

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

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STUDENT HEARING OFFICE
2012 JAN 30 AM 9

Parent, on behalf of STUDENT,¹)	
)	
Petitioner,)	
)	
v.)	
)	
THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS,)	
)	
Respondent.)	Hearing Officer: Frances Raskin

HEARING OFFICER DETERMINATION

I. JURISDICTION

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

II. BACKGROUND

Petitioner is the parent of a -year-old student ("Student") with a disability. On October 25, 2011, Petitioner filed a Due Process Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") pursuant to the Individuals with Disabilities Education Act ("IDEA").

This Hearing Officer was appointed to preside over this case on October 27, 2011. Respondent filed a timely response to the Complaint on November 2, 2011.²

The parties participated in a resolution meeting on November 17, 2011. The parties were unable to resolve the Complaint and agreed to continue to work to resolve the

¹ Personal identification information is provided in Attachment A.

² Respondent did not challenge the sufficiency of the Complaint.

Complaint through the end of the resolution session. Thus, the resolution period ended on November 24, 2011. The parties agreed that the forty-five day, due process hearing timeline began on November 25, 2011.

On November 30, 2011, this Hearing Officer held a prehearing conference in which Kiran Hassan, counsel for Petitioner, and Tanya Chor, counsel for Respondent, participated. On December 6, 2011, this Hearing Officer issued a prehearing conference summary and order, which certified two issues for adjudication at a due process hearing.

The due process hearing commenced at 9:30 a.m. on January 10, 2012. At the outset of the hearing, this Hearing Officer entered into evidence the exhibits submitted by each party. Petitioner testified and presented three witnesses on her behalf, her educational advocate ("Advocate"), an expert in clinical psychology (Clinical Psychology Expert), and a neuro-developmental pediatrician ("Pediatrician"). Respondent presented the testimony of a school psychologist ("DCPS Psychologist"), a DCPS speech-language therapist ("Speech Therapist"), and a DCPS social worker ("Social Worker") before the hearing adjourned.

The due process hearing reconvened at 10:30 a.m. on January 19, 2012. DCPS presented two witnesses, the special education coordinator at the Student's school ("SEC"), and the Student's special education teacher ("Teacher"). The parties then presented oral closing arguments. The due process hearing concluded at 12:30 p.m. on January 19, 2012.

III. ISSUES PRESENTED.

This Hearing Officer certified the following issues for adjudication at the due process hearing:

A. Whether Respondent denied the Student a free, appropriate, public education ("FAPE") on October 18, 2011, by developing an individualized educational program ("IEP") that lacks goals to address his autism spectrum disorder; and

B. Whether Respondent denied the Student a FAPE on October 18, 2011, by failing to provide him a dedicated aide to assist him with daily tasks such as toilet training in the school setting.

Petitioner requests relief in the form of an order requiring Respondent to revise the Student's IEP to include annual goals that address his autism spectrum disorder. Petitioner further seeks an order requiring DCPS to provide the Student a dedicated aide to assist with daily tasks, including adaptive issues and toilet training.³ Petitioner also seeks an order requiring DCPS to provide compensatory education to the Student.

³ Stipulation of parties.

IV. FINDINGS OF FACT

1. The Student is _____ years old and attends an elementary school in the District of Columbia.⁴ He is currently eligible for specialized instruction and related services as a student with developmental delay.⁵

2. Developmental delay is a disability category normally used for children under five years old when it is difficult to determine the exact nature of the child's disability.⁶ Children are identified as developmentally until their precise disability is identified, which usually occurs before the child is seven years old.⁷

3. The Student has extremely low adaptive skills.⁸ Adaptive skills are those practical, everyday skills required to function and meet environmental demands, including effectively and independently taking care of oneself and interacting with other people.⁹ In 2010, when the Student was three years old, he could feed himself with a spoon or fork without assistance, distinguish between food substances and non-food substances, and remove his clothing unassisted.¹⁰ He could put away toys when asked.¹¹ However, he had difficulty moving independently around the house and understanding that hot items are dangerous.¹²

