DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
1150 5th Street, S.E.
Washington, DC 20003

STUDENT,[1]
through the Parent,

Petitioner,

v.

District of Columbia Public Schools,

Respondent.

Date Issued: April 12, 2010

Hearing Officer: Virginia A. Dietrich

Case No:

Hearing Date: 04/02/10 Room: 7A

STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

BACKGROUND

On 01/29/10, a due process complaint notice ("Complaint") was filed by Petitioner alleging that Petitioner's child ("Student") had been denied a free appropriate public education ("FAPE") when the District of Columbia Public Schools ("DCPS") failed to develop an appropriate individualized education program ("IEP") that included a dedicated aide, and when DCPS failed to provide an appropriate educational placement for Student that included an aide. Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act ("IDEA"), as modified by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), 20 U.S.C. Section 1400 et. seq., the implementing regulations for the IDEIA; 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter 30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

This Hearing Officer was assigned to the case on 02/01/10. A prehearing conference took place on 03/04/10, and a Prehearing Order was issued on 03/05/10.

The parties met for a resolution session on 03/03/10, but settlement could not be reached due to an impasse on the issue of a dedicated aide. At the beginning of the due process hearing, parties were offered the opportunity to engage in a settlement discussion, but DCPS declined.

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

Hearing Officer Determination

The due process hearing was a closed hearing that began and concluded on 04/02/10. Petitioner was represented by Marlon Charles, Esq., and DCPS was represented by Harsharen Bhuller, Esq.. The following two witnesses testified on behalf of Petitioner: Petitioner; and Derek Marryshow, Petitioner's educational advocate who qualified as an expert in IEP development and the provision of special education services. The following two witnesses testified on behalf of DCPS: Katrina Brickhouse, DCPS social worker at and Special Education Coordinator at

Both Petitioner's Exhibits P-1 through P-10 and DCPS' Exhibits DCPS-1 through DCPS-6 were admitted into evidence without objection. No written closing arguments or briefs were required,

At the time the Complaint was filed, Student was an years old boy attending the grade at a public school in the District of Columbia. Student was a disabled child under IDEIA, with his most current IEP, dated 01/21/10, assigning him a disability classification of Multiple Disabilities and prescribing 5 hours/day of specialized instruction in general education, 5 hours/week of reading services outside of general education, 5 hours/week of mathematic services outside of general education, and 60 minutes/week of behavioral support services outside of general education.

The dispute in this case is about whether or not a dedicated aide is the appropriate measure of intervention for Student whose behavior problems prevent him from accessing general education. At an IEP Team meeting that occurred on 01/21/10, the IEP Team reviewed an independent neuropsychological evaluation and addressed Student's rapidly declining behaviors. Student, who had been taking prescription medication for Attention Deficit Hyperactivity Disorder ("ADHD"), had been successful in the general education and the special education curriculum from September through December 2009. However, in January 2010, Student began displaying oppositional defiant behaviors both in the general education setting and in the special education setting. The behaviors included locking himself in the bathroom, choking female students, refusing to go to classes, refusing to participate in counseling or refusal to attend counseling, refusing to move from place to place, and getting off task if someone was not working with him one-to-one. At the time of the 01/21/10 IEP Team meeting, Student was not accessing the general education curriculum due to his behavior, and Petitioner requested the services of a dedicated aide as a means to help Student stay focused and on task in the general education and special education setting. Petitioner argued that since Student's problem behaviors occurred both inside and outside of the general education setting, a new Functional Behavioral Assessment ("FBA") and Behavior Intervention Plan ("BIP") were not the solution because the school staff had already tried many behavior interventions and none of them had worked, and rather than remove Student entirely from the general education setting, Petitioner argued that IDEIA required DCPS to put in place supports that would enable Student to remain in the least restrictive environment. The DCPS component of the IEP Team concluded differently, i.e., that a dedicated aide was not warranted and that the next step in intervention was for DCPS to conduct a FBA and develop a new BIP.

The issues to be determined are as follows:

Whether DCPS failed to develop an appropriate IEP that included a dedicated aide?

Whether DCPS failed to develop an appropriate placement for Student?

The parties agreed to the following stipulated facts:

#1. A meeting occurred on 01/21/10 at which time a neuropsychological evaluation dated 10/26/09 was reviewed and Student was discussed.

