DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 Fifth Street, S.E.
Washington, DC 20003

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STUDENT, through the legal guardian[1]	)	
	)	
Petitioner,	)	Case Number:
	)	
v.	)	Hearing Date: May 24, 2010
	)	Hearing Room: 6A
THE DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	Hearing Officer: Frances Raskin
	)	
Respondent.	)	

HEARING OFFICER DETERMINATION

Counsel for Petitioner:

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[1] Personal identification information is provided in Attachment A.

I. JURISDICTION

This proceeding was invoked in accordance with the Individuals With Disabilities Education Improvement Act ("IDEIA") of 2004, codified at 20 U.S.C. §§ 1400 *et seq.*, D.C. Code §§ 38-2561.01 *et seq.*; and the regulations at 34 C.F.R. §§ 300.1 *et seq.*; and D.C. Mun. Reg. tit. 5-E, §§ 3000 *et seq.*

II. BACKGROUND

Petitioner is the mother of a -year-old, special-education student ("Student") at a non-public school in the District of Columbia. On February 26, 2010, Petitioner filed a Due Process Complaint Notice ("Complaint") against the District of Columbia Public Schools ("DCPS") alleging violations of IDEIA. In the Complaint, Petitioner alleges that, in a December 2009 settlement agreement,[2] DCPS agreed to provide the Student a dedicated aide, a laptop computer for use at home, and "Fast ForWard"(sic), a reading intervention software program by January 11, 2010.[3] Petitioner alleges that, although DCPS provided the dedicated aide, she "has no experience or credentials in special education and is not qualified"[4] to provide the Student the assistance she requires. Petitioner further alleges that the Student's current school has identified a "qualified" candidate to serve as a dedicated aide for the Student.

In the Complaint, Petitioner defines the legal issue in this case as whether DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to provide the Student with a "qualified" dedicated aide. Petitioner seeks relief in the form of an order requiring DCPS to (1) fund the dedicated aide selected by the non-public school; and (2) fund compensatory education for the Student to remediate the educational harm that resulted from the failure by DCPS to provide the Student a "qualified" dedicated aide.

On March 11, 2010, counsel for DCPS filed a Response to Parent's Administrative Due Process Complaint Notice ("Response").[5] In the Response, DCPS admits that it entered into a settlement agreement in December 2009 wherein it agreed to provide the Student a dedicated

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[2] The Complaint asserts that the parties entered into a settlement on "December 23, 2021," but counsel for Petitioner later clarified that the agreement was in December 2009.

[3] In the Complaint, Petitioner alleges that DCPS provided funding for the non-public school to obtain the Fast ForWord software and agreed to deliver the laptop to the school. In actuality, DCPS did not provide the software to the Student until two weeks before the due process hearing.

[4] IDEIA specifies that "a parent or student may not file a due process complaint . . . for the failure of a particular state education agency ("SEA") or local education agency ("LEA") employee to be highly qualified. 34 C.F.R. § 300.156 (e); Department of Education comments to IDEIA regulations, 71 Fed. Reg. 46613 (Aug. 14, 2006). That type of complaint should be filed with the SEA. In this case, however, Petitioner is alleging a denial of FAPE as result of the aide's lack of qualifications and experience. Thus, this Hearing Officer has jurisdiction over this case.

[5] Counsel for DCPS filed the Response three days after the filing deadline. During the prehearing conference on April 12, 2010, counsel for Petitioner stated that the late filing did not prejudice Petitioner.

aide as well as educational software and a laptop computer. DCPS denies that the Student has been denied a FAPE by its alleged failure to provide a "qualified" dedicated aide and asserts that the aide has been providing services to the Student. DCPS further asserts that the dedicated aide is qualified to provide services to the Student. Finally, DCPS asserts that it merely funds whatever dedicated aide the non-public school hires and has no authority to make personnel decisions for Students attending non-public schools.

The parties engaged in a resolution meeting on April 8, 2010.[6] On April 12, 2010, this Hearing Officer held a prehearing conference. During the prehearing conference, counsel for Petitioner agreed that the sole issue in this case is whether DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to provide the Student with a "qualified" dedicated aide. Both counsel agreed that the forty-five-day due process hearing timeline began on April 9, 2010.[7] Both counsel also agreed that the due process hearing would take place on May 24, 2010, and that this Hearing Officer would issue the hearing officer determination ("HOD") on or before June 3, 2010. On April 30, 2010, this Hearing Officer issued a Prehearing Order reflecting the agreement of the parties on the date the forty-five-day timeline commenced, and the dates for the due process hearing and issuance of the HOD.