4. Currently, the Student's teacher or paraprofessional must take the Student to the bathroom every hour and a half during the school day.¹³ He must be prompted to accomplish each step, including walking to the bathroom, taking down his pants, and removing his diaper.¹⁴ He sits on the toilet on his own, and will wipe himself with one prompt.¹⁵ After receiving assistance with his diaper, he is able to pull up his pants and

⁴ Testimony of Petitioner; Petitioner Exhibit 6 (October 18, 2011, IEP).

⁵ Petitioner Exhibit 17 at 1 (November 30, 2011, Confidential Psychological Re-Evaluation). Developmental delay is defined as a child aged three through seven who is experiencing developmental delays, as measured by appropriate assessment instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development. *Id.* at 7.

⁶ Testimony of DCPS Psychologist.

⁷ *Id.*

⁸ Petitioner Exhibit 12 at 2 (October 19, 2010, Educational Assessment); Petitioner Exhibit 17 at 5-6.

⁹ Petitioner Exhibit 17 at 5.

¹⁰ Petitioner Exhibit 12 at 3.

¹¹ *Id.*

¹² *Id.*

¹³ Petitioner Exhibit 18 at 4 (December 6, 2011, Social Work Assessment Report); testimony of Student's Teacher.

¹⁴ Petitioner Exhibit 18 at 4-5; testimony of Student's Teacher.

¹⁵ Petitioner Exhibit 18 at 5.

wash his hands on his own without prompting.¹⁶ Once, in November 2011, the Student was able to go to the bathroom, on his own without prompting from an adult, and appropriately accomplish the toileting task.¹⁷

5. The Student does not require a dedicated aide to assist him with toileting skills.¹⁸ Providing the Student a dedicated aide to assist with toileting would not encourage the Student to learn.¹⁹ Rather, he would become dependent on the dedicated aide, which would inhibit him from mastering these skills on his own.²⁰

6. Although the Student has a mild developmental delay in personal and social skills,²¹ social skills are a relative strength.²² He is able to greet familiar adults spontaneously, help with simple household tasks, and respond positively when familiar adults or adults in authority initiate social contact.²³ For example, when instructed to hand a coat to a peer, he smiled and complied immediately.²⁴ He responds well to praise and is able to interact positively when prompted with a high five and a smile.²⁵ He also gives high fives when prompted.²⁶ However, he has to be prompted during each interaction to make eye contact.²⁷

7. The Student displays independent behavior, identifies himself in a mirror, and expresses ownership or possession.²⁸ He appropriately communicates a range of positive emotions, imitates others, changes his behaviors based on what others are doing, and appropriately communicates a range of negative emotions.²⁹ He had not yet begun to state his first name or use a personal pronoun to refer to himself.³⁰

8. The Student has significant cognitive developmental delays.³¹ In 2010, he was unable to uncover a hidden toy, occupy himself for ten minutes without demanding attention, or search for a removed object.³² He had difficulties looking at, pointing at, or

¹⁶ *Id.*

¹⁷ Petitioner Exhibit 18 at 4.

¹⁸ Testimony of Student's Teacher, DCPS Social Worker, and SEC.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Petitioner Exhibit 12 at 2-4.

²² Petitioner Exhibit 17 at 5.

²³ Petitioner Exhibit 12 at 3.

²⁴ Petitioner Exhibit 17 at 4.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Petitioner Exhibit 17 at 4.

²⁸ Petitioner Exhibit 12 at 4.

²⁹ *Id.*

³⁰ *Id.*

³¹ Petitioner Exhibit 12 at 4.

