

**DISTRICT OF COLUMBIA**  
**OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Office of Dispute Resolution  
1050 First Street, NE, 3<sup>rd</sup> Floor  
Washington, DC 20002

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Office of Dispute Resolution  
October 24, 2019

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PETITIONER,  
on behalf of STUDENT,<sup>1</sup>

Date Issued: October 24, 2019

Petitioner,

Hearing Officer: Peter B. Vaden

v.

Case No: 2019-0218

DISTRICT OF COLUMBIA  
PUBLIC SCHOOLS,

Hearing Date: October 16, 2019

Respondent.

Office of Dispute Resolution, Room 423  
Washington, D.C.

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**HEARING OFFICER DETERMINATION**

**INTRODUCTION AND PROCEDURAL HISTORY**

This matter came to be heard upon the Administrative Due Process Complaint Notice filed by the Petitioner (MOTHER or PARENT), under the Individuals with Disabilities Education Act, as amended (the IDEA), 20 U.S.C. § 1400, *et seq.*, and Title 5-E, Chapter 5-E30 of the District of Columbia Municipal Regulations (“D.C. Regs.”). Petitioner alleges that Respondent District of Columbia Public Schools (DCPS) denied Student a free appropriate public education (FAPE) by not revising Student’s Individualized Education Program (IEP) in August 2019 to provide for a dedicated aide.

Petitioner’s Due Process Complaint, filed on August 28, 2019, named DCPS as Respondent. The undersigned hearing officer was appointed on August 30, 2019. Petitioner initially alleged additional claims against DCPS, and requested an expedited

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

due process hearing. At the telephone prehearing conference on September 16, 2019, Petitioner's counsel advised that at the September 9, 2019 Resolution Session Meeting, an agreement had been reached with DCPS on all issues except for the request for a dedicated aide. Counsel withdrew Petitioner's request for an expedited hearing. My final decision is now due by November 11, 2019.

On September 30, 2019, Petitioner filed a motion for an order requiring DCPS to allow Petitioner's educational consultant to make a second classroom observation at CITY SCHOOL. By order of October 4, 2019, I denied this motion. On October 7, 2019, Petitioner filed a motion for reconsideration, which I denied by order issued October 15, 2019.

The due process hearing was convened before the undersigned impartial hearing officer on October 16, 2019 at the Office of Dispute Resolution in Washington, D.C. The hearing, which was closed to the public, was recorded on an electronic audio recording device. Mother appeared in person for the hearing and was represented by PETITIONER'S COUNSEL and PETITIONER'S CO-COUNSEL. Respondent DCPS was represented by MES TEACHER and by DCPS' COUNSEL.

Counsel for the parties made opening statements. Mother testified at the hearing and called INVESTIGATOR, EDUCATIONAL CONSULTANT and PEDIATRICIAN as additional witnesses. DCPS called as witnesses CENTRAL OFFICE SPECIALIST and MES Teacher. Petitioner's Exhibits P-8 through P-27, P-30, P-31 and P-40 through P-44 were admitted into evidence, including Exhibits P-15, P-16, P-27, P-30 and P-44 which

were admitted over DCPS' objections. Petitioner withdrew proposed Exhibits P-1 through P-7, P-28, P-29 and P-32 through P-39. DCPS' Exhibits R-1 through R-3, R-7 and R-8 through R-12 were admitted into evidence without objection. DCPS did not offer previously disclosed Exhibits R-4, R-5, R-6 or R-8. At the conclusion of the presentation of evidence, counsel for the respective parties made oral closing arguments. At the email request of Petitioner's Counsel, the parties were granted leave to file post-hearing written argument by October 21, 2019. Only Petitioner filed a post-hearing brief.

### **JURISDICTION**

The hearing officer has jurisdiction under 20 U.S.C. § 1415(f) and D.C. Regs. tit. 5-E, § 3029.

### **ISSUES AND RELIEF SOUGHT**

The remaining issue for determination in this case, as certified in the September 16, 2019 Prehearing Order, is:

Whether District of Columbia Public Schools (DCPS) denied Student a FAPE by failing to provide Student with an appropriate Individualized Education Program (IEP), as of August 2019, in that Student's IEP was not revised to recognize Student's alleged need for a dedicated aide in the classroom, being a dedicated aide who –

1. Receives training on how to use all of Student's equipment, e.g., the adapted toilet, wheelchair, Hoyer Lift;
2. Receives training in how to perform a two-person lift;
3. Undergoes CPR training; and,

4. Meets with the school nurse for one hour once every three months to review Student's medical needs, dietary restrictions, and to review City School's procedure for how to respond to emergencies.

