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

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OSSE
STUDENT HEARING OFFICE
2010 JAN 22

# Confidential

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| STUDENT[1], by and through Parent<br><br>Petitioners,<br><br>v.<br><br>District of Columbia Public Schools<br><br>Respondent. | **HEARING OFFICER'S DECISION**<br><br>**Date: January 22, 2010**<br><br>**Hearing Officer: Wanda I. Resto, Esquire** |

[1] Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

## I. PROCEDURAL BACKGROUND

On November 12, 2009, parent's counsel filed a Due Process Hearing Complaint ("Complaint") against the Hospitality PC High School and the District of Columbia Public Schools ("Respondent") pursuant to the Individuals with Disabilities Education Improvement Act ("IDEIA"), alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing: to evaluate the Student, to implement the Individualized Education Plan ("IEP"), to provide specialized instruction and related services, and failing to provide an appropriate educational placement.[2]

The Petitioner requested that the Respondent be deemed to have denied the Student a FAPE and ordered to immediately issue a Prior Written Notice for the Student to attend the placement of the Petitioners choice for the remainder of the 2009-2010 school year. The Petitioner also requested the Respondent fund the placement and transportation of the Student.

On November 30, 2009, the Respondent filed the DCPS' Response to the Parent's Administrative Due Process Complaint Notice it denied it failed to provide a FAPE, and asserted it has been implementing the Student's October 14, 2009 IEP which provides the Student with 10 hours of specialized instruction (7.5 hours in the resource setting and 2.5 hours in the general education setting) weekly and 1 hour of counseling services weekly because there has not been a consensus on the provision of 27.5 hours weekly. The Respondent denied that the Student had suffered educational harm as a result.

A December 16, 2009 Order established that the parties agreed:

a. the Respondent is the Local Educational Agency for the public charter school in the current Complaint;
b. there is consensus in the MDT that the Student may require an out of general education setting and that the current placement cannot provide a non inclusion program;
c. The parents are exploring alternatives outside of a public educational placement.

A hearing was held on January 13, 2010. The Petitioner presented a disclosure letter dated January 6, 2010 to which nineteen documents were attached, labeled P-1 through 19 and identifying ten witnesses; two witnesses testified. The Respondent presented a disclosure letter dated January 6, 2010 identifying thirteen witnesses and to which eight documents were attached, labeled DCPS 1 through 8; no witness testified.

The hearing was conducted in accordance with the rights established under the IDEIA and the implementing federal and local regulations, and the SOP. [3] The parties stipulated

a. the Student's IEP prescribes 27.5 hours of specialized instruction in a out of general education setting, with 60 minutes weekly of behavioral support.
b. Hospitality cannot implement the Student's IEP;
c. the Respondent has not issued a Prior Notice of placement.

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[2] 20 U.S.C. §1415(c)(2)(B)(i)(I)

[3] IDEIA and 20 U.S.C. Sections 1400 et seq., Title 34 of the Code of Federal Regulations, Part 300; the Rules of the Board of Education of the District of Columbia; 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 failed to implement the Student's IEP?
2. Has the Respondent failed to provide specialized instruction and related services?
3. Did the Respondent fail to provide an appropriate educational placement?
4. Was the Student denied a FAPE?

## III. FINDINGS OF FACT

1. The Student is a student with disabilities under the IDEIA as a result of being specific learning disabled. The Student's most recent IEP is dated November 4, 2009 and provides 27.5 hours of specialized instruction, and 60 minutes of behavioral support services weekly, in a out of general education setting.[4]

2. Both the parent and the Student reside within the District of Columbia. The Student is attending a Charter School in the District of Columbia during the 2009-2010 school year which cannot implement the Student's IEP.[5]

3. An August 22, 2009 functional behavior assessment ("FBA") recommended *inter alia* that the Student will benefit from a small heavily structured, academic environment that allows for a considerable amount of individualized attention and instruction outside of in general education setting. It also recommended the IEP team discuss whether the Student meets the criteria for an emotional disability; citing his acting out behaviors, and poor comprehension of consequences.[6]