#2. On 03/26/10, DCPS authorized funding for an independent Functional Behavioral Assessment ("FBA") and a Behavior Intervention Plan ("BIP").

For relief, Petitioner requested that the Hearing Officer find that DCPS denied Student a FAPE with respect to the issues to be determined and that DCPS modify Student's IEP to include a dedicated aide. Petitioner withdrew her previous request for DCPS to fund Student in a full-time private placement at

FINDINGS OF FACT

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer's Findings of Fact are as follows:

#1. At the time the Complaint was filed on 01/29/10, Student was an years old boy attending the grade at a public school in the District of Columbia. Student was a disabled child under IDEIA, with his most current IEP, dated 01/21/10, assigning him a disability classification of Multiple Disabilities and prescribing 5 hours/day of specialized instruction in general education, 5 hours/week of reading services outside of general education, 5 hours/week of mathematic services outside of general education, and 60 minutes/week of behavioral support services outside of general education. Classroom accommodations included interpretation of oral directions, reading of test questions (math, science, and composition only), repetition of directions, calculators, small group testing, breaks between subtests, extended time on subtests, and testing administered over several days, and Student's IEP prescribed various regular statewide assessment accommodations. The 01/21/10 IEP did not indicate that any supplemental supports and services previously had been attempted in the general education setting in an effort to maintain the least restrictive environment. (DCPS-02). Student's 01/21/10 IEP also included a Functional Behavioral Assessment ("FBA") and a Behavior Intervention Plan ("BIP") with behavior observation dates of 05/08/09 and 05/18/09. (DCPS-03).

#2. An independent Psychoeducational Evaluation completed on 01/31/09 revealed that in the school setting, Student had marked difficulty setting realistic goals, planning a course to obtain goals, sequencing events, regulating attention and emotional responses, flexible thinking, inhibiting responses and self-monitoring. His testing scores further indicated that he had problems transitioning from one task to another, holding information in his mind for completing a task and generating ideas, as well as difficulties sitting still, remaining on task for an extended period to time, impulsive behavior, limited coping skills, and significant difficulties managing his emotions, particularly anger, which was often displayed through physical aggression. The Psychoeducational Evaluation provided major diagnoses of ADHD and Oppositional Defiant

Disorder. At the time of the evaluation, Student was lagging behind his classmates with regards to academics because of his oppositional behavior. Student's overall cognitive ability fell in the Extremely Low Range, was described as underdeveloped and consistent with a diagnosis of Mental Retardation. (P-3). However, Mental Retardation was later ruled out in an Adaptive Behavior Evaluation completed by DCPS on 06/08/09. And, in June 2009, it appeared that Student's maladaptive classroom behaviors had decreased significantly. (P-6).

#3. Since the beginning of the 2009-2010 school year, Petitioner has been called by numerous times, and had to go to the school so much she lost her job. Since November 2009, Petitioner had been called or gone to at least four times per week and met with school personnel for reasons relating to Student's behavior, e.g., Student locking himself in the bathroom, choking another student, screaming, yelling, throwing items, fighting with other children, refusing to go to counseling, and these behaviors persisted both inside of the general education class and inside the special education class. Petitioner has even gone to the school and sat beside Student in class in order to help Student stay focused on his class work. (Testimony of Petitioner).

#4. A Neuropsychological Evaluation, completed on 10/26/09, revealed that Student had a history of lead poisoning, a situation that is known to have deleterious effects on neurocognitive functioning. The conclusion of the neuropsychological evaluator was that Student's pattern of deficits may be organic in nature, and that the medication that Student was taking to address his ADHD symptoms appeared to be adequately managing prior issues with impulsivity and hyperactivity, as well as his ability to concentrate. Student had significant neurocognitive deficits that appeared to be having grave impact on his current and future academic aspirations. The report of Student's special education teacher at that time was that Student had had only had two instances of behavioral misconduct in class and generally could be redirected when off task. His reading comprehension at that time was described as poor. The Neuropsychological Evaluation stressed the importance of Student remaining compliant with medication in order to be focused and cognitively available for instruction, and of having a small group setting to facilitate sustained attention and redirection when necessary. The Neuropsychological Evaluation also noted that Student should be afforded sufficient individualized instruction time to help ensure that Student is processing instruction properly and even then, Student would probably need the opportunity to repeat back information before performing an academic task. (P-5).