On April 13, 2010, counsel for Petitioner subsequently filed a Motion for Continuance to allow the due process hearing to proceed on May 24, 2010. On April 30, 2010, this Hearing Officer issued an Interim Order on Continuance Motion ("Continuance Order") granting a ten-day continuance and scheduling the due process hearing for May 24, 2010.[8]

The parties exchanged five-day disclosures on May 17, 2010.[9] After reviewing the parties proposed exhibits and witness lists, this Hearing Officer scheduled a second prehearing

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[6] The prehearing conference was scheduled for the afternoon of April 8, 2010, but counsel for Petitioner failed to appear. Counsel for Petitioner also failed to timely appear for prehearing conferences scheduled on March 31, 2010, and April 8, 2010, delaying each of them by about ten minutes.

[7] Because the resolution session occurred on April 8, 2010, both counsel and this Hearing Officer simply assumed that the due process hearing timeline began the following day .

[8] Both counsel agreed to convene the due process hearing on May 24, 2010, and counsel for Petitioner offered to file a motion for a continuance to allow the hearing to proceed on that date. In the motion, counsel for Petitioner stated that the continuance was necessary for the hearing to take place on May 24, 2010, and that the Petitioner waived the forty-five-day due process hearing timeline. Due to an inadvertent error in calculation, this Hearing Officer granted a ten-day continuance as she thought this was sufficient to provide for a timely due process hearing on May 24, 2010. Only later did this Hearing Officer realize that a twenty-two day continuance, rather than a ten-day continuance, was required. On May 31, 2010, this Hearing Officer issued a corrected continuance order, which the Chief Hearing Officer signed.

[9] In Petitioner's disclosures, counsel for Petitioner failed to (a) provide a name for the "classroom teacher" listed in the witness list; (b) correctly identify the school the Student attends; (c) accurately reflect the hearing date and time, which she listed as 1:00 p.m. on April 30, 2010, a date that had passed by the time Petitioner filed these disclosures; (d) provide accurate legal citations to the relevant statutes and regulations; and (e) include a certificate of service or even accurately list the persons to whom she sent a copy of the disclosures.

conference for 8:30 a.m. on May 20, 2010, with the consent of both counsel.[10] Counsel for Petitioner failed to appear for the prehearing conference.

The due process hearing commenced on May 24, 2010. The parties' Five-Day Disclosures were admitted into evidence at the inception of the hearing with the exception of Petitioner's Exhibits 8, 14, 15, 17, and 19.[11] Two witnesses, Petitioner's educational advocate and the assistant principal of the non-public school, testified in the due process hearing.[12] DCPS rested on the record after moving for a directed verdict.

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[10] This Hearing Officer scheduled this prehearing conference to discuss with counsel the deficiencies and multiple errors in Petitioner's five-day disclosures and witness list. Primarily, this Hearing Officer hoped to discuss whether Petitioner should face adverse consequences for her counsel's failure to provide an address and brief description of anticipated testimony for each listed witnesses, as agreed upon during the prehearing conference and required by the Prehearing Order. This Hearing Officer also wanted to discuss with counsel for Petitioner whether she planned to call all nine individuals listed on her witness list as the parties had agreed to limit the due process hearing to six hours. Finally, this Hearing Officer wanted to discuss with counsel for Petitioner her failure to include on the witness list two important witnesses, the present dedicated aide and the "dedicated aide" the Non-Public School proposed as a more "qualified" replacement.

[11] This Hearing Officer excluded Petitioner's Exhibits 8 and 14 as irrelevant. This Hearing Officer excluded Petitioner's Exhibit 19, a resume on which the name, address, and phone number had been redacted. Counsel for Petitioner asserted that Exhibit 19 was the resume of the dedicated aide that the Non-Public School hoped to hire to assist the Student. This Hearing Officer excluded the redacted resume on the grounds that Petitioner failed to produce the testimony of the proposed aide, who was not on Petitioner's witness list, and thus the document could not be authenticated and DCPS would have no opportunity for cross-examination. *See*, e.g., Fed. R. Evid. 901 (b) (1). Finally, this Hearing Officer did not admit Petitioner's Exhibits 15, 17, and 18 into evidence. Exhibit 15 was a June 1, 2009, unsigned draft of the Student's individualized educational program ("IEP") that predated the Student's current IEP. Since Petitioner was not challenging either IEP or their implementation, this Hearing Officer questioned the relevance of the draft June 1, 2009, IEP and stated that Petitioner may seek to admit this Exhibit only on rebuttal if she could prove its relevance. Exhibits 17 and 18 are the *curriculum vitae* of Petitioner's proposed expert witnesses, Dr. Pius Ojevwe, Psy.D., and Dr. Deborah Gambles, Psy.D. This Hearing Officer ruled that Exhibit 17 or 18 would be admitted only upon the testimony of these witnesses.

