

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

1150 5th Street, SE
Washington, DC 20003
Tel: 202-698-3819
Fax: 202-698-3825

Confidential

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STUDENT HEARING OFFICE
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<p>STUDENT¹, by and through Parent Petitioners, v. District of Columbia Public Schools Respondent.</p>	<p>HEARING OFFICER'S DETERMINATION</p> <p>Date: July 18, 2009</p> <p><u>Hearing Officer: Wanda I. Resto, Esquire</u></p>
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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed prior to public distribution.

I. PROCEDURAL BACKGROUND

On May 19, 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") at 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 educational placement during the 2008-2009 school year; and failing to implement the individualized education plan, dated January 7, 2009.

The Petitioner requests the Respondent be ordered to fund a Linda/Mood Bell assessment of the Student and within 15 days of receipt of the assessment, the Respondent convene an MDT meeting, review all assessments, and develop an appropriate IEP; and the Student be placed and funded at a private placement of the Petitioner's choice. Additionally the Petitioner requests that the Respondent provide compensatory education services.

On June 1, 2009, the DCPS filed a Response to the Parent's Administrative Due Process Complaint. The Respondent asserted there was no allegation that the Student's IEP is inappropriate, but rather an allegation that the current location of services cannot and has not implemented the Student's IEP. The Respondent asserted that it has and will continue to implement the Student's IEP at the current location and the Student has made educational progress.

On June 4, 2009, the Respondent filed a Motion of Disposition of the Due Process Complaint indicating that no agreement could be reached and requesting that the case proceed to a due process hearing on the merits.

The undersigned hearing officer held a pre-hearing conference call with Counsel for both parties on June 17, 2009 at 11:00 AM. 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. The Petitioner alleged that on January 7, 2009, the IEP team recommended 31 hours of services in specialized instruction and counseling in an out of general education setting. The Petitioner further alleged that the Student receives a portion of his special education services in a combination general education/special education setting. The Petitioner offered four witnesses; the Respondent offered three witnesses and both Counsels provided a synopsis of their witnesses' testimony. The Respondent reasserted its position and alleged that since the creation of the IEP in January and through June 2009, the Student has been receiving services from 8:45 AM through 3:15 PM in the afternoon in a self contained classroom with a special education teacher and a dedicated aide. The Respondent alleged the Student was receiving all the services required.

On June 18, 2009, an Order scheduled the hearing for June 26, 2009 at 10:00 AM for three hours. The Petitioner was ordered to demonstrate at the hearing what IEP services the Respondent failed to implement; why the educational placement is inappropriate and how the Petitioner's choice of placement is appropriate. The Petitioner also had to demonstrate how the Student or Parent were harmed. Additionally, the Petitioner had to persuade the Hearing Officer that a Linda/Mood Bell assessment is an appropriate remedy.

The Petitioner was reminded that to sustain the request for a compensatory education award the Petitioner must prove (1) that as a result of Respondent's violation of the IDEIA, the Petitioner suffered an educational deficiency, (2) that but for the violation, the Student would have progressed to a certain academic level, and (3) that there exists a type and amount of compensatory education services that could bring the Student to the level the Student would have been but for the Respondent's violation. The Petitioner had an obligation to establish the need and reasonableness of the amount of compensatory education requested and how the hours will be integrated into the Student's current educational program.

The Respondent was ordered to demonstrate it provided the services prescribed in the Student's IEP. The Respondent had to provide evidence that the placement is appropriate, that the MDT acted appropriately when it decided to place the Student at the current placement and that FAPE has been provided to the Student.

A hearing was held on June 17, 2009 at 11:00 AM, the Petitioner presented a disclosure letter dated June 19, 2009 to which thirty-one documents were attached, labeled P-1 through 31 and which listed five witnesses. Three witnesses testified. The Respondent presented a disclosure letter dated June 17, 2009 identifying nine witnesses and to which three documents were attached, labeled DCPS 1 through 3. All documents were admitted as evidence after discussion of objections. The parties required additional time for the presentation of their evidence and because of unavailability of one of the Petitioner's witnesses the hearing was reconvened a second day for the agreed date of July 9, 2009. A second day of hearing was convened on July 9, 2009, one witness for the Petitioner testified and four witnesses testified on behalf of the Respondent.

