

**DISTRICT OF COLUMBIA  
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**  
Student Hearing Office  
810 First Street, N.E., 2<sup>nd</sup> floor  
Washington, D.C. 20002

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STUDENT, a minor, by and through  
his Parent<sup>1</sup>

Petitioner,  
v

SHO Case No:  
Erin H. Leff, Hearing Officer

DISTRICIT OF COLUMBIA  
PUBLIC SCHOOLS,

Respondent.

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STUDENT HEARING OFFICE  
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**HEARING OFFICER DETERMINATION**

**DECISION**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
ORDER

**STATEMENT OF THE CASE**

On December 28, 2010 Parent, on behalf of her child (“Student”), filed an Administrative Due Process Complaint Notice (“Complaint”), HO 1,<sup>2</sup> requesting a hearing to review the identification, evaluation, or placement of or provision of a free, appropriate public education (“FAPE”) to Student by District of Columbia Public Schools (“DCPS”) under the Individuals

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<sup>1</sup> Personal identifying information is provided in Appendix A, attached hereto.

<sup>2</sup> Hearing Officer Exhibits will be referred to as “HO” followed by the exhibit number; Petitioner’s Exhibits will be referred to as “P” followed by the exhibit number; and Respondent’s Exhibits will be referred to as “R” followed by the exhibit number.

with Disabilities Education Act, as amended ("IDEA"). 20 U.S.C.A. §1415(f)(1)(A) (Supp. 2010). Respondent filed a Response to Parent's Administrative Due Process Complaint Notice (HO 6) on January 21, 2011. Respondent's filed a Resolution Waiver dated January 11, 2011. (HO 5) but it was not signed by the Petitioner and, therefore, did not constitute a waiver of the resolution process. No resolution was reached. Petitioner filed a Motion to Compel Parental Access to School Records Under IDEA and FERPA on February 9, 2011 and I granted that Motion, after reply briefs had been received and reviewed, on February 16, 2011.

At all times relevant to these proceedings Petitioner was represented by Joy Freeman Coulbary, Esq. DCPS was represented at hearing by Kendra Berner, Assistant Attorney General.<sup>3</sup> I held a telephone prehearing conference on February 8, 2011. HO 8. By agreement of the parties, the hearing was scheduled for March 2, 2011. The hearing was held as scheduled.

I requested a post-hearing brief on the authority of the hearing officer to order relief that included the Petitioner selecting an aide to be assigned to accompany Student in school. I received a brief entitled Closing Addendum from Petitioner on March 3, 2011. HO Supplementary Exhibit 1. Respondent did not provide a reply.

The legal authority for the hearing is as follows: IDEA, 20 U.S.C.A. § 1415(f) (Supp. 2010); 34 C.F.R. § 300.511(a) (2010); and the District of Columbia Municipal Regulations, Title 5e, Chapter 30, Education of Handicapped (2003).

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<sup>3</sup> Prior to hearing, DCPS was represented by Blair Matsumoto, Assistant Attorney General and by Daniel Mc Call, Assistant Attorney General. Mr. Matsumoto represented DCPS at the Prehearing Conference, and Mr. McCall represented DCPS regarding the Motion to Compel Access to School records.

## ISSUE(S)

The issues are

1. Whether DCPS denied the student a FAPE by failing to include the related service of a dedicated aide in Student's individualized education program ("IEP");
2. Whether DCPS denied the student a FAPE by failing to provide Student the related service of transportation as provided on his IEP; and
3. Whether DCPS denied Student a FAPE by failing to fully evaluate Student by not providing a needed hearing assessment

## SUMMARY OF THE EVIDENCE

### A. Exhibits

Exhibits admitted on behalf of Petitioner are found in Appendix B.

Exhibits admitted on behalf of Respondent are found in Appendix C.

Exhibits admitted on behalf of Hearing Officer are found in Appendix D.:

### B. Testimony

Petitioner testified and presented the following witnesses:

- Gregory E. Price, Ph.D., admitted as an expert in clinical psychology with expertise in special education evaluation and the impact of the dynamics of personality on the factors assessed in special education evaluation<sup>4</sup>
- Educational Advocate

DCPS presented the following witnesses:

- Student's teacher<sup>5</sup>
- Special Education Coordinator

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<sup>4</sup> The witness was admitted as an expert over Petitioner's on-going objection to Dr. Price being admitted as an expert indicating he had limited experience in special education evaluation and supervision.