[12] After an extended discussion at the outset of the due process hearing regarding Petitioner's failure to provide notice of the testimony she planned to present by failing to provide the required brief descriptions of each proposed witness's testimony, this Hearing Officer excluded Petitioner's proposed expert witnesses, Dr. Ojevwe and Dr. Gambles. These psychologists conducted the Student's comprehensive psychological and adaptive functioning evaluation in 2009. *See* Petitioner Exhibit 7. Although Petitioner also failed to show the relevance of the testimony of these witnesses, other than interpreting their report, which was written in plain English, this Hearing Officer ruled that Petitioner would be allowed to call one of them on rebuttal, if necessary.

III. RECORD

Due Process Complaint Notice, filed February 26, 2010;
DCPS Response to Administrative Due Process Complaint, filed March 11, 2010;
Prehearing Conference Order, issued April 30, 2010;
Petitioner's Five-Day Disclosure Statement, listing ten witnesses and including fifty-nine proposed exhibits, filed November 27, 2009;
Petitioner's Five-Day Disclosure, listing nine witnesses and including nineteen proposed exhibits, filed May 17, 2010;
DCPS Five-Day Disclosure; listing four witnesses and brief descriptions of their anticipated testimony, and including seven proposed exhibits, filed May 17, 2010; and
Petitioner's Motion for Continuance of the Due Process Hearing, filed April 13, 2010;
Continuance Order, issued April 30, 2010; and
Revised Continuance Order, issued May 31, 2010.

IV. ISSUE PRESENTED

Whether DCPS denied the Student a FAPE by failing to provide the Student with a "qualified" dedicated aide.

V. FINDINGS OF FACT

1. The Student is a ·year-old, special-education student who attends a District of Columbia Non-Public School.[13] The Student is nominally in the grade.[14] The Student's current individualized educational program ("IEP"), developed on September 23, 2009, provides that she receive 27.5 hours of specialized instruction outside the general education environment.[15] The IEP provides that the Student is to receive assistive technology in the form of the Fast ForWord computer program and a laptop computer for use at school and at home.[16] The IEP also specifies that the Student would receive the full-time support of a dedicated aide.[17]

2. The Student's full scale IQ is 55, which indicates that her intelligence is in the extremely low range.[18] Within the verbal domain, the Student functions in the extremely low range, better than only 1 percent of her same-age peers.[19] Her nonverbal abilities fall within the borderline range, above only 3 percent of her peers.[20] The Student's ability to process simple or routine visual material without making errors is in the extremely low range, better than about 0.2 percent of her peers on processing speed tasks.[21]

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[13] Petitioner Exhibit 5.
[14] Testimony of Non-Public School Assistant Principal.
[15] Petitioner Exhibit 5, p. 5.
[16] *Id.*
[17] *Id.*
[18] Petitioner Exhibit 7 (Comprehensive Psychological/Adaptive Functioning Evaluation), p. 5.
[19] *Id.*
[20] *Id.*
[21] *Id.*

3. The Student's ability to sustain attention, concentrate, and exert mental control is in the extremely low range, better than only 0.3 percent of her same-age peers.[22] Her ability to recall and reverse orally presented information, as well as her ability to attend and concentrate, are extremely impaired.[23]

4. The Student has limited academic achievement skills.[24] Specifically, her math calculation skills and spelling fall in the moderate to mild impaired range.[25] Her sight-reading ability is very low.[26] Her language development and meaningful memory skills are borderline.[27]

5. Overall, the Student's cognitive abilities are commensurate with her achievement skills.[28] The Student's oral comprehension ability is within the extremely low range.[29] Her ability to listen to a sequence of auditory instructions and then follow directions is in the borderline range.[30] Her ability to read and understand the content of material she read is in the very low range.[31] Thus, the Student will find age-level tasks requiring listening skills, oral comprehension, meaningful memory, memory span, and working memory extremely difficult.[32] The Student's extremely poor performance in oral language is not surprising given her extremely low cognitive performance.[33]

6. Petitioner has observed that the Student is not always aware of others, stares blankly, babbles to herself, and has visual and auditory hallucinations.[34] She also reported that the Student has attention lapses, a short attention span, and is easily distracted.[35]

7. The Student's adaptive functioning is markedly impaired.[36] Her communication, daily living, and social skills, when combined, are at the low adaptive level in comparison to other children her age.[37] Her receptive, expressive, and written communication skills also are at the low adaptive level.[38] She struggles in all areas of communication, and her skills are comparable to a child who is between one and seven years old.[39]