For relief, Petitioner requests an order that DCPS immediately convene an IEP meeting to amend Student's IEP to provide that Student requires a dedicated aide in the classroom.

### **FINDINGS OF FACT**

After considering all of the evidence received at the October 16, 2019 due process hearing in this case, as well as the oral and written argument of counsel, my findings of fact are as follows:

1. Student, an AGE child, is a resident of the District of Columbia.

#### **Testimony of Mother.**

2. Student is eligible for special education under the IDEA disability classification Other Health Impairment - Other (Cerebral Palsy). Exhibits P-17, P-26.

3. Student is an AGE, non-verbal, non-ambulatory child who carries many complex medical diagnoses, including Cerebral Dysgenesis, Chronic Constipation, Diabetes Insipidus, Encephalopathy, Epilepsy, Gastroesophageal Reflux Rumination Disorder, Cerebral Palsy, Developmental Delay and Cortical Blindness. Testimony of Pediatrician, Exhibit P-31.

4. Student's most recent annual IEP was developed at City School on February 11, 2019. This IEP provides for 28 hours per week of Specialized Instruction outside general education as well as for Adaptive Physical Education, Speech-Language

Pathology, Occupational Therapy and Physical Therapy. The IEP states that Student does not require the support of a dedicated aide. Exhibit P-20. The IEP was amended on June 13, 2019 to provide for an assistive lifting device and an adaptive toilet. Exhibit P-21.

5. Student is placed in the Medical and Education Program (MES) classroom in the MES suite at City School. There are currently 5 students in the classroom, all of whom are medically fragile. The classroom is staffed by a special education teacher, a DCPS employed para-educator and a contract para-educator. There is one other MES classroom in the MES suite. There is a nursing station, with two nurses dedicated to the MES program, located outside the MES suite. Testimony of MES Teacher.

6. Student has been injured in incidents at City School or on the school bus in October 2017, November 2017 and June 2019. There have no incidents or injuries in the current school year. Soon after the October 2017 incident, Mother personally requested that Student be provided a dedicated aide at City School and Mother has repeatedly made that request. Testimony of Mother. On August 6, 2019, Petitioner's Counsel requested, by email, *inter alia*, that an IEP team meeting be convened to discuss Mother's request for a dedicated aide in the classroom. Exhibit P-31.

7. An IEP team meeting was convened at City School on August 22, 2019. The team decided, *inter alia*, that MES Teacher, who is new to teaching Student, would collect data on Student's need for a dedicated aide. Student's IEP was not revised at the meeting. Testimony of MES Teacher.

8. On or about the second week of the 2019-2020 school year, MES Teacher completed a dedicated aide referral to DCPS Central Office based upon Mother's expressed concerns. For herself, MES Teacher has not had safety concerns for Student this school year. Testimony of MES Teacher, Exhibit R-6.

9. At the RSM meeting on September 9, 2019, DCPS agreed to the parent's request to comprehensively reevaluate Student. Exhibit R-1. Another IEP team meeting is scheduled for October 28, 2019. The RSM meeting participants, including Mother, agreed that the IEP team would decide on Student's need for a dedicated aide at the October 28, 2019 meeting after the reevaluation is completed. Testimony of MES Teacher, Exhibit P-43.

10. On September 5, 2019, Central Office Specialist conducted a classroom observation at City School in response to the parent's dedicated aide request for Student. In her report completed on September 30, 2019, Central Office Specialist did not recommend a dedicated aide because she considered the current MES classroom setting, with the small class size and experienced staff, to be the ideal setting for Student to make progress and to be as independent as Student could be. Central Office Specialist's September 30, 2019 report is only a recommendation and it will be up to Student's IEP team to decide whether Student needs a dedicated aide in the classroom. Testimony of Central Office Specialist, Exhibit P-44.

### **CONCLUSIONS OF LAW**

Based upon the above Findings of Fact and argument and legal memoranda of counsel, as well as this hearing officer's own legal research, my Conclusions of Law are as follows:

#### **Burden of Proof**

As provided in the D.C. Special Education Student Rights Act of 2014, the party who filed for the due process hearing, the Petitioner in this case, shall bear the burden of production and the burden of persuasion, except that where there is a dispute about the appropriateness of the student's IEP or placement, or of the program or placement proposed by the local education agency, not applicable to this case, the agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided that the Petitioner shall retain the burden of production and shall establish a *prima facie* case before the burden of persuasion falls on the agency. The burden of persuasion shall be met by a preponderance of the evidence. *See* D.C. Code § 38-2571.03(6).