³² *Id.*

touching pictures in a book and finding an object hidden under one of two cups.³³ He had difficulties showing an interest in age-appropriate books and matching colors.³⁴ He had difficulties matching a circle, square, and triangle; sorting by color; and identifying familiar objects by their use.³⁵ He was able to physically explore or investigate his surroundings and imitate simple facial gestures.³⁶ He recognized himself as the cause of events or happenings, experimented with variations of causal behavior, reached around a barrier to obtain a toy, pulled a cloth to obtain an object, and nested objects inside one another.³⁷

9. The Student also has profound delays in expressive and receptive language.³⁸ His articulation skills are below average for his age.³⁹ He responds well to the structure of his classroom, although he does not always appear to understand.⁴⁰ He has limited communication.⁴¹

10. In January 2011, the Student did not speak in class and did not point at things.⁴² Now he speaks a bit more and points to things he wants.⁴³ He interacts well with his teachers and the paraprofessional, responds when his name is called, and engages in cooperative play with other children.⁴⁴ He shares his toys and interacts in symbolic play with his peers, often smiling and laughing.⁴⁵ He knows the names of all eight of his classmates.⁴⁶ He has made a lot of progress socially.⁴⁷

11. The Student responds well to direction.⁴⁸ He is able to follow directions and participate in the classroom.⁴⁹ However, he has difficulty retaining information and his current academic functioning is low.⁵⁰ While he is able to demonstrate his knowledge of colors, shapes, and numbers on one day, he may not be able to identify them the next day.⁵¹ Nonetheless, this school year, the Student has learned to identify objects and can speak

³³ *Id.*

³⁴ *Id.* at 5.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 4-5.

³⁸ Petitioner Exhibit 11 at 5 (October 4, 2010, Report of Comprehensive Speech and Language Evaluation).

³⁹ *Id.*

⁴⁰ Petitioner Exhibit 17 at 4.

⁴¹ *Id.*

⁴² Testimony of Student's Teacher.

⁴³ *Id.*; Testimony of DCPS Psychologist.

⁴⁴ *Id.*

⁴⁵ *Id.*; testimony of Student's Teacher.

⁴⁶ Testimony of Student's Teacher.

⁴⁷ *Id.*

⁴⁸ Testimony of DCPS Psychologist.

⁴⁹ *Id.*

⁵⁰ Testimony of DCPS Psychologist.

⁵¹ Testimony of Student's Teacher.

their names one word at a time.⁵² He also can now count from one to ten.⁵³ However, if he is asked to identify a number three or four, he is unable to do so.⁵⁴

12. The Student has extreme difficulty controlling his emotions and staying out of trouble, concentrating, paying attention, and completing tasks, and doing things without supervision or restrictions.⁵⁵ He has quiet a few troubles accepting responsibility for his actions and expressing his feelings.⁵⁶

13. The Student also has trouble focusing.⁵⁷ The Student's Teacher creates barriers with a box, provides him one-on-one instruction, and breaks the concepts down into small steps to help him learn.⁵⁸ Even with this level of attention, the Student often cannot concentrate for more than three minutes at a time.⁵⁹

14. Some of the Student's behaviors may appear to be similar to those of children with autism, although these behaviors are more associated with his limited functioning, including delays in his growth and development.⁶⁰ His behaviors and functioning indicate that he may be intellectually deficient.⁶¹

15. On October 18, 2011, DCPS convened a meeting of the Student's IEP team.⁶² Petitioner and the Advocate participated in the meeting.⁶³ The IEP team developed goals in the areas of academics/mathematics that included prompting, verbal cues, and visual aids.⁶⁴ These goals would be no different if the Student were identified as autistic as they address the very basics of learning, such as identifying basic shapes and primary colors, learning to express his feelings and needs verbally, and using the toilet independently.⁶⁵

16. The IEP team also developed goals in adaptive and daily living skills, speech and language, and motor skills.⁶⁶ Because the Student had not mastered all of the goals in

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Petitioner Exhibit 18 at 4.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Testimony of DCPS Psychologist.