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[22] *Id.* at p. 6.
[23] *Id.*
[24] *Id.* at p. 7.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at p. 8.
[35] *Id.*
[36] *Id.* at pp. 9-10.
[37] *Id.* at p. 9.
[38] *Id.*
[39] *Id.*

8. The Student's daily living skills are below the first percentile of her same-age peers.[40] Her functioning in this area is comparable to children between the ages of two and eight years old.[41]

9. The Student's socialization skills also are below the first percentile of her same-age peers.[42] She has difficulty coping with changes in her environment and play/leisure activities.[43] She prefers to be alone, does not initiate conversation with peers, and depends on others more than usual.[44] She is most at risk for impoverished social skills as manifested by frequent use of poor judgment, limited understanding of the antecedents and consequences of social actions, and lack of reciprocity of peer interactions.[45] Given the Student's history of behavioral needs in school, she requires a classroom environment where behavioral expectations are clearly stated and consistently reinforced.[46]

10. The Student is at a serious disadvantage in a regular school setting due to her severe cognitive deficits.[47] Unless she receives services that can focus on her deficits one domain at a time and provide her specialized and individualized instruction, she has little chance of academic success.[48] She has the best chance for success in an all-day, special education environment that focuses on her specific limitations.[49] The Student requires a highly structured classroom environment that has a low student-teacher ratio, and clear and consistent academic routines.[50] She also is in need of increased emotional support, structure, and nurturance to encourage the development of her expressive language abilities.[51]

11. In light of her auditory processing difficulties, the Student is unable to grasp large amounts of verbally presented information, especially information presented in a multi-step format.[52] Because she has difficulty with concentration and attention, the Student will benefit from a teaching method that limits the amount of information provided at one time, and provides repeated instruction and organization.[53]

12. The Student requires comprehensive therapeutic support, including counseling, crisis management, and/or medical/psychological management.[54] She should participate in weekly

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[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at p. 10.
[44] *Id.*
[45] *Id.*
[46] *Id.* at p. 11.
[47] *Id.* at p. 10.
[48] *Id.*
[49] *Id.*
[50] *Id.* Notably, the evaluators did not recommend that the Student be in the extremely restrictive placement of a one-to-one student-teacher ratio.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*

individual therapy that focuses on improving her problem-solving and coping skills as well as her abilities to verbalize her feelings.[55]

13. On September 23, 2009, an IEP team consisting of Petitioner, counsel for Petitioner, the Non-Public School Principal, and the Non-Public School Assistant Principal ("Assistant Principal"), met to revise the Student's IEP.[56] The team members unanimously agreed that the Student requires a dedicated aide because she is easily distracted, processes information slowly, and is below grade level in all academic areas.[57] The Student is more successful when she works in a one-to-one relationship with a teacher who is competent to provide her instruction.[58] If the Student is not provided one-to-one instruction, she is unable to focus and stops working on her assignment.[59]

14. The IEP team discussed that the Student should receive 27.5 hours of specialized instruction, with five hours per week to be provided in an inclusion setting with the use of a dedicated aide.[60] However, the Student's IEP provides only that the Student is to receive 27.5 hours of specialized instruction outside the general education setting and makes no mention of inclusion instruction.[61] The IEP states that the Student requires a small, structured environment to accommodate her disabilities due to her low achievement in reading, written expression, and mathematics.[62] The IEP further states that the Student is to receive a full-time dedicated aide to provide support *outside* the general education setting.[63]

15. At the September 23, 2009, meeting, the IEP team agreed that the Student required assistive technology.[64] The team agreed that the Student needed a laptop for use at school and at home as well as Fast ForWord, a computer-based software program for reading intervention and instruction.[65]

16. At the September 2009 meeting, the IEP team agreed that the Student needed ninety minutes per week of speech and language services and one hour per week of counseling.[66] However, the IEP team failed to document these related services on the actual IEP.[67]

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[55] *Id.*
[56] Petitioner Exhibit 5, p. 11.
[57] Testimony of Assistant Principal.
[58] *Id.*
[59] *Id.*
[60] Petitioner Exhibit 5, p. 11 (September 23, 2009, IEP meeting notes).
[61] Petitioner Exhibit 5, p. 5.
[62] *Id.* at p. 6.
[63] *Id.* at p. 5.
[64] *Id.* at p. 11.
[65] *Id.*
[66] *Id.*
[67] Petitioner Exhibit 5, p. 5. The IEP reflects the Student's present levels of performance in speech and language, although it fails to describe how the Student's disability affects her involvement and progress in the general education curriculum. *See id.* The IEP reflects the Student's speech and language needs, which are simply described as "[t]he student needs to