The hearings were conducted in accordance with the rights established under the IDEIA 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. Has the Respondent failed to implement the Student's individualized education plan, dated January 7, 2009?
2. Did the Respondent fail to provide an appropriate educational placement during the 2008-2009 school year?
3. Was the Student denied a FAPE by the Respondent?

III. FINDINGS OF FACT

1. Both the parent and the Student reside within the District of Columbia. The Student was registered in a DCPS during the 2008-2009 school year.²

² P# 2 Compliant filed May 19, 2009.

2. The Student is a student with multiple disabilities under the IDEIA. The Student's most recent IEP is dated January 7, 2009, it identified the Student's disability classification as Multiple Disabilities, provides 31 hours of specialized instruction outside the general education setting, and 1 hour of behavioral support services weekly. ³
3. The parties stipulated that on at the January 7, 2009 the MDT made a recommendation of educational placement for the Student to
4. At the January 7, 2009 meeting, it was determined along with the specialized instruction hours and related services the Student would also be provided with a dedicated aide in the classroom and that a behavior intervention plan would be structured for the Student. ⁴
5. On May 12, 2009, a meeting was convened by the Respondent, the notes indicate that both the dedicated aide and the Petitioner expressed concerns with the Student's behavior, at times he is angry and throws things at students. It also indicates that the Student behavior's which were consistently negative have subsided since receiving services from the dedicated aide. The teacher shared that the Student's problems are in general education, but that he does well when he focuses in the classroom. The SET-shared that an educational setting without interaction with non-disabled students could be detrimental to the Student "success to date".⁵
6. The Education Advocate observed the Student for approximately 2 hours outside his special education class the Student was in his art class with a dedicated aide and she had to redirect him frequently. She spoke with the dedicated aide about the Student's behaviors and saw the Student hit the dedicated aide about two times. The Student recently had fought with another student; he argues and is not listening to the teacher. The Student was in a self contained classroom except for the art class. ⁶
7. The Student has approximately five teachers the SET, reading, math, and arts. There are approximately eight students in his class and they go together to arts and gym class. The dedicated aide stays the entire day and with the Student, although and not in the special classes. ⁷
8. The Student has been at the _____ for almost three years. The mother participated in a meeting in January 7, 2009 and the Student's specialized instruction was increased. The parent got frequent calls from the School about the Student's behavior, and the Student was suspended for setting off a false fire alarm in school. The teachers are keeping track of the Student's behavior on a behavior sheet. The parent gets complaints about the Student cursing in school, leaving the classroom, hitting teachers and students. The Petitioner believes the Student's behavior has gotten worse; neither the dedicated aide not the teacher can control him. The Student was in a combination setting and in January was changed to a self-contained setting and the parents agreed.

³ P#15 January 7, 2009 -IEP and stipulation of the parties.

⁴ P#16 January 7, 2009 -MDT meeting notes.

⁵ P#11 May 12, 2009

⁶ Testimony of the education advocate. P#15 P#14

⁷ Testimony of the Student.

