

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

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**Confidential**

<p>STUDENT<sup>1</sup>, by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.</p>	<p><b>HEARING OFFICER'S DETERMINATION</b></p> <p>Date: May 31, 2009</p> <p><b><u>Hearing Officer: Wanda I. Resto, Esquire</u></b></p>
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STUDENT HEARING OFFICE  
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<sup>1</sup> Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

## I. PROCEDURAL BACKGROUND

On May 4, 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 (hereinafter "IDEIA District of Columbia Public Schools ("Respondent"), pursuant to the Individuals with Disabilities Education Improvement Act (hereinafter "IDEIA"), 20 U.S.C. §1415(c)(2)(B)(i)(I) alleging the Respondent denied the Student a Free Appropriate Public Education ("FAPE") by failing to provide an appropriate Individualized Education Program ("IEP"), and failing to provide an appropriate educational placement.

The Petitioner requests the Respondent fund a full time special education private placement of her choice, convene a multidisciplinary team ("MDT") meeting to complete an appropriate IEP for the Student and provide her with appropriate special education and related services. Additionally, the Petitioner requests that the Respondent provide a compensatory education plan through a dedicated aide.

The DCPS' Response to Parent's Administrative Due Process Complaint Notice was filed on April 17, 2009.<sup>2</sup> The Respondent asserted the Student does not require a full time educational school setting. The Respondent further asserted that the MDT met on March 30, 2009, and determined the Student would be appropriately serviced in the Autism program with the recommended support and services. The Respondent further alleged that the Student is behind in only one academic area and performs well with support. The Petitioner expressed her interest in having the Student placed at \_\_\_\_\_ but the team felt that would not satisfy the IDEIA's least restrictive environment mandate.

On May 6, 2009, the Respondent filed a Motion pursuant to 34 C.F. R. §300.510 agreeing to waive the resolution session and requesting that the case proceed to a due process hearing on the merits.

The Hearing Officer held a pre-hearing conference call with Counsel for both parties on May 12, 2009. During that conference call, the parties agreed that the right to a resolution session was waived. The Petitioner chose for the Due Process Hearing ("hearing") to be held in a closed session and reiterated the issues as plead. Both Counsels provided a synopsis of their witnesses' testimony.

On May 15, 2009, the Petitioner was ordered to demonstrate at the May 21, 2009 hearing why the Student requires a full time placement, how the Petitioner's choice of placement is appropriate and why the Respondent's proposed placement is not. The Respondent was required to show that the proposed placement is appropriate and that the MDT acted appropriately when it decided to place the Student at \_\_\_\_\_

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<sup>2</sup> The parties agreed that the Response and documents presented in Complaint number 0530, listen in the Respondent's April 23<sup>rd</sup> and Petitioner's April 24<sup>th</sup>, 2009 disclosure letters, were the documents submitted for the current Complaint.

A hearing was held on May 21, 2009. The Petitioner presented a disclosure letter dated April 24, 2009 to which four documents were attached, labeled P-1 through 4 and listing four witnesses. Three witnesses testified – the Mother, the General Education Teacher and the Private School representative. The Respondent presented a disclosure letter dated April 24, 2009 identifying fifteen witnesses and to which seven documents were attached, labeled DCPS 1 through 7. One witnesses testified – the Special Education Coordinator. The documents were admitted without objections.

The hearing was conducted in accordance with the rights established under the Individuals with Disabilities Education Act of 2004 (“IDEIA”), 20 U.S.C. § 1400 et seq. and the implementing regulations, 34 CFR Part 300; and Title 5 District of Columbia Municipal Regulations (D.C.M.R.), Chapter 30, including §§3029-3033, and the Special Education Student Hearing Office Due Process Hearing Standard Operating Procedures (“SOP”).

## II. ISSUE(S)

1. Did the Respondent fail to provide an appropriate program and placement for the Student?
2. Was the Student denied a FAPE?