17. The IEP provides that the Student will receive the "full time support" of a dedicated aide outside the general education setting.[68] However, it the IEP fails to specify the precise services the aide is to provide.[69]

18. Petitioner had to leave the September 23, 2009, IEP meeting before the team could print out the final draft of the Student's IEP but signed a draft copy to indicate her agreement with its contents.[70] Counsel for Petitioner signed the final IEP on Petitioner's behalf and indicated her agreement with its contents.[71]

19. On November 19, 2009, Petitioner filed a due process complaint.[72] On December 23, 2009, Petitioner and DCPS entered into an agreement in which Petitioner agreed to withdraw the complaint and DCPS agreed to "fund and provide a dedicated aide" for the Student for the 2009-2010 school year.[73] DCPS agreed that the dedicated aide would begin providing services to the Student during the week of January 11, 2010.[74] DCPS also agreed to provide the Student "a laptop computer and Fast-Forward (sic) software based program."[75]

20. DCPS hiring requirements specify that an educational aide, also referred to as a "dedicated aide," must possess either an Associate's degree, forty-eight college credit hours, or a high school diploma and have passed the ParaPro Assessment.[76] Pursuant to the December 23, 2009, settlement agreement, DCPS provided a dedicated aide ("Dedicated Aide") to the Non-Public School to assist the Student.[77] The Dedicated Aide has a Bachelor's degree.[78]

21. The Dedicated Aide began working at the Non-Public School on January 5, 2010.[79] Two days later, the Assistant Principal emailed Petitioner's counsel to complain that the Dedicated Aide "spends no time with the Student in an outside of general education setting and, in fact, is little more than a classroom assistant in an inclusion setting."[80]

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improve her very weak language skills." *Id.* It contains only one speech and language goal, described as "[t]o increase expressive and receptive vocabulary skills." *Id.* Even though this goal is not measurable, and the IEP lacks a description of how the Student's progress toward meeting this annual goal will be measured, both of which are required by IDEIA, *see* 34 C.F.R. § 300.320 (a) (2) (i), Petitioner is not challenging the September 23, 2009, IEP.

[68] *Id.* at p. 5.

[69] *Id.* This may be due to the constraints of the DCPS Easy IEP computer program that the IEP team used to generate this IEP. Testimony of Assistant Principal.

[70] *Id.* at 6, 12.

[71] *Id.* at p. 1.

[72] Petitioner Exhibit 9, p. 1.

[73] *Id.*

[74] *Id.*

[75] Petitioner Exhibit 9, p. 1.

[76] DCPS Exhibit 7, p. 2.

[77] Petitioner Exhibit 12, p. 1.

[78] *Id.*; Testimony of Assistant Principal.

[79] Petitioner Exhibit 12, p. 1.

[80] Petitioner Exhibit 12, p.1. At the due process hearing, Petitioner failed to provide an explanation, either through testimony or documentary evidence, why the Non-Public School

22. On February 22, 2010, an IEP team, consisting of Petitioner, who participated by phone, a DCPS Compliance Case Manager, the Educational Advocate, and the Assistant Principal, met to discuss various matters including the services to be provided by the Dedicated Aide.[81] At the meeting, the Assistant Principal informed the team that he objected to the Dedicated Aide because she lacked prior teaching experience and training in special education.[82] The Assistant Principal stated that the Dedicated Aide was not qualified to work with the Student on a one-to-one basis and does not have the requisite training or experience to assist the Student with the Fast ForWord program.[83] When the Assistant Principal observed the Dedicated Aide working with the Student, he noted the Student's resistance to both the Dedicated Aide and to working on her assignment.[84]

23. At the February 2010 meeting, the Assistant Principal explained that he planned to hire another "dedicated aide" who has special education teaching credentials and is qualified to use Fast ForWord.[85] The Non-Public School required that, at a minimum, this "dedicated aide" must be licensed to provide speech pathology or special education.[86] The Assistant Principal expected that this "dedicated aide" would provide direct instruction and use the Fast ForWord program with the Student.[87] The Non-Public School intended for the "dedicated aide" position to be a "teaching and instructional position where the lead teaching role would be fulfilled by the 'dedicated aide.'"[88] In essence, the Non-Public School intended for the "dedicated aide" to serve as a one-on-one special education teacher for the Student.[89]

24. The DCPS Compliance Case Manager responded that replacing the Dedicated Aide with the Non-Public School's proposed "dedicated aide" was outside the realm of his responsibility.[90] The Compliance Case Manager did authorize an additional four hours of speech pathology to be added to the Student's IEP so that the speech pathologist could provide the Student instruction in the Fast ForWord program.[91]

25. The Student's report card for the first two quarters of the 2009-2010 school year show that she was struggling in many of her classes.[92] During the first quarter, she failed health/physical education and science, but received a C+ in language/writing and reading and a B- in math.[93] During the second quarter of the school year, the Student received failing grades in

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could not simply define the duties of the Dedicated Aide to include the assistance the Student requires and then direct the aide to provide these services to the Student.