<sup>5</sup> Student's teacher testified as a replacement for the Director of High Roads Primary School who was unable to testify due to a death in the family.

Petitioner also testified in rebuttal.

### FINDINGS OF FACT

Based upon the evidence presented, I find the following facts by a preponderance of the evidence:

1. Student is a      year old,      grade student. He is classified as having Multiple Disabilities: Emotional Disturbance, Specific Learning Disabilities, and Other Health Impairment due to Attention Deficit Hyperactivity Disorder. P25; P 19; P 11; Testimony of      Testimony of
2. Student has attended five schools, including his present placement, since first grade. In each school he has exhibited behavioral and academic difficulties. Student's behavioral issues include excessive use of profanity, aggression directed toward adults and peers, disobeying directions, oppositional behavior, and leaving the classroom or school building without permission. Academically Student is functioning at an extremely low level. P 20; Testimony of Petitioner; Testimony of
3. Student has had multiple evaluations. Six psychological and/or psycho-educational evaluations, P 2; P 8; P 25; P 26; P 27; P 33, were completed between January 11, 2007 and June 25, 2010. In February 2009, Student was evaluated by a Social Worker, P 20, and by an Occupational Therapist in April 2007 (P 5). He also had a Hearing and Speech Evaluation with a report issued on November 1, 2006 (P 16) and a Speech Language Evaluation in February 2009. P 24.
4. Student's most recent scores, from January 2010, on the Woodcock-Johnson III, when Student was in the      grade at the school he attended prior to his current school, were consistently in the Lower Extreme Range. He scored below the first percentile in Broad

Reading, Broad Written Language, Basic Reading, Math Calculation and Academic Skills. His highest score was at the second percentile in Broad Math. During the same evaluation Student also was administered the WISC-IV. Again he scored in the Lower Extreme Range in all areas (Verbal Comprehension, Working Memory, and Processing Speed) except one, Perceptual Reasoning, where he scored in the Borderline range. His Full Scale IQ was 58. P 26. Student's scores on the WISC-IV show a notable decline in some areas when compared to his scores on the same test in January 2007. P 8. On the 2007 administration, Student earned a Verbal Comprehension score of 77, sixteen points higher than his score of 61 on the 2010 administration. The Processing Speed Index score was ten points higher (78 as compared to 68) in 2007, and Student's full scale IQ was 9 points higher (67 as compared to 58). P 8; P 26; Testimony of Price.

5. Student's adaptive behavior is lower than the vast majority of students his age. P 2; Testimony of
6. Student is difficult to evaluate. He is easily distractible and often does not engage with the material. The validity of the results, therefore, is hard to assess. P 25; Testimony of Price. Student has low self-esteem regarding his academic ability and does not like to reveal his limitations. Testimony of
7. Student has a history of ear infections. Ear infections can cause hearing impairments. There is conflicting documentation regarding whether Student has a mild hearing loss. Student has had three auditory evaluations. One document identifies a mild, bilateral loss and a second reports normal hearing. P 24. A third evaluation was conducted in the fall of 2010. The examiner recommended Student see an Ear Nose and Throat ("ENT") doctor

and then return for another, different audiology evaluation. Student has not seen the ENT doctor. Testimony of Petitioner. Student requires a current audiology assessment. P 28.

8. Petitioner, through her counsel, began requesting Student be assigned a dedicated aide in March 2009 when he was in an open space school environment. P 28; P 22. There have been multiple requests for a dedicated aide. DCPS has determined an aide is not needed. P 19. An aide can be either beneficial or harmful. If Student likes the assigned aide and the aide works cooperatively with Student's teacher, the aide might be able to provide academic support and assure Student does not injure himself. Student also might act in opposition to the aide and, therefore, increase his undesirable behaviors. Student worked with an aide assigned to another student in a different placement approximately two years ago. This occurred during part of Student's fourth grade year. He responded well to that aide. Testimony of Petitioner; Testimony of                      Testimony of                      Testimony of  
of

9. Student's 11/16/10 IEP includes transportation services. R 6. When Student transferred to his current school in December 2010, transportation services were not provided initially. Petitioner paid to have someone walk Student to and from school until bus transportation started. Student missed approximately 8 days of school due to the lack of transportation. Testimony of Petitioner. Transportation services were scheduled to begin January 4, 2011. R 11. Student has been receiving bus transportation since that time. Testimony of Petitioner.