4. On October 14, 2009 and November 4, 2009, the Student's IEP was reviewed. The MDT discussed the challenges the Student was having difficulties with transitions from classes and an aversion to staff. When interventions are attempted the Student shuts down and does not accept guidance. The Student academically is not progressing; his grades are D and Fs. There was consensus in the MDT to modify the IEP to include a full-time special education placement. The MDT agreed with the that the Student requires a small highly structured program with individual attention including vocational training. The Respondent has not issued a Prior Notice of Placement naming another school for the Student; and there has not been a meeting with the MDT to discuss any further placement action.[7]

5. Accotink Academy *is* a private therapeutic day school for students with learning and emotional disabilities, and other health impairments in Springfield, Virginia serving students with special education full time needs, who range in ages from five to twenty-one. The school places a strong emphasis upon social-emotional development and provides a behavior management program. The student-to-teacher ratio is small; the Student will receive individualized attention; group counseling and work towards a high school diploma. The Student's class rotates in a group of 6-11 students to six classes with a special education teacher and a co-teacher. There are seven behavior counselors, Language and Speech, Occupational Therapy, Physical Therapy and Psychological Counseling can be provided. The teachers are certified in the state of Virginia. The program also provides vocational training, career exploration, and assessments to determine desires and needs for daily living. The

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[4]DCPS 2 November 11, 2009-IEP.

[5] See -stipulation by the parties

[6] DCPS 8 August 22, 2009-FBA.

[7] Testimony of the education advocate and P-15 Student's 2009 school transcript.

Student's IEP, educational records, clinical psychological, FBA were reviewed and the team determined that the Student can benefit from the placement at Accotink. The cost is approximately $251.00 a day.[8]

## IV. CONCLUSIONS OF LAW

### FAPE Determination

The Respondent is required to fully evaluate every child suspected of having a disability within the jurisdiction of the District of Columbia, ages 3 through 22, determine their eligibility for special education and related services and, if eligible, provide special education and related services through an appropriate IEP and Placement, designed to meet their unique needs and prepare them for further education, employment, and independent living.[9]

The applicable regulations 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)." [10]

In assessing whether a FAPE has been provided, a court must determine whether (1) the school complied with the IDEIA's procedures; and (2) the IEP developed through those procedures was reasonably calculated to enable the Student to receive educational benefits.[11]

### Burden of Proof

The burden of proof is 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.[12]

### Prior Written Notice

According to 34 C.F.R. §§ 300.503(a)-(b), Prior Notice by the Public Agency, "written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency proposes to change … the educational placement.

The Respondent infringed its obligation to provide the parent with a written notice consistent with 34 C.F.R. § 300.503, which requires the Respondent to provide a detailed explanation within a reasonable time as to why it is refusing to make a placement determination.

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[8] Testimony of the Private school representative.

[9] 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006).

[10] 34 C.F.R. § 300.17

[11] *Bd. of Educ. v. Rowley,* 458 U.S. 176, 206-07 (1982); and *Jalloh v. District of Columbia,* 535 F. Supp. 2d 13, 16 (D.D.C. 2008).

[12] 5 D.C.M.R. § 3030.3,

**Placement**

The IDEA requires that at the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in § 300.320. [13]

According to 34 C.F.R. 300.323 (c) Each public agency must ensure that—

(1) A meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and

(2) As soon as possible following development of the IEP, special education and related services are made available to the child in accordance Pursuant to 34 CFR 300.323(c)(2) (a) General.

The Respondent failed to comply with its obligation the Student was determined to require a full time special education placement on October 14, 2009. The Student should have had his program available, more than three months have passed, and the Respondent has not identified an appropriate full time placement for the Student.

The Respondent has pointed to no evidence in the record contradicting the Petitioner's claims that the Student's IEP was not implemented. The Respondent has not provided or offered an appropriate full time special educational placement for the Student. The Petitioner established that the public school placement was non-existent; the inquiry is whether or not the private school placement is appropriate.