#5. For the year preceding the filing of the Complaint, Student had been taking prescription medication for ADHD on a regular basis and it was effective in controlling ADHD symptoms of impulsivity and inattentiveness. (Testimony of Petitioner; P-5).

#6. From September through November 2009, Student was generally doing well behaviorally at school and from November through December 2009, Student was fully compliant with services. (Testimony of Katrina Brickhouse). However, in January 2010, Student began a behavior regression and exhibited disruptive behaviors such as hiding under the desk, refusing to go to classes (specials) and special education classes, locking himself in the bathroom in the special education classroom, going outside instead of going to the afterschool program, refusing to move from one place to another, generally refusing to cooperate, and in several instances, the

school security guard had to intervene to get Student out of the bathroom or back to class. Since 01/21/10, the frequency of Student's problem behaviors were increasing in frequency and getting progressively worse in nature, and the assistance of the security guard in resolving the problems was increasing. (Testimony of Dr. Marryshow; Testimony of Testimony of Katrina Brickhouse). Within the month preceding the due process hearing, Petitioner had been called by over 15 times because Student did not want to go to the special education classroom or do work in the special education classroom and the general education classroom. (Testimony of Petitioner).

#7. On 01/18/10, DCPS completed a written review of the independent Neuropsychological Evaluation dated 10/26/09 that revealed the following information about Student based on a classroom observation by the DCPS reviewer who was a psychologist: While the teacher assisted another student, Student began engaging in several off-task behaviors in the special education classroom that were loud and disruptive to other class members, but he could be redirected when the teacher stood near him. However, when the teacher no longer focused on Student, Student resumed off-task behaviors such as crawling under the table and singing songs aloud in class while classroom instruction was underway. Subsequently, Student did not respond to redirection by the teacher, but did eventually respond to the redirection of an educational assistant and remained engaged in learning only while the educational assistant focused solely on Student. The DCPS reviewer noted that the results of the Neuropsychological Evaluation indicated that Student demonstrated several neuropsychological deficits with notable areas of weakness in cognitive efficiency and flexibility, simultaneous processing of information and planning ability, which affected Student's ability to multi-task and engage in higher order thought processes, and that Student's overall executive functioning was suggestive of organic brain damage. (P-4).

#8. On 01/21/10, the IEP Team met to review the independent Neuropsychological Evaluation and to discuss Student's behavior. (Stipulation #1; P-8). At the meeting, Student's special education teacher reported that Student needed continuous redirection, that he was not available for learning, that he was refusing to participate in class work, that he had locked himself in the bathroom, that he refused to go to counseling and the special education resource room, that it was difficult to teach other students due to Student's disruptive behaviors in class, that there were some safety issues associated with Student's behaviors, that no learning was taking place due to Student's behaviors, and that these behaviors were continuing to increase on a weekly basis. (Testimony of Dr. Marryshow; P-8). In the general education classroom, Student was exhibiting similar types of behaviors such as shutting down, remaining secluded, refusing to complete class work, walking around the room, refusing to go to time out, and these behaviors were occurring more daily. (P-8). At times, Student could be redirected. (P-8; Testimony of Petitioner). On 01/21/10, the IEP Team agreed that Student was not accessing the general education curriculum and was unavailable for learning because he refused to cooperate. (Testimony of Dr. Marryshow; Testimony of P-8).

#9. At the IEP Team meeting on 01/21/10, Petitioner requested that the IEP Team add the services of a dedicated aide to Student's IEP in order to help minimize Student's negative behaviors by working with him individually and prompting him for each step of the day. Petitioner felt that the aide was an appropriate intervention measure because Student had

previously responded to one-to-one redirection, and Student had previously demonstrated progress in the general education setting without an aide. (Testimony of Petitioner; Testimony of Dr. Marryshow; P-8). DCPS did not agree to add a dedicated aide to Student's IEP, but did agree to conduct a FBA and complete a BIP as an intervention measure. (P-8; Testimony of Dr. Marryshow; Testimony of