⁶¹ *Id.*

⁶² Petitioner Exhibit 6 at 1 (October 18, 2011, IEP and Signatures of IEP Team Participants).

⁶³ *Id.*

⁶⁴ *Id.* at 2.

⁶⁵ Testimony of Student's Teacher; Petitioner Exhibit 6 at 2-4.

⁶⁶ Petitioner Exhibit 6 at 3-7.

his previous IEP, including some of his academic and speech-language goals, the goals he had not mastered were carried over to the October 18, 2011, IEP.⁶⁷

17. At the October 18, 2011, IEP meeting, neither Petitioner or the Advocate objected to the goals on the IEP the team developed for the Student.⁶⁸ However, near the end of the meeting, the Advocate requested that the IEP include goals designed for a student on the autism spectrum.⁶⁹ Petitioner and the Advocate also expressed their opinion that the Student needed a dedicated aide to assist him with toileting and other adaptive skills.⁷⁰

18. Pursuant to the October 18, 2011, IEP, the Student receives 25 hours of specialized instruction to address his difficulties with performing on expected age/grade level in all academic areas due to his impaired cognitive skills.⁷¹ He receives one hour per week of occupational therapy to address his adaptive/daily living skills, including self-care and interpersonal skills.⁷² He also receives one hour per week of speech-language therapy to address his expressive and receptive language deficits and inability to communicate in the classroom setting.⁷³

19. The Student receives speech-language therapy twice a week to address his deficits and delays in expressive language, receptive language, and speech intelligibility.⁷⁴ The therapy is provided inside the Student's classroom in a group that includes six students in addition to the Student.⁷⁵

20. Since September 2011, the Speech Therapist has seen great improvement in the Student's speech-language skills.⁷⁶ With moderate cues, he is able to identify colors.⁷⁷ When the group sings, the Student sings along with the other students.⁷⁸ The Student responds to visual cues in speech-language therapy.⁷⁹ If the Speech Therapist reads him a story, gives him a visual cue, and asks him a question, he is able to provide a one-word answer.⁸⁰

⁶⁷ Testimony of Student's Teacher, Speech Therapist.

⁶⁸ Testimony of the Student's Teacher.

⁶⁹ Petitioner Exhibit 7 at 1 (October 18, 2011, Advocate's MDT Notes).

⁷⁰ *Id.*; testimony of Advocate.

⁷¹ Petitioner Exhibit 17 at 1; Petitioner Exhibit 6 at 8 (October 18, 2011, IEP).

⁷² Petitioner Exhibit 17 at 1; Petitioner Exhibit 6 at 8.

⁷³ *Id.*

⁷⁴ Testimony of Speech Therapist.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

21. The Student is now able to produce about one hundred words, which is at least twice the number of words he produced in September 2011.⁸¹ If given a model, he is able to repeat a short sentence with about sixty percent intelligibility.⁸² He is still not where he should be for his age but has made progress since the beginning of the school year.⁸³

22. The Gilliam Autism Rating Scale-Second Edition ("GARS-2") is a norm-referenced screening instrument for identifying persons who have an autism spectrum disorder.⁸⁴ The GARS-2 is composed of three subscales, each of which contains fourteen items that are based on the definition of autism adopted by the Autism Society of America and on the criteria for autistic disorder published in the American Psychiatric Association's Diagnostic and Statistical Manual, Fourth Edition Text Revision ("DSM-IV-TR").⁸⁵ The three subscales are stereotyped behaviors, communication, and social interaction.⁸⁶

23. On November 22, 2011, DCPS administered the GARS-2 to Petitioner, the Student's current teachers, and his related service providers.⁸⁷ Petitioner's responses on the GARS-2 indicated that the Student exhibits a number of autistic behaviors, such as observations that he echoes words verbally or with signs or repeats words or phrases over and over.⁸⁸ Conversely, the Student's current teachers and related service providers did not observe the Student exhibiting these behaviors in the school setting, other than his difficulties with social interactions.⁸⁹ For a child to be diagnosed as autistic, the student must exhibit autistic behaviors in all settings, including at school and at home.⁹⁰