10. Student has had several injuries in school, including two in his current placement. These injuries were accidents and did not result in major injuries. Testimony of                      In one

prior placement Student had injuries that required he be taken to the emergency room.

Testimony of Petitioner.

11. Student enrolled in his current school on or about December 14, 2010. Student's behavior has improved tremendously since entering his current school. His classroom has a strict behavior management program to which Student had been responding for one or two weeks as of the date of the due process hearing. His use of profanity had been cut approximately 85%. He successfully changed work rotations approximately 80% of the time. He apologized for acting out behavior, when it occurred, approximately 90% of the time, and he was earning incentives. Student was also demonstrating some academic success. Testimony of

12. Student continues to have bad days. He still acts out sometimes. His acting out was observed by his educational advocate during a school visit on February 17, 2011 and Petitioner received a telephone call regarding Student's behavior on February 28. P 35;

Testimony of                      Testimony of                      Testimony of Petitioner.

### **DISCUSSION**

The following discussion is based on my review of the exhibits introduced by the parties, witness testimony and the record in this case. While I find all witness testimony presented in this matter to be credible, some witnesses were more persuasive than others. Where these differences in persuasiveness are relevant to my determination, I will so indicate.

*Whether DCPS denied the student a FAPE by failing to include the related service of a dedicated aide in Student's individualized education program ("IEP").*

Under the IDEA each local education agency is required to provide a FAPE to each student found eligible for special education and related services. A FAPE is:

Special education and related services that . . . are provided at public expense, under public supervision and direction, and without charge; . . . [m]eet the standards of the [state educational agency] . . . [i]nclude an appropriate preschool, elementary school, or secondary school education . . . ; and . . . [a]re provided in conformity with an . . . IEP that meets the requirements of [the IDEA regulations].

34 C.F.R. § 300.17. *See also*, D.C. Code § 30.3001.1.

An IEP is a written statement that includes, in pertinent part, the eligible student's: present levels of academic and functional performance; the effect of the student's disability on his/her involvement and progress in the general curriculum; measurable annual academic and functional goals designed to meet the student's educational needs resulting from his/her disability; a statement of the special education and related services, supplementary aids and services, and program modifications and supports to be provided to the student to allow him/her to advance toward attaining the IEP goals and progress in the general curriculum and to participate in nonacademic activities. In developing the IEP the team is to consider the strengths of the child, the concerns of the parent for enhancing the education of the student, the results of the most recent evaluation and the academic, developmental and functional needs of the student.

34 C.F.R. § 300.324(a). *See also*, D.C. Code § 30.3007. If a student's behavior impedes the student's learning or that of other students, the team is to consider interventions and strategies to address the behavior. *Id.* An IEP that memorializes the team's FAPE determination must be designed to provide the student with some educational benefit. *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 176, 203-204 (1982).

While the content of an IEP is a team decision 34 C.F.R. §§ 300.320 – 300.323.

*See also*, D.C. Code §§ 30.3007.1 & 3008.1, teams are required to consider all the relevant information before them. *Id.* In the instant matter, for several years, beginning in 2009 Petitioner has requested Student be assigned a dedicated aide. The aide is intended to assist Student both in academics and in controlling his behavior. Petitioner also testified that, for a short period of time, Student had worked with an aide who was assigned to another Student at one of his prior placements, and Student had responded positively to the aide. At an IEP meeting at Student's prior school there was extensive discussion regarding whether Student warranted a dedicated aide. Several members of the MDT suggested that an aide be tried for a few months to assess the benefits to Student. DCPS, however, determined a dedicated aide was not warranted.

