

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

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Confidential

STUDENT ¹ , by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.	<p style="text-align: center;">HEARING OFFICER'S DECISION</p> <p style="text-align: center;">Date: December 9, 2009</p> <p style="text-align: center;"><u>Hearing Officer: Wanda I. Resto, Esquire</u></p>
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STUDENT HEARING OFFICE

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

I. PROCEDURAL BACKGROUND

On October 28, 2009, parent's counsel filed a Due Process Complaint ("Complaint") against 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").² The Petitioner requested the Respondent be ordered to place and fund the Student at a private school of her choice; and for transportation to be supplied. Additionally, the Petitioner requested the Respondent be ordered to reimburse the High Road Primary School for the cost of the Student's placement as of the date of the Student's enrollment.

On November 10, 2009, the DCPS' Response to Parent's Administrative Due Process Complaint Notice was filed. The Respondent asserted the Student was provided with additional support by way of small grouping, modified scheduled and a dedicated aide. The Respondent asserted the aide was necessary for the Student in order to address physical movements that may require rest in his transit in the school building, as well as to monitor potential seizure activity. The aide was to follow the Student to his specials each day as well as to his related service providers. The SEC at MES requested through central office with DCPS an aide for the Student. The aide had not yet been assigned to the school when the Student suffered a seizure on September 30, 2009.

It also asserted the Student's protective helmet had been received; and the aide would be assigned the day the Student attends classes next. The Respondent affirmed it can provide a safe place for the Student to attend school and an educational placement where the Student's individualized education plan ("IEP") can be implemented by the DCPS. The Respondent contends a private educational placement, like the one the Petitioner requested, cannot implement the Student's IEP, and also does not have an aide, as required on the IEP.

A telephonic pre-hearing conference call for the above reference matter was conducted on November 12, 2009 at 3:30 PM. Attorney Ellen Douglass Dalton participated on behalf of the Petitioner. Attorney Tanya Chor participated on behalf of the District of Columbia Public Schools. The Petitioner reiterated her claims. Counsel for the Respondent argued that the protective helmet had arrived at the school and the Student's IEP can be implemented; along with the dedicated aide services. The Respondent further argued that it is willing to consider another educational location to provide the services for the Student.

The parties stipulated the Student on September 17, 2009, was determined eligible under the IDEIA as a Student with Multiple Disabilities. The Student was provided with 24.5 hours of specialized instruction in a general education setting, with occupational therapy, physical therapy per week, and speech and language services, each to be provided for 60 minutes per week; and with the services of a dedicated aide. The parties also agreed on September 30, 2009, the Student suffered a seizure; the dedicated aide had yet to be assigned to the school. The parent and the school agreed

² 20 U.S.C. §1415(c)(2)(B)(i)(I)

that a helmet was necessary in order to protect the Student in the event that another seizure occurred.

A hearing was held on December 1, 2009. The Petitioner presented a disclosure letter dated November 24, 2009 to which twenty documents were attached, labeled P-1 through 20 and which listed seven witnesses; three witnesses testified. The Respondent presented a disclosure letter dated November 24, 2009 identifying sixteen witnesses and to which thirteen documents were attached, labeled DCPS 1 through 13; two witnesses testified. The hearing officer sustained DCPS' objection to Petitioner's proposed exhibit No. 5, there was no witness available to be examined on the document created by Counsel. The hearing officer deferred ruling on the admission of various documents submitted by the Petitioner until testimony was provided on the content of the documents; thereafter all documents were admitted.

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

II. ISSUE(S)

The Petitioner presented the following issue:⁴

1. Whether DCPS failed to provide the Student with an appropriate placement following the development of his September 17, 2009 IEP?

The Hearing Officer upon review of the issue and the facts as presented by the parties; determined that prior to making an educational placement determination she must consider the following:

- A. Did the Respondent provide an appropriate educational placement for the Student for the 2009 2010 school year?
- B. Was the Student thereafter denied a FAPE?
- C. Can the Respondent provide an appropriate educational placement for the Student for the 2009 2010 school year?
- D. Can the school chosen by the Petitioner meet the unique needs of the Student?
- E. Should the parent be reimbursed for a unilateral educational placement decision?⁵

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").

⁴ November 30, 2009, Order.