24. The Student displayed behaviors that are hallmarks of autism, including atypical behaviors before he was three years old.⁹¹ Before age three, he did not smile at his parents or siblings, cried when he was picked up, did not speak until after he was two years old,⁹² did not participate in reciprocal play, and did not explore his environment.⁹³

25. Currently, the Student does not exhibit some of the behaviors typical of autistic children.⁹⁴ He is not aggressive, does not hit other children, and does not have

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Petitioner Exhibit 17 at 6.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Petitioner Exhibit 17 at 1, 6-7.

⁸⁸ *Id.* at 6-7.

⁸⁹ *Id.* at 7.

⁹⁰ Testimony of Clinical Psychology Expert.

⁹¹ Testimony of Clinical Psychology Expert.

⁹² Testimony of Pediatrician.

⁹³ Testimony of Clinical Psychology Expert.

⁹⁴ Testimony of DCPS Psychologist.

temper tantrums at school.⁹⁵ He does not engage in self-stimulating behavior typical of autistic children, such as jumping or arm flapping.⁹⁶ He has no problem sitting still and does not engage in an inappropriate level of activity.⁹⁷

26. Autistic children, as well as children with expressive and receptive language difficulties, need IEP goals requiring visual aids to support all instruction.⁹⁸ Using visual aids allows the teacher to ensure the student understands the instruction.⁹⁹ Without these visual aids, an autistic or speech-language impaired student will not lose much of the verbal instruction.¹⁰⁰ Thus, the goals on an autistic student's IEP must incorporate visual aids.¹⁰¹

27. Applied Behavioral Analysis ("ABA") is the hallmark of behavioral intervention and teaching methods for autistic children.¹⁰² It is a framework that assists teachers in creating goals for autistic students, developing their lesson plans, and for interacting with them.¹⁰³ ABA lesson plans are tied to each student's unique needs and learning styles.¹⁰⁴ The ABA method incorporates pictorial representations and repetition of information.¹⁰⁵ It also is a framework for gathering data about a student to figure out whether he is on the autism spectrum.¹⁰⁶

28. Petitioner was a credible witness. She testified forthrightly about the Student's developmental history and low academic performance. She recalled in detail her requests at the October 18, 2011, meeting.

29. The Clinical Psychology Expert provided credible testimony in interpreting the Student's assessments and discussing the behaviors associated with autism. However, her testimony about the Student's October 18, 2011, IEP was not credible. She testified that the goals in this IEP were inappropriate because they lacked visual aids; yet, the academic goals specifically require physical prompting, verbal cues, manipulatives, visuals, and objects of different shapes, color, or size.¹⁰⁷ This Hearing Officer also does not credit the testimony of the Clinical Psychology Expert regarding the speech goals in the IEP, and

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Testimony of Clinical Psychology Expert.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Testimony of Advocate.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See Petitioner Exhibit 6 at 2-3.

whether the IEP should require the speech-language therapy to be provided in the classroom, as speech-language pathology is an area beyond her expertise.¹⁰⁸

30. The Advocate provided credible testimony on the behaviors the Student exhibits that may be associated with autism. He has experience teaching children with autism and using Applied Behavioral Analysis. However, the Advocate's testimony regarding the October 18, 2011, IEP was less credible, especially his testimony that the goals were inappropriate because they lacked visual aids. The academic goals in this IEP specifically require physical prompting, verbal cues, manipulatives, visuals, and objects of different shapes, color, or size.¹⁰⁹ Further, this Hearing Officer does not credit the Advocate's testimony that the Student's inability to retain information is due to the fact that his instruction was not presented in pictorial format, was too complex, and was not repeated as this testimony was directly contradicted by the Student's Teacher.