#### **Analysis**

Did DCPS deny Student a FAPE by failing to revise Student's IEP, as of August 2019, to provide that Student requires the support of a dedicated aide?

Concerned by two incidents in 2017 and a more recent incident in June 2019 when Student fell at school, Mother has long advocated for Student to be provided a dedicated aide in the classroom at City School. She renewed this request, through her

attorneys, on August 6, 2019. When Student's IEP team met on August 22, 2019, MES Teacher undertook to collect data on Student's need for an aide in the classroom and to submit Mother's request to DCPS' Central Office. At the RSM meeting on September 9, 2019, DCPS agreed to the parent's request to comprehensively reevaluate Student and the participants agreed to decide on Student's need for a dedicated aide at the next IEP team meeting, which was scheduled for October 28, 2019. As of the due process hearing date, no decision had been made on Mother's request for a dedicated aide for the 2019-2020 school year. Petitioner contends that DCPS denied Student a FAPE by not revising the IEP at the August 22, 2019 IEP team meeting to affirm Student's alleged requirement for a dedicated aide. DCPS responds that there has been no denial of FAPE because the IEP team appropriately decided to collect more data before making a decision on the aide request.

Under the IDEA, a dedicated aide is a "supplementary aid and service" that must be provided in an IEP, if required to assist a child with a disability to benefit from special education and to be educated with nondisabled children in regular classes to the maximum extent appropriate. *See* 34 CFR §§ 300.42, 300.114(b). The IEP team must include a dedicated aide in a child's IEP if required "to permit the child to benefit educationally from [his IEP personalized] instruction." *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). *Cf. Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 79, 119 S. Ct. 992, 1000, 143 L. Ed. 2d 154 (1999).

Student has not heretofore had a dedicated aide as part of the City School IEPs. Student's classroom teacher, MES Teacher, who was a very credible witness, testified that she has not observed behaviors of Student that indicate the need for an aide and that this school year, there were no safety concerns. However, MES Teacher explained that it had to be an IEP team decision, after more data were collected and Student's reevaluation was completed.

MES Teacher is correct. As the D.C. Circuit Court of Appeals explained in *Z. B. v. District of Columbia*, 888 F.3d 515 (D.C. Cir. 2018), “[u]nderstanding the particulars of a child’s current skills and needs is critical to developing an ‘individualized’ educational plan: ‘An IEP . . . is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.’ *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, ——— U.S. ———, 137 S.Ct. 988, 999, 197 L.Ed.2d 335 (2017). (citing 20 U.S.C. §§ 1414(d)(1)(A)(i)(I)-(IV), (d)(3)(A)(i)-(iv) ). . . . [The IDEA] extensively details information-gathering procedures to ensure that school systems provide children with qualifying disabilities an education tailored to their distinctive needs. *See* 20 U.S.C. § 1414(d)(3)(A); *see also id.* §§ 1414(a)-(c).” *Z. B.* at 522.

In the present case, DCPS acted appropriately at the August 22, 2019 IEP team meeting to defer a decision on Student's need for a dedicated aide pending collection of more data by the current classroom teacher. City School scheduled a second IEP team meeting for October 28, 2019 to review those data and the results of Student's reevaluation. Considering that not having an aide has not been a safety issue for

Student this school year, I find that this was not undue delay. *Cf. Herbin ex rel. Herbin v. District of Columbia*, 362 F.Supp.2d 254, 259 (D.D.C.2005) (Reevaluations should be conducted in a “reasonable period of time,” or “without undue delay,” as determined in each individual case.) I conclude that DCPS has not denied Student a FAPE by failing to revise Student’s IEP, as of August 2019, to provide for Student to have a dedicated aide in the classroom.<sup>2</sup>

**ORDER**

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

ORDERED:

All relief requested by the Petitioner herein is denied without prejudice to Petitioner’s right to file a new due process complaint relating to the ultimate decision of Student’s IEP team as to whether Student requires the support of a dedicated aide.

Date: October 23, 2019

s/ Peter B. Vaden  
Peter B. Vaden, Hearing Officer

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<sup>2</sup> In her post-hearing brief, Petitioner, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), posits that the “ripeness” doctrine does not bar the hearing officer from deciding the dedicated aide issue. To be clear, I do not hold that Petitioner’s claim is not ripe for review. My decision is that DCPS’ not acting in August 2019 to amend Student’s IEP to provide for a dedicated aide was not a denial of FAPE.

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. § 1415(i).

cc: Counsel of Record  
Office of Dispute Resolution  
OSSE - SPED  
DCPS Resolution Team