III. FINDINGS OF FACT

1. A July 2009 decision by the undersigned Hearing Officer determined, the Student was denied a FAPE was made and the Respondent failed to identify the Student as a child in need of special education services during the 2008-2009 school year. The Order concluded the Respondent was on notice of the Student's brain surgery and complicating medical condition of seizures. The Respondent was ordered to convene a multidisciplinary team ("MDT") eligibility meeting by September 18, 2009 with the appropriate personnel to review all prior and new evaluations determine eligibility; develop an IEP; discuss and determine placement if warranted.⁶
2. The Student on September 17, 2009, was determined eligible under the IDEIA as a Student with Multiple Disabilities which include a speech and language impairment and other health impairment resulting from a seizure disorder. The Student was provided with 24.5 hours of specialized instruction in a general education setting, with occupational therapy, physical therapy per week, and speech and language services, each to be provided for 60 minutes per week; and with the services of a dedicated aide.⁷
3. During the 2008/2009 school year, the Student attended MES and the school personnel were aware of the Student's two brain surgeries attempting to control his seizures. At the MDT/IEP meeting on September 17, 2009, the school was advised that the Student would be returning on September 28, 2009. When the Student returned to school on September 28, 2009, the dedicated aide required by his September 17, 2009 IEP was not available for the Student. On September 30, 2009, the Student had a seizure and fell, hit his head and had to be rushed by ambulance to the hospital. After the fall that the parents were informed that a dedicated aide had not yet been assigned by central office.⁸
4. The Respondent admitted the dedicated aide was necessary for the Student in order to address physical movements that may require rest in his transit in the school building, as well as to monitor potential seizure activity. The aide was to follow the Student to his specials each day as well as to his related service providers. The Respondent also admitted that the aide had not yet been assigned to the school when the Student suffered a seizure on September 30, 2009. That same day, the school agreed to provide a protective helmet to protect the Student in the event he

⁵ The District of Columbia Code imposes a strict order of priority for special-education placement: "(1) DCPS schools or District of Columbia public charter schools; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia." ⁵ A local government meets its federal and local statutory obligations to implement a Student's IEP -- and thus provide a FAPE -- where public placement is "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 207. ⁵

⁶ July 7, 2009 HOD

⁷ P #17 September 17, 2009- Individualized Education Program

⁸ Testimony of the Petitioner.

fell again. The classroom aide was to serve as the Student's dedicated aide upon his return to school; until the time Respondent's central office assign a dedicated aide.⁹

5. On October 2, 2009, Petitioner requested that the Student's IEP be amended and provided the information necessary to order the protective helmet and advised that the company supplying the protective helmet could provide it within two days with rush delivery. The Student's IEP was amended in October 2009; to include a protective helmet.¹⁰
6. The Student's multidisciplinary team agreed in September 2009 that the Student should receive instruction in an inclusion setting to allow him to have interaction with peers; and because of the seizures he requires a dedicated aide. The Student's classroom has approximately 22 students. There is a process in place at MES to follow should the Student have a seizure and a Nurse who is aware of the Student's needs. Last school year the Nurse called the Mother a couple of times to pick-up the Student when he had seizures. The E-mail correspondence admitted into evidence as P 10-18 and the testimony substantiate the fact that as of *October 2, 2009*, and that as early as the end of September the Respondent knew the Student required the protective helmet.¹¹
7. The Petitioner during the school year 2008-2009 was called approximately every other day because the Student had seizures at MES, although the parents had provided the school with a protocol to follow if a seizure occurred. The Petitioner had discussed with the Respondent her concerns about the Student and expected all the Student's IEP services to be provided on the first day back to school after his surgery. The Student was available to return to school on October 7, 2009, however because the DCPS did not have the helmet available the Petitioner did not send the Student to school. After waiting more than three weeks; the parents informed the Respondent they would be exploring other educational placements for the Student.¹²
8. The Student's cognitive ability is in the borderline range; his language comprehension and phonological processing are well below average. The Student's diagnostic impression is an Axis I - mixed receptive expressive language disorder; Axis II -phonological disorder; developmental coordination disorder; Axis III- seizure disorder; Axis IV -none; GAF = 60. The Student has difficulties communicating with peers and has speech impairment. Because of the Student's severe learning, language and motor deficits, as well as chronic seizures; the student requires a full time special education program outside of general education with intensive 1 to 1 assistance to complete tasks in a small classroom setting with

⁹ Testimony of the Special Education Coordinator; the Petitioner; and November 10, 2009, DCPS' Response to Parent's Administrative Due Process Complaint Notice.

¹⁰ P#10; and testimony of the Special Education Coordinator.

¹¹ October 5, 2009; October 8, 2009; and October 13, 2009 E-mails; and testimony of the Special Education Coordinator.