31. The Pediatrician was a credible witness on the hallmarks of autism as he has been practicing in the field of neuro-developmental pediatrics for more than 40 years. This Hearing Officer also finds credible his testimony that the Student is developmentally delayed because he is not performing as expected for his age. However, this Hearing Officer does not find his testimony to be convincing on the issue of whether the Student is autistic because much of his testimony was not recorded in his report memorializing his one-hour consultation with Petitioner and the Student.¹¹⁰ The Pediatrician testified about the behaviors the Student exhibited during his one-hour consultation with the Student and Petitioner, including that he flapped his arms, used only three words, stayed by himself, did not make eye contact, and did not want the hospital examiners to touch him. The Pediatrician testified that, in addition to the information Petitioner provided, these behaviors were the reason he diagnosed the Student with autism. However, the Pediatrician failed to note any of these behaviors in his report. Instead, his report simply relates what Petitioner stated during the consultation. Additionally, the Pediatrician testified that he usually requests further testing by a speech-language pathologist, psychologist, and social worker before diagnosing a student with autism, information he did not possess when he diagnosed the Student. Thus, this Hearing Officer does not find credible the Pediatrician's testimony, and diagnosis that the Student is a student with autism.

32. The DCPS Psychologist was a credible witness. She has a doctorate in clinical psychology and almost six years' experience as a certified school psychologist. She has conducted more than twenty assessments of children to determine whether they are autistic. She conducted an assessment, record review, and classroom observation of the

¹⁰⁸ The DCPS Psychologist credibly testified that she does not create speech-language goals on IEPs because this is outside her area of expertise.

¹⁰⁹ See Petitioner Exhibit 6 at 2-3.

¹¹⁰ See Petitioner Exhibit 16. Because the Pediatrician sees thirty to forty children each week, his report would be a more reliable record than his memory of a visit with the Student and Petitioner that occurred five months earlier.

Student to determine whether he was a student with autism. She also interviewed the Student's teachers and related service providers.

33. The Speech Therapist provided credible testimony. She was familiar with the Student's evaluations, current IEP, and previous speech-language goals. She provided in-depth testimony about the Student's performance on his speech-language goals as well as his deficits in this area.

34. The Social Worker was a credible witness. He provided detailed testimony about his observation of the Student. He was forthright about the few behaviors associated with autism that the Student exhibited during this observation.

35. The Student's Teacher provided credible testimony. She was forthright about the Student's academic difficulties and slow progress toward independent toileting skills. She was forthright about the Student's difficulties maintaining attention and retaining information. She provided detailed information about his progress in socialization, behavior, and adaptive skills. She also had excellent recall of the October 18, 2011, IEP meeting and the participation of Petitioner and the Advocate.

36. The SEC provided credible testimony about the Student's disability, the reasons why she believed that his current disability classification is accurate. She provided forthright testimony about the Student's current functioning and his limitations.

V. CONCLUSIONS OF LAW

The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs."¹¹¹ Implicit in the congressional purpose of providing access to a FAPE is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.¹¹² FAPE is defined as:

[S]pecial education and related services that are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA . . . include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP).¹¹³

In deciding whether Respondent provided a student a FAPE, the inquiry is limited to (a) whether Respondent complied with the procedures set forth in IDEA; and (b) whether

¹¹¹ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179-91 (1982); *Hinson v. Merritt Educ. Ctr.*, 579 F. Supp. 2d 89, 98 (2008) (citing 20 U.S.C. § 1400(d)(1)(A)).

¹¹² *Rowley*, 458 U.S. at 200; *Hinson*, 579 F. Supp. 2d. at 98 (citing *Rowley*, 458 U.S. at 200).