[81] Petitioner Exhibit 6, p. 1.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] Petitioner Exhibit 6, p. 1.
[86] Testimony of Assistant Principal.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] DCPS Exhibit 6.
[93] *Id.*

character education, health/physical education, and science.[94] She received a C- in language/writing and reading. She received a B- in math and a pass in social studies.

26. The 2009-2010 report card includes numerous comments that the Student did not "do homework" or complete assignments.[95] The first quarter comments for the Student's science class state that the Student often procrastinates, fails to complete assignments, is off task, and disrupts other students and classroom activities.[96] The second quarter comments for the science class state that the Student is progressing.[97]

27. Even though the Student's September 23, 2009, IEP mandates that she receive all of her instruction outside the general education setting, the Assistant Principal asserted that the Student receives one-half to two-thirds of her weekly instruction in an "inclusion setting."[98] The School Principal, who is not a special education teacher, serves as the instructor in this inclusion classroom.[99]

28. Due to its limited staff, the Non-Public School was unable to implement the Student's September 23, 2009, IEP on the day it was developed.[100] This is why the IEP team contemplated that the "dedicated aide" would serve as the Student's special education teacher.[101] To date, the Non-Public School still has been unable to implement the Student's IEP.[102]

29. Nonetheless, Petitioner believes the Student is making some academic progress.[103] Petitioner has observed that the Student is improving her spelling, learning vocabulary, learning to look up words in the dictionary, and improving her addition and multiplication skills.[104] However, Petitioner could not provide specific details of the Student's progress.

VI. CREDIBILITY DETERMINATIONS

The testimony of all three witnesses at the hearing was credible. DCPS presented no testimony that contradicted the testimony of Petitioner's witnesses.

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[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] Testimony of Assistant Principal.
[99] *Id.* Although Petitioner failed to present any testimony to explain the setting in which the Student is being educated, including whether the student population at the Non-Public School includes general education students, this Hearing Officer believes that the Assistant Principal understood the common meaning of the word "inclusion." See 34 C.F.R. 300.320 (a) (4) (iii) ("to be educated and participate with other children with disabilities and nondisabled children" in school activities).
[100] Testimony of Assistant Principal.
[101] *Id.*
[102] *Id.*
[103] Testimony of Petitioner.
[104] *Id.*

The Assistant Principal was especially credible and knowledgeable about the Student.[105] He has discussed the Student's academic performance with her teachers a few times each month.[106] He also has spoken to the Student's speech pathologist every week during the 2009-2010 school year, and has observed the Student in the classroom, albeit for less than twelve minutes each time.[107] He has conducted three IEP meetings and has drafted two IEPs for the Student.[108]

VII. CONCLUSIONS OF LAW

IDEA guarantees children with disabilities the right to a free and appropriate public education with services designed to meet their individual needs.[109] FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."[110] DCPS is obligated to provide a FAPE "for all children residing in the state between the ages of 3 and 21, inclusive."[111]

The Hearing Officer's inquiry in this case is twofold. First, has the State complied with the procedures set forth in the Act?[112] Second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?[113]

In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding provision of FAPE, or caused the child a deprivation of educational benefits.[114] In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.[115]

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[105] Even though he has no background in teaching or other education-related work experience, but instead has a law degree, the Assistant Principal also serves as the special education coordinator and teaches math and science at the Non-Public School. Testimony of Assistant Principal.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] 20 U.S.C. §§ 1400 (d) (1) (A), 1412 (a) (1).
[110] *Bd. of Education v. Rowley*, 458 U.S. 176, 188-89 (1982) (citation omitted).
[111] 34 C.F.R. § 300.101.
[112] *Rowley*, 458 U.S. at 206.
[113] *Id.* at 207-07.
[114] 20 U.S.C. § 1415 (f)(3)(E)(ii).
[115] *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted). *Accord, Kruvant v. District of Columbia,* 99 Fed. Appx. 232, 233 (D.C. Cir. 2004) (denying relief under IDEA because "although DCPS admits that it failed to

VIII. DISCUSSION

The burden of proof is properly placed upon the party seeking relief.[116] Under IDEIA, a Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.[117] Here, the sole legal allegation was that DCPS denied the Student a free, appropriate, public education ("FAPE") by failing to provide the Student with a "qualified" dedicated aide.