¹² P# 15, and testimony of the Special Education Coordinator; and the Petitioner.

no more than 10 students, one teacher and aide. The Student does not need the services of a nurse if the seizures have diminished. The Student has a protective helmet, a dedicated aide has his own space to work and the related services are in close proximity. ¹³

9. The request for a protective helmet was sent to the financial offices; which provides funding and that process was slow. A dedicated aide was provided by the Central Office to MES and she was assigned to another student.¹⁴
10. On October 23, 2009, the Student was accepted by a private school in Washington, DC. That same day the private school, the protective helmet was ordered. On Monday, October 26, 2009, the protective helmet was received. On November 2, 2009; the Student started attending the private school; the school has provided the Petitioner with tokens for transportation to school and back home. Staffs at the school are trained on Cardiopulmonary Resuscitation and first aid practices and how to manage seizures. The Director of Admission described the procedures to be followed if the Student suffers a seizure lasting more than 5 minutes; procedures which are also know to other staff. The private school's educational model provides morning courses in reading, writing, math, and language arts; afternoon instruction in science, social studies, health, and art, provided in 20-minute rotations among (1) teacher-directed tutorials; (2) independent seatwork; and (3) computer workstation sessions. The Student is in a classroom with 6 other students; one certified special education teacher; special education teacher's assistant and his dedicated aide. The dedicated aide accompanies the Student to lunch and assists in academic needs. The Student at the new school is on task and more engaged with the other students; his pencil grip has improve and has started counting from 1-10. The Student likes the staff and has not had a seizure at the school. ¹⁵

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.¹⁶

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

¹³ P#4; and testimony of the neuropsychological and psychoeducational evaluations expert.

¹⁴ Testimony of the Case Manager.

¹⁵ Testimony of the Director of [REDACTED] and the Petitioner.

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

appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."¹⁷

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.¹⁸

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.¹⁹

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

Educational Placement

The IDEIA and its implementing regulations require when determining the educational placement of a child with a disability, the decision is made by a group of persons, including the parents. It also requires that the determination of the educational placement of a child with a disability must be based on a child's IEP.²⁰

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 IDEIA requires that the parents of a Student with a disability be members of any group making a decision regarding the Student's placement. 20 U.S.C. § 1414(e); 34 C.F.R. §300.327. 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).

It is the petitioner's assertion that the IEP is appropriate; however the setting at MES is not because; the Student requires a full time placement outside the general education where his lagging academic achievement will be address and accommodations are made to address his fragile medical needs, with particular attention to seizures.

The IDEIA supports a strong preference in educating children with disabilities in regular classes with appropriate aids and supports. Specifically, Section 300.114, requires each public agency to ensure that, to the maximum extent appropriate, children

¹⁷ 34 C.F.R. § 300.17

¹⁸ *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).

¹⁹ 5 D.C.M.R. § 3030.3.

²⁰ 20 U.S.C. 1412(a)(5); 34 C.F.R. § 300.116; and 5 D.C.M.R. § 3013.1(e).

with disabilities are educated with children who are not disabled. Similarly, a Student or parent must have an opportunity to demonstrate that a disability requires some other arrangement, the child is educated in the school that he or she would attend if non-disabled; and in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that the Students needs. ²¹

The District of Columbia Code imposes a strict order of priority for special-education placement: "(1) DCPS schools or District of Columbia public charter schools; (2) Private or residential District of Columbia facilities; and (3) Facilities outside of the District of Columbia." ²²

In the present case the evidence established that the Respondent did not meet its legal obligations when the dedicate aide was not made available for the Student upon returning to school. The Respondent exacerbated its failures by not providing the Student with the protective helmet or an alternative for him to receive his specialized instruction in a consistent manner.

The Respondent argued the school chosen by the Petitioner does not allow any interaction with the general education population which is not the 'least restrictive environment"

Least Restrictive Environment

The IDEA seeks to educate disabled children with non-disabled children "to the maximum extent possible." § 1412(a)(5)(A). "Special classes, separate schooling, or other removal . . . occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* "The "proper inquiry" in every mainstreaming case is "whether a proposed placement is appropriate under the Act." *Doe v. Arlington County Sch. Bd.*, 41 F. Supp. 2d 599, 604 (E.D. Va. 1999). However, assessment of whether the child is placed in the least restrictive environment is [**94] "ultimately a goal subordinate to the requirement that disabled children receive educational benefit." *Hartmann by Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1002 (4th Cir. 1997).

The educational benefit to be provided a child must be "meaningful" and it "must be assessed based on the educational capacity of each individual student." *J.P. v. County Sch. Bd. of Hanover County*, 447 F. Supp. 2d 553, 584 (E.D. Va. 2006).

One of the core goals of the IDEIA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. The IDEIA requires the IEP team to consider, for all Students with disabilities, the academic, developmental, and

²¹ 20 U.S.C. 1412(a)(5); and 34 C.F.R. § 300.114 through 300.118.

