabled peers. DCPS has carefully considered the parent's request for the student to have a dedicated aide. DCPS considers the student having a dedicated aide as too restrictive and believes the presence of an adult all the time with the student would make her more dependent rather than independent and restrict much of the peer to peer learning that normally goes on in a general education classroom. With the increased services and assistive technology that the student's IEP now includes she will be better able to access the general education curriculum.

Additional training for the student's classroom teacher is planned along with additional accommodations and strategies to increase the student's attention and perceptions in the classroom and to remove physical obstacles that interfere with student ease in navigating her classroom. Some of the additional services and assistive technology that were added to the student's IEP as of the October 4, 2011, meeting have not yet been provided due to the DCPS procurement process. An aide has been added for the student to attend field trips with the student. testimony, Petitioner's Exhibit 7-8)

17. Petitioner presented a compensatory education plan which requested the Hearing Officer grant the student 10 hours of one on one time with a qualified person chosen by the parent who can assist the student learn accommodations she case use in the classroom when working with academics and safe traveling through her class classroom. (Petitioner's Exhibit 28)

### CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i) a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii) in matters alleging a procedural violation a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.

Pursuant to 5E DCMR 3030.14 the burden of proof is the responsibility of the party seeking relief.<sup>9</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). In this case the student/parent is seeking relief and has the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with FAPE.

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--  
(a) Are provided at public expense, under public supervision and direction, and without charge;  
(b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

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<sup>9</sup> The burden of proof shall be the responsibility of the party seeking relief. 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.

**ISSUE:**

Whether DCPS denied the student at FAPE by failing to provide the student a dedicated aide?

**Conclusion:** The evidence demonstrates that the student was unable to attend field trips during SY 2010-2011 because of her disability and not having the benefit of a dedicated aide. Petitioner sustained the burden of proof by a preponderance of the evidence that the student was unable to access these portions of the general education curriculum because during those field trips she was not provided a dedicated aide. However, the Hearing Officer does not conclude that the student is in need of a full time dedicated aide particularly given the additional services and assistive technology that has been added to the student's current IEP.

The IEP is the central part of the special education process and the failure to develop an appropriate IEP is a substantive denial of a Free Appropriate Public Education ("FAPE"). 20 U.S.C. § 1401 (9) (FAPE consists of special education and related services that are provided in conformity with the student's IEP, which in turn is to be developed according to a student's unique educational needs); 34 C.F.R. § 300.17; D.C. Mun. Regs. Tit. 5 § 3000.1. See also Scott v. District of Columbia, (D.C. Cir.) 03-1672 DAR (March 31, 2006); and Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 276, 182 (1982) ("The free appropriate public education required by the Act is tailored to the unique needs of the handicapped child by means of an Individualized Educational Program ("IEP")).

20 U.S.C. 1414(a)(i) defines Individualized Education Program as a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes a statement of the child's present levels of academic achievement and functional performance." It includes measurable goals, statements of related services, assistive technology and other appropriate accommodations. It is developed by the IEP team which consists of the child's parent, general education teachers, LEA special education teachers and anyone deemed as a necessary participant by reason of the services provided to the student. The IEP is the centerpiece or main ingredient of special education services.

34 C.F.R. § 300.101 provides:

- (a) General. A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in Sec. 300.530(d).
- (b) FAPE for children beginning at age 3.
  - (1) Each State must ensure that--
    - (i) The obligation to make FAPE available to each eligible child residing in the State begins no later than the child's third birthday; and
    - (ii) An IEP or an IFSP is in effect for the child by that date, in accordance with Sec. 300.323(b).
  - (2) If a child's third birthday occurs during the summer, the child's IEP Team shall determine the date when services under the IEP or IFSP will begin.

(c) Children advancing from grade to grade. (1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

(2) The determination that a child described in paragraph (a) of this section is eligible under this part, must be made on an individual basis by the group responsible within the child's LEA for making eligibility determinations.

34 C.F.R. §300.42 provides:

Supplementary aids and services means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with Sec. 300.114 through 300.116.