## III. FINDINGS OF FACT

1. The Petitioner and the Student are residents of the District of Columbia.
2. The Student is a student with disabilities under the IDEIA. The Student’s IEP is dated March 16, 2009 and provides 10 hours weekly of specialized instruction, 1 hour a week occupational therapy, and 30 minutes of behavioral support services weekly. The Student’s primary disability classification is Autism.<sup>3</sup>
3. The general education teacher has work with the Student since pre-kindergarten in a summer group. Then the Student passed to her first grade class and he is now in her second grade class. She was his teacher in the first and now in the second grade. The Student had various assessments done including the dynamic indicators of basic early literacy skills (“DIBELS”). To determine reading fluency in November of 2008 the Student was able to read 19 words in 1 minute, in January of 2009 the Student was able to read 59 words per minute and the goals was to reach 90. The teacher has seen growth and progress in the Student compared to when started at the school. The Student received 30 minutes of tutoring twice a week and she saw gains in the Student. The Student’s attendance may have affected his progress he had 19 absences 39 marks for being tardy to class, at times he would arrive between 9:30 AM and 10:30 AM. The students have diverse work stations with 15 minutes intervals of different activities, book reading, interaction with the teacher, listening skills development, computer use and sometimes writing. The Student does well in his science, physical education, library

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<sup>3</sup> P 3 March 16, 2009 Individualized Education Program

and arts and music classes which require he goes to another school and there were no complaints from other teachers. Within his group of five students he was able to do the work independently by January 2009 and towards the end he became independent and even a group leader. The Student's writing is not legible, he writes off the line and she used different strategies like giving him a bigger pencil, helping him with his letter formation and she has learned to understand his writing. She referred him for special education evaluations during the previous school year because he was behind in class, but he did not qualify. When she referred the Student he was already receiving 30 minutes of tutoring after school twice a week. The Student was receiving tutoring services and additional support from a community based organization. The Student only interacts with peers outdoors when approached, in class he does interact. The Student functions better in small groups of 5 to 6. The Student did not have problems with transitioning because they have established a routine. If it's not a routine then it becomes difficult for the Student to transition. The Student may be able to participate in pull-out session for specialized instruction because he has been pulled out of class for various testing and does not have a problem to go with the evaluators. The Student was not performing where he should be yet he was making academic progress and is at the beginning of his grade level. The Student was placed in a smaller group of 5 within his class of 21 students, so that they could work together and she could provide individualized instruction time. The Student often arrived late to class after the morning meeting, reinforcement of skills, and assignments had been discussed, he would not turn-in his homework and then he would rush attempting to catch up. The Student attendance was a problem and he missed a lot of instruction, reinforcement and because he was already behind it impacted his progress. The Student's classroom was appropriate because he was placed in a smaller group that was at his same learning level, receiving individualized instruction and he obtained gains. The Student benefits from a small group setting because big class sizes have too many distractions. The Student requires reinforcement at home and school, he's at the beginning of the second grade level. In March 2009 he was scheduled to be provided with occupational therapy and specialized instruction but the Student was transferred on April 9, 2009 from school.<sup>4</sup>

4. *The comprehensive developmental evaluation provides a diagnostic impression of the Student it indicates on Axis I -Pervasive Development Disorder Nos; Axis II: None; Axis III : None; Axis IV- learning problems, poor peer relationships and Axis V GAF current =55 the evaluators s findings and recommendations, *inter alia*, include the following:*

- a. The Student Woodcock Johnson Test of Achievement-Third Edition revealed the Student's total achievement score was 79 which fell in the low range. The Student academic skills and application were in the average ranges respectively. His achievement testing also revealed that his fluency skills were in the very low range of 69.

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<sup>4</sup> Testimony of the general education teacher.

- b. The Student diagnostically demonstrated characteristics consistent with a student with Pervasive Developmental Disorders NOS on the Autism spectrum.
- c. The MDT should develop an IEP based on the Students developmental, social deficits and PDD-NOS diagnosis.
- d. Speech and language assessment be done
- e. An occupational therapy assessment
- f. To address transitions provide the Student an opportunity to preview new material and give him advance notice of any changes in routine or classrooms. If the student should be allowed to preview his new educational setting and spend some one-on-one time with his new teacher.
- g. Consider including extra time as an accommodation on the student's IEP plan.
- h. To optimize the Student's performance in the classroom he should be provided with regular and frequent breaks, small group setting for tests, reduced distractions, and verbatim reading of directions and selected text.
- i. The student should participate in a highly structured, multisensory, incremental approach to learning the language for math and identify the appropriate symbols associated for basic calculation.
- j. The student needs to participate in a social skills group that helps to demonstrate age appropriate social behaviors in school and at home.
- k. The student will benefit from having regular and meaningful social contact with other children his age and it encourages the parent to allow the student to participate in an organized for all social activity such as cub scouts, band, drama or the arts. <sup>5</sup>