#10. The use of a dedicated aide is not restricted only to students with physical disabilities. Dedicated aides can be used for students with behavior problems (Testimony of Testimony of Dr. Marryshow), students with safety problems, impaired students, or students with difficulty transitioning around the building. (Testimony of

#11. Student is capable of moving around and freely performing, but sometimes he doesn't want to. Behavior interventions used by the school since the 01/21/10 IEP Team meeting have included one to one assistance, and when this intervention is applied, Student is generally cooperative and compliant, but it may take 5-10 minutes. With regard to Student's progress in counseling, Student's regression began prior to January 2010 in that he would go to counseling, but would not fully participate. Beginning in January 2010, Student began refusing to go to counseling. In February 2010, Student wasn't participating in counseling and didn't care about the consequences, he was regressing towards his goals, and his willingness and participation had declined. In March 2010, a new behavior contract with Student was developed with respect to counseling, and Student was fully compliant with it in March 2010. (Testimony of Katrina Brickhouse). At the time of the due process hearing on 04/02/10, Student still was not accessing the general education curriculum and his behavior was getting worse. (Testimony of

#12. Student's last report card, issued in March 2010, reported that Student was not making any progress in special education areas. (Testimony of Petitioner).

#13. On 03/26/10, DCPS authorized funding for an independent FBA and a BIP.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

"The burden of proof in an administrative hearing…is properly placed upon the party seeking relief." *Schaffer v. Weast,* 546 U.S. 49, 126 S.Ct. 528, 535-37 (2005), 44 IDELR 150. "Based solely upon 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 with a FAPE." 5 D.C.M.R. 3030.3.

Whether DCPS failed to develop an appropriate IEP that included a dedicated aide?

Petitioner alleges that Student's classroom behavior at over the past four months has caused significant disruption in the educational setting and created safety concerns for Student and Student's classmates. Petitioner argues that Student's behavior of refusing to open the bathroom door, leaving the building during transition to the aftercare program, not responding to redirection in the classroom, and frequent and severe disruptive behaviors in the general education and special education classrooms requires intervention in the form of a dedicated aide to help Student stay on task and access the general education curriculum; and that DCPS' refusal to add a dedicated aide to Student's IEP when Petitioner requested it on 01/21/10, is a denial of a FAPE.

The overall goal of IDEIA is to ensure that 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. 34 C.F.R. 300.1. *Related services* under IDEIA means services as are required to assist a child with a disability to benefit from special education, and although the statute doesn't specifically list a dedicated aide as a related service, the list is not an exhaustive list, and an aide falls within the realm of related services. See 34 C.F.R. 300.34; The Comments to the Federal Register, Vol. 71, No. 156, p. 46569; *Calaveras School Dist.,* 29 IDELR 1099 (SEA Cal. 1998).

Each public agency must ensure that to the maximum extent appropriate, children with disabilities, are educated with children who are nondisabled; and special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114. And, special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability. Specially designed instruction means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability, and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 C.F.R. 300.39.

IDEIA requires DCPS to put interventions in place that will enable Student to access the general education curriculum and be educated with his non-disabled peers. From the beginning of the 2009-2010 school year until December 2009, Student was able to satisfactorily access the general education curriculum without the assistance of a dedicated aide. However, in January 2010, Student experienced a significant regression in behavior, to the point of Petitioner being called by the school at least 15 times in one month and the security guard having to provide interventions in order for Student to return to class. (Findings #3, #6). The evidence showed that Student's regression in behavior was not due to uncontrolled ADHD symptoms, but that the most likely cause was organic in origin; i.e., neurocognitive deficits. (Findings #2, #4, #5, #7). And, the evidence showed that these deficits, with the resulting academic implications, should be expected and would require individualized instruction and redirection. (Finding #4). The question then is, what should we do about it?

Hearing Officer Determination

Petitioner's suggestion, to put a dedicated aide in place, is a good one. The record showed that Student's cognitive ability was adequate, that his behavior was getting worse in both the general education and the special education setting, that the behavior was not a result of untreated ADHD symptoms, that Student had recently been successful in the general education setting, that Student responded positively to one-to-one attention (Findings #2, #3, #5, #6, #7, #8, #11), and that an aide was an appropriate measure of intervention for Student's behaviors (Finding #10).