Under IDEA, an "appropriate" placement is that which enables a child to obtain "some benefit" from the public education he is receiving; not necessarily maximization of his potential. In addition to requiring that the child's placement be appropriate in the sense of providing some benefit, IDEA mandates that to the fullest extent possible, disabled children be educated with nondisabled children in the least restrictive environment.[14]

The evidence was that the least restrictive environment for the Student for the school year 2009/2010 requires a full-time program with appropriate related services of counseling and speech and language.

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."

There was no evidence to explain a delay in determining the placement and location for the Student's special education services. The Respondent has failed to provide the Student with an educational placement according to its IDEIA obligations. The Parent has sought and the Student has been accepted in a private special education program. Accotink Academy has accepted the Student for placement. The Student can receive services in accordance with the IEP in a full time placement with a low Student teacher ratio and intensive behavior management.

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[13] 20 U.S.C. 1414(d)(2)(A)-(C)

[14] 20 U.S.C. 1412(a)(5); Rowley, 458 U.S. at 198-200, 202, 102 S. Ct. at 3047; Sherri A.D., 975 F.2d at 206.

In determining the appropriate placement for a child, preference is given to the least restrictive environment and the appropriate schools nearest the child's home.[15] 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 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.[16]

The IDEIA equates a FAPE, to an appropriate education with an educational benefit. For the reasons set forth above, because the Student needs require a small structured, academic environment with individualized attention and instruction outside of in general education setting. 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.

## V. SUMMARY OF DECISION

The Petitioner proved that the Student's IEP was not implemented by the Respondent. The Petitioner proved the Student does not have an appropriate special educational placement for the 2009-2010 school year. The Respondent has failed to provide the Student with an educational placement according to its IDEIA obligations. The Parent has sought and the Student has been accepted in a private special education program. The Respondent will fund the Student's tuition and transportation to the Accotink Academy.

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 denied the Student a FAPE and issues the following:

## VI. ORDER

**ORDERED** the Respondent will by February 20, 2010 issue a Prior Notice of Placement to the Accotink Academy. The Respondent shall fund the placement of the Student at the Accotink Academy 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 convene to review the Student's progress, discuss the IEP and make adjustments as necessary, **it is further;**

**ORDERED,** all meetings shall be scheduled through counsel for the parent in writing, **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;**

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[15] 20 U.S.C. §1412(a)(5

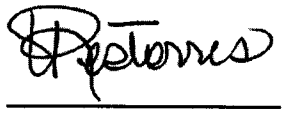
[16] 20 U.S.C. § 1412(a)(10)(B)(I); Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985).

**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 matters presented in the Petitioner's November 12, 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)



**Signed: January 22, 2010**

**Wanda Iris Resto - Hearing Officer**

# APPENDIX A

## INDEX OF NAMES

**In the MATTER OF "Student" V. DCPS**

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|---|---|
| Child Name:<br>SHO DPC# 2009-1490<br>Student STAR # 9022863 | Xavier Wigfall<br>Date of Birth: 11/30/1992 |
| Child's Parent(s) | Geraldine Proctor, Mother |
| Child/Parent's Representative | Domiento Hill, Esquire |
| DCPS' Representative | Daniel Kim, Esquire |
| Educational Advocate | Kevin Carter |
| Private School –Assistant Director Accotink | Ann Warnke |
| Attending School | Hospitality PC High |

PM 1:04

## Brown, Pamela M. (OSSE)

**From:** admin@dcsho.i-sight.com
**Sent:** Friday, January 22, 2010 9:53 AM
**To:** Kim, Daniel (DCPS-OGC); dhill@jeblaw.biz; Student Hearing Office (OSSE); Due, Process (OCTO)
**Subject:** DCSHO: HOD# 2009-1490 From <Wanda.Resto@dc.gov>
**Attachments:** WXHOD1-22-10.pdf

OSSE
STUDENT HEARING OFFICE
2010 JAN 22 PM 1:04

** NOTE: Please do not modify subject line when replying **
** This email was sent by Wanda Resto-Torres <mailto: Wanda.Resto@dc.gov>
**

Counsels,
Attached the HOD for XW. WResto