5. At the March 2009 MDT meeting the team heard from the general education teacher reviewed the evaluations and an IEP was generated based on the data. The Student was found eligible for special education and related service at the MDT meeting. The Student was making progress and evaluations also suggested that the Student was progressing. The Student was receiving tutoring services twice a week. The Student had many strengths and the MDT decided to provide the Student first with pullout services in a resource room services for 2 hours a day. The MDT chose to maintain the Student in the classroom with support instead of placing him in the full Autistic program. The Student is verbal, can read and his needs are different. The Student can use the resource classroom during the time the teacher is providing group instruction. The Autistic program at \_\_\_\_\_ has two classrooms; the primary which is kindergarten through second grade and the intermediate which is third grade through fifth grade. There are eight students in one class and the other has six. The Student could be placed in the intermediate because the primary group is mostly non-verbal students. In the intermediate group the students are more verbal and the academic and educational program would match with the other students in the classroom who are higher functioning students. To be in the Autistic program the students usually requires more than 10 hours on the IEP.<sup>6</sup>

<sup>5</sup> P4 - February 20, 2009, Comprehensive Developmental Evaluation.

<sup>6</sup> DCPS 6 - March 16, 2009, MDT notes and testimony of the special education coordinator.

6. The Student attended \_\_\_\_\_ from kindergarten to second grade. The Petitioner requested the Student be evaluated starting in the first grade. There were frequent meetings with the teacher to talk about the Student's grade level, progress and what the parent could do to help him at home. The school personnel recommended occupational therapy and indicated that they would begin providing the services in May of 2008, and the Student had not received any of the services. The March 2009 IEP provided 10 hours of specialized instruction and the mother was not in agreement because she felt the Student needed full time services. The Student was already getting tutoring and 10 hours of services and it did not appear to be enough. The mother chose \_\_\_\_\_ as a private educational placement for the Student. The Student is doing better he shows no signs of frustration with class and is not complaining about not knowing the material. Currently the Student can do his work independently. There are eight children in the classroom the Student is happy and is learning with ease.<sup>7</sup>

7. The Student is attending \_\_\_\_\_ a private school offering full-time special education services. The Student adjusted easily to the new school he is in a class with all boys approximately the same age as the Student. The School There is a special education teacher and a general education teacher in the classroom. The class was chosen because of the students are the same age, within the same academic level and can provide the Student with peer role models. The Student is receiving services from the speech pathologist working on his pragmatic skills. Behavioral support can be given at \_\_\_\_\_. The cost for tuition is approximately \_\_\_\_\_ a year without related services.<sup>8</sup>

#### IV. CONCLUSIONS OF LAW

##### **FAPE Determination**

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

The applicable regulations at 34 C.F.R. § 300.17 define a FAPE as "special education and related services that are provided at public expense; meet the standards of the SEA; include an appropriate pre-school, elementary school, or secondary school; and are provided in conformity with an individualized education program (IEP)."

##### **Burden of Proof**

Pursuant to 5 D.C.M.R. § 3030.3, the burden of proof shall be the responsibility of the party seeking relief, in this case the parent. It requires that based solely upon the evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student a FAPE.

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<sup>7</sup> Testimony of the mother.

<sup>8</sup> Testimony of the IEP Developer-Admission's Assistant at KDS.

The Respondent met its legal obligation under the IDEIA. Here is why.

The IDEIA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the DCPS 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. *See id.* § 1400(d)(1)(A).

### **Individualized Education Program**

In accordance with 20 U.S.C. § 1414 (d)(1)(A)(i)(II)(aa), (bb), Individualized Education Programs or IEP “means a written statement for each child with a disability that includes a statement of measurable annual goals, including academic and functional goals, designed to—

- aa. Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
- bb. Meet each of the child’s other educational needs that results from the child’s disability.”

Whereas in 34 C.F.R. Section 300.320(a)(4) , the local and state educational agency is required to ensure that each student with a disability in need of services within its jurisdiction is provided with an IEP that contains:

“ A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child--  
(i) to advance appropriately toward attaining the annual goals;  
(ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and  
(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;”

Pursuant to 34 C.F.R. Section 300.324 requires that in the development of the IEP, certain factors be taken into account; “The IEP team must consider:

- (i) The strengths of the child;
- (ii) The concerns of the parent for enhancing the education of their child;
- (iii) The results of the initial or most recent evaluation of the child; and
- (iv) The academic, developmental and functional needs of the child.”

The parent has an obligation to participate in the process to form a plan and program designed to meet the unique needs for her child. However, because the development of the IEP is a multi-person responsibility, the parent does not have the last word. When the parent believes the IEP is inappropriate she must demonstrate what the insufficiencies are.