The evidence also showed that DCPS' course of action, i.e., to conduct an updated FBA and BIP and use the new BIP to address Student's behavior was a day late and a dollar short, simply because Student's behavior was on a rapid downward slope. (Findings #8, #11). And, more importantly, at some point in time, DCPS would have to try a dedicated aide to enable Student to access the general education curriculum if it wanted to be in compliance with IDEIA's mandate to ensure to the maximum extent possible that Student was educated with his non-disabled peers and that all supports and services had been exhausted prior to his removal from the general education environment. At the time of the due process hearing, DCPS had not tried supplementary supports in the general education setting as evidenced by Student's 01/21/10 IEP (Finding #1), and there is no question that it would only be a matter of time before Student was removed entirely from the general education setting because his behaviors were very disruptive to the education of the other students and Student was not accessing the general education curriculum with the current IEP, FBA and BIP. Moreover, at the time of the due process hearing, DCPS had yet to complete an updated FBA and BIP because on 03/26/10, DCPS authorized funding for the accomplishment of these independent assessments. (Finding #13).

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision is made in conformity with the least restrictive environment provisions of IDEIA, and that a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 C.F.R. 300.116(e).

Petitioner is only trying to keep Student in the least restrictive setting, i.e., the general education setting. Student's current IEP calls for 5 hours/day of specialized instruction in the general education setting. The method of providing the specialized instruction must be amped up at this point to include the services of a dedicated aide. If it turns out that the dedicated aide is not effective in culling Student's behavior problems, then DCPS would be justified in removing Student from the general education population in order to provide instruction because it would then have exhausted all possibilities in providing services that would enable Student to access the general education curriculum in the least restrictive environment.

A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

The harm to the child in this case by DCPS not providing a dedicated aide is that Student's behavior is getting worse, he is not making any progress in his special education classes, and he is not currently accessing the general education curriculum; therefore, Student has been deprived of an educational benefit.

The Hearing Officer concludes by a preponderance of the evidence that Student was denied a FAPE when DCPS refused to include a dedicated aide on Student's IEP when it was requested by Petitioner at the IEP Team meeting on 01/21/10. Petitioner met her burden of proof on this issue.

Whether DCPS failed to develop an appropriate placement for Student?

Petitioner alleges that Student's placement at without a dedicated aide fails to provide Student with educational benefit; therefore, the placement is inappropriate.

In determining the educational placement of a child with a disability, each public agency must ensure that the placement decision 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; that it is made in conformity with the least restrictive environment provisions of IDEIA; and that the child's placement is based on the child's IEP. 34 C.F.R. 300.116.

An IEP is appropriate if it is reasonably calculated to enable a student to receive educational benefits. The student must be provided with a "basic floor of opportunity" meaning access to specialized instruction and related services which are individually designed to provide educational benefit. *Hendrick Hudson Cent. School Dist. v. Rowley,* 458 U.S. 176, 189, 206-207, 102 S.Ct. 3034, 3042, 3051 (1982).

The Hearing Officer has previously determined in this Hearing Officer Determination that Student's IEP was inappropriate because it failed to include the services of a dedicated aide. Without an appropriate IEP, there cannot be an appropriate placement since the placement is based on the IEP. Without an aide or an effective behavior intervention plan, Student did not have access to the general education curriculum, he was not making any progress in his special education classes and he was not participating in counseling. (Findings #8, #11, #12). Therefore, DCPS failed to provide Student with an appropriate placement because the IEP lacked the services and supports that would enable Student to access the general education curriculum and access specialized instruction and related services in a way in which he could receive educational benefit.

The Hearing Officer concludes that Petitioner met her burden of proof by a preponderance of the evidence that Student's placement at without a dedicated aide was an inappropriate placement. Student was denied a FAPE.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, this Hearing Officer orders:

(1) DCPS shall modify Student's current IEP within 5 business days to include the services of a dedicated aide who can provide behavior management and academic assistance to Student.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 USC §1415(i).

Date: April 12, 2010

/s/ Virginia A. Dietrich
Hearing Officer

Copies to:

Petitioner (via U.S. mail)
Petitioner's Attorney: Marlon Charles, Esq. (electronically)
DCPS' Attorney: Harsharen Bhuller, Esq. (electronically)
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