IDEIA mandates that the State Education Agency ("SEA") establish and maintain qualifications for personnel who provide services to children with disabilities under the Act.[118] These qualifications must ensure that personnel, including paraprofessionals, are appropriately and adequately prepared and trained, and have the content knowledge and skills to serve children with disabilities.[119]

To prevail on her claim that DCPS denied the Student a FAPE by failing to provide her a "qualified" dedicated aide, at a minimum Petitioner should have demonstrated that IDEIA requires specific training and qualifications for dedicated aides, including, perhaps, by referring to the requirements in 34 C.F.R. § 300.156 and any case law interpreting this section. Petitioner also should have established the policies that the SEA, the Office of State Superintendent of Education("OSSE"), instituted to comply with this provision of IDEIA, especially those requirements regarding the background experience, and training of paraprofessionals. Finally, Petitioner should have provided evidence that the Dedicated Aide's educational background and experience do not satisfy OSSE's personnel requirements. Alternatively, Petitioner should have attempted to prove that DCPS failed to ensure that the Dedicated Aide was adequately and appropriately prepared as required by 34 C.F.R. 300.156.[120] Petitioner utterly failed to introduce any of this evidence, much less prove that the Dedicated Aide's background and qualifications did not satisfy these OSSE/DCPS requirements.[121]

Even if Petitioner had proved that the Dedicated Aide's background and qualifications did not satisfy these requirements, this would not, ipso facto, equate to a denial of FAPE. Rather, to prevail in this case, Petitioner was required to prove that the failure of DCPS to provide the Student a "qualified" dedicated aide, i.e., an aide whose qualifications satisfy 34

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satisfy its responsibility to assess [the student] for IDEA eligibility within 120 days of her parents' request, the [parents] have not shown that any harm resulted from that error").

[116] *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

[117] 20 U.S.C. § 1415 (i) (2) (c). *See also Reid v. District of Columbia*, 401 F.3d 516, 521 (D.C. Cir. 2005) (discussing standard of review).

[118] 34 C.F.R. § 300.156.

[119] *See* 34 C.F.R. § 300.156; U.S. Department of Education comments at 71 Fed. Reg. 46611 (Aug. 14, 2006) (stating that the provisions of 34 C.F.R. § 300.156 are sufficient to ensure that paraprofessionals meet high standards).

[120] *See* 34 C.F.R. § 300.207.

[121] As discussed below, Petitioner failed to introduce even a scintilla of evidence to show that the Dedicated Aide lacked any necessary qualifications, much less the qualifications required by 34 C.F.R. § 300.156. Instead, as the Assistant Principal testified, the Dedicated Aide's qualifications exceed the DCPS requirements. See ¶ 20, above.

C.F.R. § 300.156, amounted to a substantive violation that denied the Student a FAPE.

Moreover, Petitioner failed to present any testimony or other evidence that the Student was denied a FAPE. Petitioner failed to introduce any evidence on any aspect of the Student's educational performance during the 2009-2010 school year, before or after DCPS provided the Dedicated Aide to the Student.[122] Petitioner also failed to introduce any evidence on the Student's progress, or lack thereof, as a result of her work with the Dedicated Aide. Thus, Petitioner utterly failed to introduce any evidence to show the Student was denied a FAPE.

Instead, Petitioner proved only that the Non-Public School wanted to convince DCPS to provide the Student a one-on-one special education teacher in the guise of a "qualified dedicated aide." The Assistant Principal candidly admitted that this was his intent.

Under IDEIA, however, dedicated aides are not directly responsible for the provision of special education and related services to students with disabilities.[123] Rather, these paraprofessionals provide special education and related services to children with disabilities only under the supervision of special education and related services personnel.[124]

Even if the Dedicated Aide failed to provide the Student the assistance the IEP team envisioned, as the Assistant Principal testified, the IEP team failed to provide any direction in the IEP regarding the role and qualifications of the dedicated aide that the Student requires.[125]

In the end, Petitioner proved only that the Non-Public School failed to implement the Student's September 2009 IEP. Specifically, Petitioner proved that the Non-Public School was unable to implement the IEP from the day it was drafted because they lacked the teaching staff

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[122] The only evidence through which Petitioner provided any insight into the Student's academic performance was the July 2009 Comprehensive Psychological and Adaptive Functioning Evaluation, on which the IEP team relied in developing the Student's September 2009 IEP. While this evaluation recommends that the Student receive 27.5 hours per week of specialized instruction in a small, structured setting outside the general education environment, it does not support Petitioner's claim that the Student requires a dedicated aide, much less a "qualified" dedicated aide. The evaluation makes no mention of a dedicated aide/paraprofessional.