¹¹³ 20 U.S.C. § 1401 (9); 34 C.F.R. § 300.17.

the student's IEP is reasonably calculated to enable the student to receive educational benefit.¹¹⁴

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.¹¹⁵ In other words, an IDEA claim is viable only if those procedural violations affected the student's *substantive* rights.¹¹⁶

The burden of proof is properly placed upon the party seeking relief.¹¹⁷ Petitioner must prove the allegations in the due process complaint by a preponderance of the evidence.¹¹⁸

VI. DISCUSSION

A. Petitioner Failed to Prove that Respondent Denied the Student a FAPE by Failing to Include Goals to Address His Autism in the October 18, 2011, IEP.

School districts must ensure that all children with disabilities residing in the State who are in need of special education and related services are identified.¹¹⁹ Once such children are identified, a team, including the child's parents and select teachers, as well as a representative of the local educational agency with knowledge about the school's resources and curriculum, develops an IEP, for the child.¹²⁰ The IEP must, at a minimum, provide personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.¹²¹

The adequacy of the student's IEP is determined by whether the student has "access to specialized instruction and related services which are individually designed to provide educational benefit."¹²² IDEA does not require that the services provided maximize each child's potential.¹²³

¹¹⁴ *Rowley*, 458 U.S. at 206-207.

¹¹⁵ 34 C.F.R. § 300.513 (a)(2).

¹¹⁶ *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006) (emphasis in original; internal citations omitted).

¹¹⁷ *Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005).

¹¹⁸ 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).

¹¹⁹ *Branham v. District of Columbia*, 427 F.3d 7, 8 (D.C. Cir. 2005) (citing *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005)).

¹²⁰ *Branham*, 427 F.3d at 8.

¹²¹ *Id.* (citing *Rowley*, 458 U.S. at 203).

¹²² *Rowley*, 458 U.S. at 201 (1982).

¹²³ *Id.* at 198.

In developing an IEP, the IEP team must consider the strengths of the child; concerns of the parents for enhancing the education of the child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child.¹²⁴ An IEP must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum.¹²⁵ An IEP also must include a statement of measurable annual goals.¹²⁶

Here, there is no dispute that the Student's academic, adaptive, social, and communication skills are extremely impaired. However, Petitioner failed to prove that the Student's October 18, 2011, IEP was not reasonably calculated to enable him to receive educational benefit. Petitioner presented no testimony to show that the goals were not individualized, i.e., designed to address the Student's individual deficits. Instead, Petitioner's sole complaint was that the IEP did not contain goals designed to address his autism.

Although it was not an issue in this case, Petitioner sought to prove that the Student has autism or should be identified as a student with autism to buttress her claim that the Student's October 18, 2011, IEP should have included goals to address his autism. Yet, the only evidence she presented to show that the Student has autism was a report by the Pediatrician that included no evaluative data, no observation results, and little other than a recitation of Petitioner's report of the Student's behaviors. While the Pediatrician testified that he had observed the Student exhibiting autistic behaviors, this information was not in his report. Considering that the Pediatrician examines thirty to forty children each week, including many students with autism, and that five months had passed between the date that the Pediatrician examined the Student and the date he testified at the due process hearing, this Hearing Officer finds that he could not possibly remember details of his one-hour visit with the Student and Petitioner that were not in his report.

The "autistic" behaviors the Pediatrician claims to have observed during his examination of the Student are not behaviors that the Student exhibits in school. As Petitioner's Clinical Psychology Expert testified, for a student to be identified as autistic, he must exhibit autistic behaviors both at home and at school. Yet, the Student's Teacher and the Speech Therapist, both of whom are regularly in the Student's classroom, have not seen the Student exhibit self-stimulating behavior such as arm flapping, avoidance of physical contact, or the other behaviors associated with autism that the Pediatrician claims to have observed.

The Student is making steady progress in academic, social, and adaptive skills. He

¹²⁴ 34 C.F.R. § 300.324 (a).

¹²⁵ 34 C.F.R. § 300.320 (a) (1); D.C. Mun. Reg. tit. 5-E § 3009.1 (a); *A.I. ex rel. Iapalucci v. District of Columbia*, 402 F. Supp. 2d 152, 159 (2005) (finding that an IEP must include measurable goals and benchmarks to measure the child's progress toward the annual goals).