The parent visited _____ and there is more monitoring; one-on-one service for the Student; the students are not distracted in the class and she did not see fights. ⁸

9. The Student's report card during the school year 2008-2009, reflects the Student progressed from Beginning to the level of Developing skills. The Student has mastered or progressed in all his goals.⁹
10. The Student is in a self contained classroom with first and second graders and a special education teacher. The Student receives his specialized instruction in the SET classroom and he transfers with the same group of students to "special classes" which are arts, music, gym and have lunch at the cafeteria. In the special classes there are no general education students and during the time at the cafeteria the special education students are separate from the general education population. The Student has an opportunity to interact with nondisabled students during recess time and either the SET or the dedicated aide is also present. All the services in the IEP have been provided to the Student and he started receiving the services of a dedicated aide in February 2009. The SEC can see the Social Worker's office and she has seen the Student many times there; receiving counseling services. The Student's behavior has improved; he has not been sent to the front office and is having more good days than bad. The Student requires less interaction with the SEC. The SET is a certified special education teacher; however the certification of the teachers which provide the "special classes" is not known. ¹⁰
11. The Dedicated Aide worked with the Student from February 2009 until June 15, 2009. A normal day with the Student would begin at 8:00 AM until 3:30 PM, with a break between 12:15 until 1:00 PM, her duties required that she assists the Student with assignments, assist in calming the Student when he had behavioral outbursts, make sure that the Student is understanding what is happening in classes and she took notes of changes in the Student's behavior. She accompanied the Student to the other side of the building to take art class along with the other eight students, and also accompanies the Student to his music, gym, dance, and computer classes. The Student was a challenge at the beginning; he did not want to cooperate with her and resisted help. The Student usually in the morning would have outburst, yell and did not like to be touched or interaction any other person. The Student has progressed; he is working hard, wants to do more and is assuming leadership within the group. There is a behavior code; there are colored cards in yellow, green, and red; red being a day when the Student required a lot of interventions; from February through June of 2009 the Student had mostly green cards. In April he had a violent incident with another Student; however, overall his behavior problems have diminished. The Student currently negotiates to try and prevent negative incidents from happening. ¹¹
12. The Principal has known the Student for three years; previously the Student's behavior was aggressive towards peer, adults and his mother. The Student would hit the mother, fight and hit other students, run out of the classrooms, and now he doing much better. The Student was going on errands for the SET; he brings things to the office and can return directly to his classroom. He is a

⁸ P#28- Progress notes SY 08-09, P#29 -March and May 2008-Dedicated Aide notes, and testimony of the mother.

⁹ P# 27 - 2nd grade report card school year 2008-2009 and DCPS#1-May 27, 2009-Student Report of Progress.

¹⁰ Testimony of the SEC and DCPS #3 -Service Tracker forms for Psycho-social counseling.

¹¹ Testimony of the Dedicated Aide.

different child and doing quite well. The Student's IEP is being implemented in a full time setting with a special education teacher and in a self contained classroom, all his IEP services are provided and the 31 hours in the Student's IEP can be implemented at The Student's interaction with general education students happens only during lunch and recess. ¹²

13. Accotink Academy is a private therapeutic day school in Springfield, Virginia serving students who range in age from five to twenty-one. The school places a strong emphasis upon social-emotional development. The student-to-teacher ratio is small and intensive, affording students a great deal of individualized attention. The students are always escorted and there are no general education students. There are behavior counselors, Language and Speech, Occupational Therapy, Physical Therapy and Psychological Counseling can be provided. The Student was accepted to the school program based on a review of his educational file, IEP and interview. The Student has a full time IEP, requires plenty of supervision and reinforcement to stay focused. There has not been a classroom designated for the Student, he would be placed with same age peers. The School only offers a 30 hours a week program; therefore the Student's IEP would likely be changed to reflect the 30 hours. The teachers are certified in the state of Virginia. The cost is approximately a day and per hour of counseling services. ¹³
14. The Petitioner was to provide the hearing officer with evidence that the IDEIA requires that all the Student's classes be provided by a SET and the Petitioner did not.

IV. CONCLUSIONS OF LAW

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.

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

The Petitioner claimed the Student received non core academic classes without his SET; the Student receives a portion of his special education services in a combination general education/special education setting and therefore was not being provided the 31 hours of services in his IEP and not in a full time special educational placement during the 2008-2009 school year.

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—

¹² Testimony of the Principal.

¹³ Testimony of the private school representative.