Petitioner's testimony regarding the need for an aide and Student's experience with an aide was credible. However, her testimony was a recitation of history and past experience. Student moved to a new school in December. His current teacher was most persuasive in his testimony. The teacher described his classroom's strict behavior management program that involves a point system and daily incentives, among other things. Student has recently begun to respond to this behavior management program. The teacher's description of Student's progress was notable. Student's negative behavior has decreased significantly, and he has shown some academic progress about which he felt proud. The teacher's credibility was bolstered by his ready acknowledgement that Student still has bad days. He also acknowledged that an aide might be helpful, but he noted that as aide also might be disruptive because Student would have to like the aide for the aide to be effective and because Student might engage in oppositional behavior with the aide. He indicated Student's response was not predictable.

Petitioner was in the unlikely position of arguing against accepting Student's progress in his current placement. She noted he has a history of responding and then not responding to

interventions. While this may be true, and Student, in fact, may regress after showing progress in his current placement, the same argument can be made about the effect of an a dedicated aide. That is, Student might respond to the aide and show improvement for some period of time and then regress. Student's past limited experience with an aide does not assure that assigning Student a dedicated aide would result in continuous, on-going positive effects. In this regard it should be noted that Student's experience with the aide was almost two years ago and that the current behavior management program is working for the moment. Petitioner also noted that Student responds better to one on one assistance and support, but this is not dispositive. It would be difficult to find any student who would not respond better to one on one assistance than to group instruction.

It is clear that numerous efforts have been made to find an appropriate program and set of supports that will allow Student to access education and receive some educational benefit. *See, Rowley, supra.* Petitioner is clearly making strong efforts to ensure her son receives an education, and her efforts to support him and find a combination of supports and services that will meet his needs are commendable. That said, I find Student's current constellation of programs and services to be addressing Student's needs as memorialized on his IEP. It is beneficial to allow the efforts in student's current placement to proceed without adding the intrusive, omnipresence of an aide. Petitioner has not met her burden of proof. She has not established by a preponderance of the evidence that Student requires a dedicated aide in order to receive a FAPE.

*Whether DCPS denied the student a FAPE by failing to provide Student the related service of transportation as provided on his IEP*

IDEA requires that a free, appropriate public education (“FAPE”) must be available to all eligible children. 34 C.F.R. § 300.301. A FAPE is defined as special education and related services provided in conformity with an IEP.” 34 C.F.R. § 300.17. While it is clear that *de minimis* deviations from the content of the IEP are contemplated, substantive deviations from the IEP can be construed as denials of FAPE. *See, Van Duyn v, Baker School District 5J*, 481 F.3d 770 (9<sup>th</sup> Cir. 2007).

Student’s November 16, 2010 IEP includes transportation services. This IEP was developed at the school Student attended prior to transferring to his current school. Student transferred to his current school in mid-December. Student did not receive bus service to his new school upon his enrollment, and, as a result, Petitioner had to make arrangements for someone to walk Student to school in the morning and home in the afternoon. Petitioner did not make these arrangements immediately and Student, therefore, missed approximately eight days of school. It is clear that DCPS did not make the necessary arrangements to have bus transportation start at the date of Student’s enrollment in his current school. The Student Transportation Form effectuating this service indicates transportation to Student’s current school was to begin January 4, 2011. The question before me, then, is whether the loss of eight days of school due to failure to provide IEP mandated transportation service constitutes a substantive or *de minimis* deviation from the IEP.

Petitioner argues Student has been denied a FAPE due to the lack of transportation. Petitioner’s testimony on this subject was not clear. She stated, at different times, that Student had missed a couple of days due to transportation and that he had missed two or three weeks. Upon closer examination, it appears that Petitioner was testifying to both the time Student was without bus transportation and the time he actually missed school. Once Petitioner had arranged

to have someone walk Student to school and home,<sup>6</sup> he missed only 8 eight days of school.

Petitioner acknowledges Student has been receiving bus transportation for the last couple of months.