[123] 71 Fed. Reg. 46612. The Department of Education specified that this provision "should not be construed to permit or encourage the use of paraprofessionals as a replacement for teachers or related services providers." *Id.* "To the contrary, using paraprofessionals and assistants as teachers or related services providers would be inconsistent with the state's duty to ensure that personnel necessary to carry out the purposes of [IDEIA] are appropriately and adequately prepared and trained." *Id.*

[124] *Id. See also Cavanagh v. Grasmick*, 75 F. Supp. 2d 446, 464 (D. Md. 1999) (distinguishing between IDEIA personnel standards for special education teachers and paraprofessionals, and stating that teachers principally provide special education instruction in the classroom while paraprofessionals simply assist with the provision of special education under a teacher's supervision).

[125] See ¶ 17, page 9, above.

necessary to provide the placement required by the IEP.[126] However, as noted above, Petitioner did not challenge the IEP in her Complaint or allege that the Non-Public School failed to implement it.

Thus, Petitioner failed to prove that DCPS had committed any procedural violation, much less prevail on her claim that DCPS denied the Student a FAPE.[127] Thus, Petitioner failed to prevail on the sole claim in her Complaint.

IX. DIRECTED VERDICT

After Petitioner presented her case in chief, counsel for DCPS moved for a directed verdict. This Hearing Officer granted the motion, briefly provided the reasons therefore, and explained that she would provide further explanation of her ruling in this HOD.

While federal court rules do not apply to due process hearing under IDEA, they are instructive here. Pursuant to Federal Rule of Civil Procedure 50(a), the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.[128] If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.[129] A directed verdict is not appropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[130] The judge must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. [131]

The judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.[132] The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.[133] The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could

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[126] Testimony of Assistant Principal. As noted above, the Non-Public School has been unable to provide the Student the 27.5 hours of specialized instruction outside the general education environment that her IEP requires. *Id.*

[127] Moreover, had Petitioner fully investigated her case prior to filing the Complaint, she would have learned that the Non-Public School was seeking a special education teacher in the form of a "dedicated aide," which IDEA expressly forbids.

[128] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (citing *Brady v. Southern R. Co.*, 320 U.S. 476, 479-480 (1943)).

[129] *Id.* at 250-51 (citing *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949)).

[130] 477 U.S. at 248 (discussing the similar standards that govern this inquiry under Fed. R. Civ. P. 56 (c) and Fed. R. Civ. P. 50 (a)). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. 477 U.S. at 251-252 (citation omitted).

[131] *Id.* at 251-252.

[132] *Id.* at 252.

[133] *Id.*

find by a preponderance of the evidence that the plaintiff is entitled to a verdict – "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."[134]

Here, as explained above, Petitioner did not produce even one scintilla of evidence in support of her position that DCPS denied the Student a FAPE by failing to provide her a "qualified" dedicated aide. In fact, the evidence was so one-sided that this Hearing Officer could reach only one conclusion: that DCPS must prevail as a matter of law.[135] For this reason, this Hearing Officer granted the DCPS motion for directed verdict.

Finally, given the concerns expressed herein, it is questionable whether the IEP is appropriate to meet the student's needs and whether the Student is making meaningful progress at the Non-Public School.[136] The parties may think it wise to explore these concerns in an IEP meeting. They should consider whether any assessments of the Student should be conducted prior to the meeting.

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[134] *Id.* (citing *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872)).
[135] 477 U.S. at 251-252
[136] According to the Assistant Principal, the Student may need a more restrictive placement than she is currently receiving. However, this Hearing Officer notes that the Assistant Principal has no background or training in education, much less special education. An IEP team likely would be in a better position to assess the educational needs of the Student.

ORDER

Upon consideration of Petitioner's request for a due process hearing, and the testimony and exhibits admitted at the hearing, this third day of June 2010 it is hereby:

ORDERED that Petitioner's Complaint is **DISMISSED WITH PREJUDICE**;

IT IS FURTHER ORDERED that this Order is effective immediately.

By: /s/ *Frances Raskin*
Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. § 415(i)(2).

Distributed to:

Roberta Gambale, Attorney at Law
Daniel Kim, Attorney at Law
Hearing Office
DCPS