- 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;”

The Petitioner alleged that at the current educational placement the Student receives a portion of his special education services in a combination general education/special education setting. There was no evidence to sustain the allegation. The proof was that the Student is receiving the services prescribed in his IEP, the Student was in a combination setting and in January was changed to a self-contained setting and the parent agreed. The Student receives his specialized instruction in the SET classroom and he transfers to arts, music, and gym; where there are no general education students and during the time at the cafeteria the special education students are separate from the general education population. The Student also has a dedicated aide that accompanies the Student to his music, gym, dance, and computer classes, and assists him with work during the school day.

Teachers Serving Children with Disabilities

The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA 2004) requires that all public elementary and secondary special education teachers be highly qualified as special education teachers. The definition of highly qualified special education teachers in the IDEA [20 U.S.C. 1401(10)] is aligned with No Child Left Behind's highly qualified requirements under that statute at section 9101 of the Elementary and Secondary Education Act (ESEA) [20 U.S.C. 7801(23)] and the implementing regulations at 34 CFR § 200.56. Section 300.18(g)(1) of the IDEA regulations states that a teacher who is highly qualified under section 602(10) [20 U.S.C. 1401(10)] of IDEA shall be considered highly qualified for purposes of the ESEA. Section 300.18 of the IDEA regulations establishes requirements for special education teachers in general, as well as those teaching core academic and multiple subjects and those not teaching core academic subjects. In addition, it establishes requirements for special education teachers teaching to alternate achievement standards and describes alternative routes to certification.

The IDEIA also requires the SEA must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of Part 300 are appropriately and adequately prepared

and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.¹⁴

However there is also language in the regulation that 'nothing in this part shall be construed to create a right of action means that a claim that a teacher is not highly qualified may not serve as a basis for relief for an individual Student or class of Students under IDEIA.¹⁵

If concerns arise about whether a special education teacher is highly qualified, the Department encourages parents to try to resolve issues at the school level. It would make sense for them to talk to their child's principal first, before doing anything else, to find out what the school is doing to ensure that the teacher gets the training that he or she needs to meet the highly qualified standards. If they are not satisfied with the steps the LEA is taking, they could file a complaint with the State educational agency (SEA). Id.

The Petitioner did not bring forth any evidence to establish the Student's teachers were not qualified, it was an allegation brought in the Complaint, no effort to investigate with the school and not credible evidence was provide. The DCPS has in place requirement for certification and standards of teachers and there is no evidence that the teachers do not meet the standard.¹⁶

Additionally, any public elementary school or secondary school special education teacher teaching in a State, who is not teaching a core academic subject, is highly qualified if the teacher has met the requirements for special education teachers in general or holds at least a bachelor's degree and has met the requirements under an alternative certification program.¹⁷

The responsibility for personnel qualifications belongs to the SEA and are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;¹⁸

Educational Placement

The Petitioner alleged the Respondent failed to provide the student with an appropriate placement for the 2008-2009 school year.

The IDEIA at 20 U.S.C. § 1400 et seq. and 5 D.C.M.R. § 3000.2 (2006) requires the Respondent 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,

¹⁴ See: 34 CFR 300.156(a) and 20 U.S.C. 1412(a)(14)

¹⁵ 47 IDELR 165-107 LRP 11710 Questions and Answers on Highly Qualified Teachers Serving Children with Disabilities – Office of Special Education and Rehabilitative Services- January 1, 2007

¹⁶ District of Columbia Statewide Highly Qualified Teacher Plan; July 2008- See: <http://www.ed.gov/programs/teacherqual/hqtplans/dcstateplan08.doc>.