Respondent argues that Student is receiving bus service and did not miss school so there is no harm. While it is true that Student is currently receiving bus service and has been for some time, it is not true that bus service was always in place. It is clear, moreover, that Student did miss school as a direct result of DCPS' delay in implementing bus service. However, while it is clear that DCPS failed to implement Student's IEP as written by delaying the implementation of transportation to January 4, 2011 despite Student's entering his current school in mid-December 2010, I find, by a preponderance of the evidence, that this failure to provide transportation during approximately two weeks in December<sup>7</sup> is a *de minimis* deviation from Student's IEP and does not constitute, therefore, a failure to provide FAPE.

*Whether DCPS denied Student a FAPE by failing to fully evaluate Student by not providing a needed hearing assessment*

Under IDEA, a student must be assessed in all areas related to his/her suspected disability including hearing. 34 C.F.R. § 300.304(c)(4). A FAPE, *See, supra* at 7, includes the provision of related services determined to be necessary to meet the student's needs resulting from his/her disability and that will enable him/her to be involved in and progress in the general curriculum and on the other educational needs resulting from his/her disability. 34 C.F.R. § 300.311(a)2(i). Related services include audiology services. 34 C.F.R. § 300.34(a). It,

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<sup>6</sup> I note Petitioner paid someone to provide this service. The need to pay someone to accompany Student to school and home due to DCPS' failure to timely initiate bus transportation is a violation of IDEA in that special education and related services are to be free. However, the number of days Petitioner was obliged to pay for escorting Student to school and home, again, were minimal and, thus, a *de minimis* violation of IDEA. Since I found student to have missed eight days of school due to the lack of bus transportation, the total number of days Petitioner paid someone to escort Student had to be fewer than 5 when winter break is considered.

<sup>7</sup> This is particularly true as Petitioner made arrangements to allow Student to attend school even without the provision of required transportation for some part of this time period.

therefore, follows, that to determine whether a student needs audiology services, an audiology assessment must occur.

Student has a history of ear infections, and ear infections can cause hearing impairments. Student has had three audiology evaluations. There is conflicting evidence regarding whether Student does, in fact, have a hearing loss. At his last audiology evaluation performed at Children's Hospital in the fall of 2010 Petitioner was told Student needed to be seen by an ENT and then a different audiology assessment would be performed. Petitioner has not yet taken Student to the ENT. In order for the audiology assessment to be beneficial to Student, the ENT services must be provided. Without the ENT services the results of the audiology assessment could be inaccurate.

It is essential to determine whether Student has a hearing impairment that is impacting his education. DCPS is responsible for evaluating Student in all areas of suspected disability, including hearing. However, before a new audiology assessment is performed Student must receive the ENT services recommended during the most recent audiology assessment. I conclude, DCPS is responsible for evaluating Student's hearing, but this evaluation cannot take place until after the ENT services are complete. I find Student was denied a FAPE by DCPS failure to provide a new audiology evaluation.

**CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law as follows:

1. DCPS did not deny the student a FAPE by failing to include the related service of a dedicated aide in Student's individualized education program. This claim is **DISMISSED.**
2. DCPS did not deny Student a FAPE by failing to provide Student the related service of transportation, as provided on his IEP, for approximately two weeks in December 2010. This claim is **DISMISSED.**
3. Student was denied a FAPE by DCPS' failure to provide Student a needed hearing assessment.

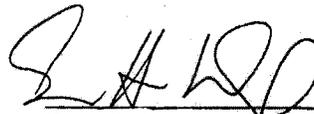
**ORDER**

Based upon the above Findings of Fact and conclusions of law, it is hereby ordered that:

Petitioner is to make arrangements to have Student seen by an Ear, Nose and Throat doctor within 30 days of the issuance of this Hearing Officer Determination. Petitioner is to provide DCPS with verification that the medical treatment has been completed within 10 days of the appointment. DCPS is to provide the audiology evaluation within 10 days of receiving notification that the medical treatment has been completed.

**IT IS SO ORDERED:**

March 11, 2011  
Date

  
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Erin H. Leff  
Hearing Officer

**NOTICE OF RIGHT TO APPEAL**

This is the final administrative decision in this matter. Any party aggrieved by the Findings and/or Decision 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 Decision of the Hearing Officer in accordance with 20 USC §1451(i)(2)(B).