The evidence demonstrates, through the parent's credible testimony<sup>10</sup>, that the student was unable to attend field trips during SY 2010-2011 because of her disability and not having the benefit of a dedicated aide. However, the Hearing Officer does not conclude that the student is in need of a full time dedicated aide particularly given the additional services and assistive technology that has been added to the student's current IEP.

The student's father credibly testified that on a number of occasions the student was denied and unable to attend field trips with her class because there was no one to go along with the student to provide for her safety. At the most recent IEP meeting DCPS amended the student's IEP to include an aide for field trips. The provision of special education services including the provision of supplementary aids and services are precisely what IDEA seeks to ensure students with disabilities are provided so they have equal opportunities provided their non-disabled peers. This was a clear instance when the student was denied parts of the general education curriculum because of her disability and LEA failing to provide her services that would have ensured access to the curriculum. The fact that this service has now been added to the IEP is one indication of its need and a need that should have been provided the student in her initial IEP. The Hearing Officer thus concludes that the failure to provide the student with a dedicated aide for field trips was a denial of FAPE. The parent effectively testified that the student was unable to gain full access to the curriculum because of the deprivation and the Hearing Officer concludes that that such a denial is was a material failure under IDEA and more than de minimis.<sup>11</sup>

Although Petitioner presented a witness who was qualified as an expert in clinical psychology and who evaluated the student years ago, the witness has not recently observed the student. The Hearing Officer was not convinced by her recommendation that the student needs a full time dedicated aide. The Hearing Officer gave greater weight to the testimony of the DCPS staff

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<sup>10</sup> The Hearing Officer found the witness credible based upon his demeanor and his frequent contact with the student's teachers and service providers and visits to the student's classroom.

<sup>11</sup> *Catalan v. District of Columbia* 478 F. Supp. 2d 73 (D.D.C. 2007)

members who currently work with the that she is able to navigate her classroom safely and with the additional services and assistive technology and the skills she will presumably gain over time she will have her greater independence and greater ability to access the general education curriculum without the need for a dedicated aide. However, the Hearing Officer notes that many of the assistive technology that was added to the student's IEP at the October 4, 2011, meeting had not yet been provided the student a month later as of the due process hearing. This prompts the Hearing Officer to direct that DCPS convene a MDT/IEP meeting within ninety (90) days of the issuance of this order to assess the effectiveness of the additional services and assistive technology that have been added to the IEP.

### **Compensatory Education**

Under the theory of compensatory education, "courts and hearing officers may award educational services ... to be provided prospectively to compensate for a past deficient program." "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." *Reid*, 401 F.3d 522 & 524. To aid the court or hearing officer's fact-specific inquiry, "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." *Id.* at 526.

Despite fact that the student was denied a FAPE due the failure to provide the student a dedicated aide during field trips Petitioner failed to present evidence of how any proposed award would be reasonably calculated to provide the educational benefits that likely would have accrued if she had been provided the dedicated aide for field trips previously. The testimony and documents offered by Petitioner with regard to compensatory education did not specifically address the denial. However, when a denial of FAPE has been proven it is inequitable for the student to be provided nothing.<sup>12</sup> Consequently, the Hearing Officer will order, based on equitable considerations, and as compensatory education, that DCPS provide the student a nominal amount of services to assist the student accessing the assistive technology that she will eventually be provided under her current IEP.

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<sup>12</sup> *Mary McLeod Bethune Day Acad. Public Charter School V. Bland* 534 F. Supp. 2d 109 (D.D.C. 2008)

**ORDER:**

1. DCPS shall provide the student five (5) hours of additional one-on-one services to assist the student in use of the assistive technology beyond the services provided in the student's IEP as compensatory education.
2. DCPS shall, within ninety (90) days of the issuance of this Order convene and IEP meeting to review the student's progress with the additional services and assistive technology added to the student's IEP in effectively allowing the student to both better navigate her classroom and school environment safely and gain full access to the general education curriculum.

**APPEAL PROCESS:**

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).



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**Coles B. Ruff, Esq.**  
**Hearing Officer**  
**Date: November 21, 2011**