²² D.C. Code § 38-2561.02(c) (2007).

functional needs of the child, which could include as appropriate, the child's needs to develop skills in the areas of socialization, independent living, orientation and mobility.²³

The Hearing Officer cannot disregard the fact that the Student was determined eligible as a result of an HOD that found there was a denial of FAPE and requiring the Respondent to evaluate and determine eligibility, the Respondent was aware since 2008 of the Student's seizures, surgeries and academic deficits. Furthermore, although given advance notice; the Respondent failed to provide the Student with a dedicated aide, when he returned to MES after brain surgery. The Respondent further demonstrated its lack of attention and failure in addressing the Student unique needs when it assigned a dedicated aide; however that person was designated to another Student in the school.

The cornerstone of the IDEIA is whether the child will receive a FAPE, an appropriate education with meaningful educational benefit, not whether the child can benefit from some contact, with non-disabled peers. For the reasons set forth above, for the school year 2009-10 because of the Student's severe learning, language and motor deficits, as well as chronic seizures; and based on the recommendations of the evaluations; the Student requires a full time special education program outside of general education with intensive one-to-one assistance in a small classroom setting.

When the public school district is unable to provide a FAPE in the public schools, the IDEIA requires that the school districts to assume the cost of educating the child in a private school that meets the child's educational and social services needs. 24

██████ is a full time placement and does not offer contact with non-disabled peers. However, given the evidence and the totality of the needs of the Student, I find the Student needs a small setting in a full time special education program with individualized attention outside the general education setting.

At ██████ the Student has small classes for all subjects with a 7/1 student - teacher ratio. They are able to address the Student's learning, language and motor deficits throughout the day and his seizures have not interfered with his learning at ██████. Services provided in the classroom have resulted in improved self esteem and the Student staying on tasks.²⁵ He is receiving educational benefit at ██████.

Reimbursement

The Petitioner requests reimbursement for all of the tuition and related services the Student received at ██████ since enrollment.

The Supreme Court has held that courts may order school districts to reimburse parents for expenses incurred by the unilateral placement of their child at a private

²³ 34 C.F.R. 300 §324 (a)(1)(iv).

²⁴ 20 U.S.C. § 1412(a)(10)(B).

²⁵ Testimony of the Petitioner; and of the Director of the Private School.

school if: 1) the Student's public school IEP was inappropriate, thereby denying the child FAPE; and 2) the private placement desired by the parents is proper. Sch. Comm. of the Town of Burlington, Mass. v. Dep't of Educ., 471 U.S. 359, 369, 85 L. Ed. 2d 385 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 10-11, 126 L. Ed. 2d 284 (1993).

As indicated above, the IEP for the Student included a dedicated aide and had to be amended to include a protective helmet; it took the Respondent more than month before it made the helmet and the dedicated aide available to the Student. At [REDACTED] the Student received the helmet within two days of ordering and the dedicated aide was assigned before the Student started classes. The Student has improved while attending [REDACTED]. Finally, the Respondent alleged it offered any DCPS placement for the Student; yet it provided no evidence to suggest that there is another appropriate placement within the DCPS.

Accordingly, Respondent must reimburse Petitioners for costs incurred for the Student's tuition and related service costs for the school 2009-10 at [REDACTED].

V. SUMMARY OF DECISION

The Respondent denied the Student a FAPE by not providing the services the Student's IEP required. It failed to make available a dedicated aide and a protective helmet in a timely manner. At the private school the Student received the helmet within two days of ordering and the dedicated aide was assigned before the Student started classes. The Respondent is ordered to place and fund the Student at the private school with transportation.

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 shall issue a Notice of Placement for the student to [REDACTED] by January 11, 2010. Copies to parent, parent's counsel, and [REDACTED] **it is further;**

ORDERED, the Respondent will place and fund the Student at the High Road Primary School with transportation, **it is further;**

ORDERED, the Respondent shall issue a Notice for an IEP Meeting to be held at [REDACTED] for the student to all relevant parties by January 11, 2010, **it is further;**

ORDERED, the **Respondent** shall convene an IEP meeting at [REDACTED] by January 18, 2010, to review the educational program and amend the IEP to add the following:

- a. Setting outside the general education.

ORDERED, the **Respondent** will reimburse the Petitioner for the cost of the Student's placement at [REDACTED] from the date of enrollment, **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, the Respondent shall send all notices to counsel for the parent with copies of such to the parent, **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 matters presented in the Petitioner's October 28, 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)



Wanda Iris Resto - Hearing Officer

Signed: December 9, 2009