¹⁷ See: 34 CFR 300.18(b)(1) 300.18(b)(1)(iii) 300.18(b)(2) 300.18(b)(3)

¹⁸ See: 34 CFR 300.156(b) and 20 U.S.C. 1412(a)(14)(B)

designed to meet their unique needs and prepare them for further education, employment, and independent living.¹⁹

A MDT Meeting was held for the Student on or about January 7, 2009, in which the IEP Team reviewed the Student's evaluations, and revised and updated the Student's IEP. The IEP team including the Petitioner agreed that the Student was in need of new placement, and a full-time special education program was warranted. The Respondent offered and the Student was placed at the _____ in a self-contained classroom with a SET in a full time special education placement.

According to the IDEIA at 20 U.S.C. 1412(a)(5) the determination of the educational placement of a child with a disability should be done annually and must be based on a child's IEP. The IDEIA and its regulation at 34 C.F.R. § 300.17 requires the Respondent as the local state education agency, to make certain that the educational placement, for the child with a disability within its jurisdiction, is able to implement the student's individualized educational program.

Additionally in an accordance with 34 C.F.R. § 300.116 of the IDEIA regulations when determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that— (a) The placement decision— (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

Also pursuant to 5 D.C.M.R. § 3013.1(e), Placement, "[t]he LEA shall ensure that the educational placement decision for a child with a disability is ...based on the child's IEP." This Student's current IEP was created January 7, 2009. The Respondent determined an educational placement and provides the Student with "special classes" with a non- special education teachers, the Petitioner failed to prove that consequently that amounts to not providing education in a full time education setting.

The Respondents have pointed to evidence that show the Student transfers to "special class" with the same group of special education students, and is assisted by a dedicated aide when he is in these non-core academic classes. The evidence is that when the Student is at lunch time in the cafeteria, he continues to be with the same group of 9 students and they separate from the general education students.

Moreover, the Petitioner is requesting a private placement which is outside the jurisdiction of the DC, which only provides a 30 hours a week program for the Student and does not provide for any interaction with the general education students. Furthermore, there has not been a classroom designated for the Student.

Under IDEIA 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, Section 300.114, requires each public agency to ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled. Further, 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

¹⁹ See: 20 U.S.C § 1400(d)(1)(A).

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.

In addition, 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." ²⁰ 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. ²¹

The Respondent offered services at the _____ a DCPS that according to the Respondent could rationally provide the Student with an educational benefit. The Student at the time was in a placement that was not appropriate and the entire MDT including the Petitioner agreed required a full time placement.

FAPE Determination

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

The IDEA and its 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)."

Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability."²² 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1.

In evaluating whether a FAPE is denied, the Supreme Court has established a two-part test to guide the analysis: "First, has the State complied with the procedures set forth in the [IDEA] And second, is the individualized educational program developed through the [IDEA]'s procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-07. If these requirements are met, the Court explained, then defendants have "complied with the obligations imposed by Congress and the courts can require no more."²³

Undoubtedly the Respondent has a statutory obligation to implement the IEP through an appropriate placement, they did just that: the Student has a fulltime program with a SET, attends classes with special education students and has a dedicated aide to assist him. There was no procedural violation of the IDEA and the Student IEP was reasonably calculated to provide educational benefit, the

²⁰ D.C. Code § 38-2561.02(c) (2007).

²¹ *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982)

²² See: 20 U.S.C. § 1401(28), 34 C.F.R. § 300.39, 30 DCMR Sec. § 3001.1.

²³ *Id.*

school even adapted to the Student's behavior needs, provided a dedicated aide and there was evidence that the Student has progressed educationally.

V. SUMMARY OF DECISION

The Petitioner did not demonstrate that Student's IEP services were not implemented, or that the educational placement is inappropriate. The Petitioner failed to demonstrate how the Student or Parent were harmed. The Student is in a full time placement in a self contained classroom with a SET, attends classes with special education students and has a dedicated aide to assist him. There was no procedural violation of the IDEIA and the Student IEP was reasonably calculated to provide educational benefit,

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 not denied the Student a FAPE and issues the following:

VI. ORDER

ORDERED, the Complaint is Dismissed

This order resolves all issues presented in the Petitioner's **May 19, 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

Date: July 18, 2009