The evidence is that at the March 2009 MDT meeting the team heard from the general education teacher, reviewed evaluations and an IEP was generated based on the data. The Student was receiving some individualized instruction from the general education teacher and receiving tutoring for approximately 2-3 hours a week from a community based organization. That information was available to the MDT. The IEP created in March 2009 was based on current information with input from the teacher, and parent. The Student's March 2009 IEP provides 10 hours weekly of specialized instruction, 1 hour a week occupational therapy, and 30 minutes of behavioral support services weekly. The Student's primary disability classification was classified as Autism. The Respondent made efforts to program for the Student needs; there was no evidence that the Student requires a full time placement beyond the wish of the parent. In the present case the parent believes the Student requires additional hours of specialized instruction to address his PPD. The current evaluations and recent teacher did not indicate the Student required additional hours on his program; there merely was a statement from the general education teacher that he may benefit from a full time placement.

In *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982) a two-part test to determine whether a school has fulfilled its duty to provide a FAPE was established: (1) has the school district complied with the procedures provided by the IDEA; and (2) is the student's IEP reasonably calculated to provide educational benefits. If the school district fails either part of the Rowley test, the student's right to a FAPE has been denied.

There was no evidence that the Respondent violated its procedural obligation under the IDEA. The IEP created in March 2009 was calculated to provide an educational benefit to the Student. There was no evidence that the Respondent denied the Student services.

### **Education Placement**

It is the position of the Petitioner that the Student requires a higher level of services including more specialized instruction hours in a full time special education setting as opposed to the 10 hours of specialized instruction through pull-out services. This is contrary to the IDEA 20 U.S.C. 1412(a)(5) and its regulation at Sections 300.114 through 300.118, consistent with implementing the Act's strong preference for educating children with disabilities in regular classes with appropriate aids and supports.

Specifically, the IDEA at 20 U.S.C. 1412(a)(5) and its regulation at Section 300.114, require each public agency to ensure that, to the maximum extent appropriate,

children with disabilities are educated with children who are not disabled. The placement should be as close as possible to the child's home and made in conformity with the least restrictive environment ("LRE") provisions. The Petitioner 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 LRE, consideration is given to any potential harmful effect on the child or on the quality of services that the student needs. Under the IDEA the parent is a statutorily required participant in a group discussion about placement. The parent, however, is only a member of the MDT/IEP team and not the final arbiter of the placement decision. No such power is granted the parent under the IDEA. Recent case law makes that point clear.

The evidence suggested the Student must make efforts to improve attendance and timeliness. The Student was receiving individualized instruction in a smaller group setting within the class of 21 students and the Respondent was proposing to provide additional accommodations through specialized instruction and related services that the MDT estimated sufficient. In the present case the evidence was the Student was to receive 10 hours weekly of specialized instruction, 1 hour a week occupational therapy, and 30 minutes of behavioral support services weekly all consistent with an independent development evaluation and the credible evidence is that the Student was progressing. This Hearing Officer determines that pull-out services combined with a small group setting were what the evidence demonstrated this Student required. Although the Petitioner seeks placement of the Student at a private full time placement there was no evidence of the Student requiring such a restrictive environment.

"Although the IDEA guarantees a Free Appropriate Public Education, it does not, however, provide that this education will be designed according to the parent's desires. The primary responsibility for formulating the education to be accorded a [child with a disability] and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parent or guardian of the child. Thus proof alone that loving parents can draft a better program than a state offers does not, alone, entitle them to prevail under the Act." *Shaw v. The District of Columbia*, 238 F. Supp. 2d 127, 139 (D.D.C. 2002).

## V. SUMMARY OF DECISION

The evidence demonstrated the Student programmed to receive 10 hours weekly of specialized instruction, 1 hour a week occupational therapy, and 30 minutes of behavioral support services weekly and the credible evidence is that the Student was progressing, the IEP was calculated to provide an educational benefit. The Petitioner did not prove that the Student requires a full time placement or that the Student requires such a restrictive environment.

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 Respondent has not denied the Student a FAPE and issues the following:

#### **VI. ORDER**

**ORDERED**, the Complaint filed May 4, 2009 is dismissed.

This order resolves all issues raised in the Petitioner's May 4, 2009 due process hearing complaint; and the hearing officer makes no additional findings.

#### **NOTICE OF RIGHT TO APPEAL**

This is the FINAL ADMINISTRATIVE DECISION. An Appeal can be made to a court of competent jurisdiction within ninety (90)-days of this Order's issue date pursuant to 20 U.S.C. § 1415 (i)(1)(A), (i)(2)(B) and 34 C.F.R. §300.516)

/s/WI Restorres

**Date: May 31, 2009**

**Wanda Iris Resto - Hearing Officer**