¹²⁶ 34 C.F.R. § 300.320 (a) (2) (i).

has learned to count from one to ten, has increased his vocabulary by at least 50 words since the beginning of the 2011-2012 school year, and has developed play skills and learned to socialize with his peers. While he still needs prompting to make eye contact, Petitioner has failed to show that he has not made progress in social, communication, and adaptive skills, i.e., the areas in which autistic children exhibit deficits. Thus, the Student is properly identified as a student with developmental delay until his disability is further clarified.

Petitioner failed to show that the goals on his October 18, 2011, IEP are not individually designed to provide educational benefit or how they would have been different had he been identified as a student with autism. While the Advocate and the Clinical Psychology Expert testified that the Student must have goals that incorporate visual aids and repetition of information,¹²⁷ the goals in the October 18, 2011, IEP specify that the Student is to receive prompting, verbal cues, and visual aids as part of his specialized instruction.

Finally, the goals on the Student's IEP would be no different if he were identified as autistic. His current goals already address the very basics of learning, such as identifying basic shapes and primary colors, learning to express his feelings and needs verbally, and using the toilet independently.

Thus, Petitioner failed to prove that Respondent denied the Student a FAPE when it failed to include goals to address the Student's autism in his October 18, 2011, IEP. Respondent is the prevailing party on this issue.

B. Petitioner Failed to Prove that Respondent Denied the Student a FAPE by Failing to Provide the Student a Dedicated Aide to Assist with Daily Living Skills and Toileting.

Petitioner alleges that the Student requires a dedicated aide to assist him with toileting and other adaptive skills. Petitioner proved, and Respondent does not dispute, that the Student's toileting skills are extremely delayed.¹²⁸ Petitioner also proved that, at the October 18, 2011, meeting, she and the Advocate requested that Respondent provide the Student a dedicated aide.

¹²⁷ The Advocate further testified that students with autism must have goals that incorporate Applied Behavior Analysis, i.e., pictorial representations and repetition of information.

¹²⁸ The Student is still wearing pull-up diapers and must be prompted to go to the bathroom throughout the school day. He must be prompted to accomplish each step, including walking to the bathroom, taking down his pants, and removing his diaper. He sits on the toilet on his own, and will wipe himself with one prompt. After receiving assistance with his diaper, he is able to pull up his pants and wash his hands on his own without prompting.

However, Petitioner did not prove that the Student needs a dedicated aide to assist him with toileting. Rather, the testimony and evidence at the due process hearing showed that, if a dedicated aide were to be assigned to the Student to assist him with toileting, it is likely that he would not learn to be self-sufficient in this area. He may become dependent on the dedicated aide, which would inhibit him from mastering these skills on his own.

Further, Petitioner did not introduce any evidence or testimony to show that the Student requires a dedicated aide to assist him with any other daily living skills. Petitioner did not even identify, through documentary evidence or testimony, any other areas in which the Student adaptive skills are so severely impaired that he requires a dedicated aide.

Thus, while there is no dispute that the Student is unable to go to the toilet without prompting and assistance, Petitioner failed to prove that he would benefit from a dedicated aide, much less that Respondent denied him a FAPE by failing to provide him an aide. For this reason, Respondent is the prevailing party on this issue.

ORDER

Based upon the findings of fact and conclusions of law herein, it is this 27th day of January 2012 hereby:

ORDERED that the Complaint is **DISMISSED WITH PREJUDICE**.

By: /s/ Frances Raskin
Frances Raskin
Hearing Officer

NOTICE OF APPEAL RIGHTS

This Hearing Officer Determination is a final determination on the merits. Any party aggrieved by the findings and decision of this Hearing Officer Determination shall have 90 days from the issuance of the Hearing Officer Determination 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. § 1415(i)(2).