

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

Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
STUDENT HEARINGS OFFICE
2012 APR 20 PM 3: 58

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| STUDENT, ¹ |) | |
| through the Parent, |) | |
| |) | Date Issued: April 20, 2012 |
| Petitioner, |) | |
| |) | Hearing Officer: Virginia A. Dietrich |
| v. |) | |
| |) | |
| District of Columbia Public Schools |) | |
| |) | |
| |) | |
| Respondent. |) | |

HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of _____ year old Student, filed a due process complaint notice on January 13, 2012, alleging that the District of Columbia Public Schools (“DCPS”) had denied Student a free appropriate public education (“FAPE”) in violation of the Individuals with Disabilities Education Act (“IDEA”).

Petitioner alleged that Student’s Individualized Education Programs (“IEP”) that were developed in May 2011 and December 2011 were inappropriate for several reasons that included non-current and inaccurate performance data on the IEPs, failure to address Student’s lack of progress on his IEP goals and failure to provide Student with full-time specialized instruction outside of general education services on the December 2011 IEP. Petitioner also asserted that DCPS had failed to take into consideration pertinent factors and evaluative information when determining the Least Restrictive Environment (“LRE”) in December 2011. Lastly, Petitioner asserted that DCPS had failed to provide Student with the dedicated aide that was prescribed by Student’s December 2011 IEP.

DCPS asserted that it made timely and appropriate interventions from January 2011 until the filing of the due process complaint to provide services to Student so that Student could be educated in the least restrictive environment at his local neighborhood elementary school. What

¹ Personal identification information is provided in Appendix A.

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to do about Student's behavior problems in school became more complicated when Student was placed in foster care for several months beginning in January 2011, which added new behaviors of being sullen and crying to Student's existing behaviors of using profanity and occasionally walking out of class. Although it ultimately became clear just two months after the complaint was filed that the elementary school had exhausted all available resources and that Student required full-time services outside of general education, DCPS asserted that it had not denied Student a FAPE because the school had employed every available intervention in a systematic and sensitive way until the time the complaint was filed to assure that Student could continue schooling in the least restrictive environment at his neighborhood school with the school staff who knew him, cared about him and could provide the supportive adult consistency that he needed.

Subject Matter Jurisdiction

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, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations ("C.F.R.") Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations ("D.C.M.R.").

Procedural History

The due process complaint was filed on 01/13/12. This Hearing Officer was assigned to the case on 01/17/12.

Petitioner waived the resolution meeting, but DCPS did not. The resolution meeting took place on 02/21/12 at which time parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The resolution period ended on 02/12/12, the 45-day timeline to issue a final decision began on 02/13/12 and the final decision was initially due on 03/28/12.

The due process hearing was a closed hearing that was scheduled for and took place on 03/08/12 and 03/19/12. However, despite the best efforts of both parties, the hearing could not be concluded on 03/19/12. A joint motion for a continuance was granted and the hearing resumed and concluded on 04/11/12. The final decision due date was extended for 24 days, with the final decision due on 04/21/12.

Petitioner participated in the hearing in person on 03/08/12 and 03/19/12. Due to an employment conflict, the Hearing Officer waived Petitioner's presence on 04/11/12.

Petitioner presented five witnesses: Petitioner; educational specialist; Admissions Coordinator at Foundations School; educational consultant who qualified as an expert in IEP development and programming for children with special needs; and behavior specialist with National Center for Children and Families ("NCCF"). DCPS presented four witnesses: DCPS

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school psychologist who qualified as an expert in Multidisciplinary Team and IEP determinations of educational environments for students; DCPS social worker; DCPS special education teacher; and DCPS special education coordinator ("SEC").

Petitioner's disclosures dated 03/01/12, containing a witness list and Exhibits P-1 through P-22 and P-24 through P-31, were admitted into evidence without objection. P-23 did not exist, although labeled as a document in the table of contents of the disclosures.

DCPS' disclosures dated 03/01/12, containing a witness list and Exhibits R-1 through R-14, were admitted into evidence without objection. DCPS' Supplemental Disclosure, dated 03/13/12, containing Exhibit R-15, was admitted into evidence without objection.

The parties agreed to the following stipulations of fact:

#1. The 12/01/11 IEP provided for the services of a dedicated aide. A dedicated aide for Student was put into place on 02/21/12.

#2. DCPS agrees that as of 03/08/12, Student requires full-time specialized instruction outside of general education, without a dedicated aide.

The three issues to be determined in this Hearing Officer Determination is as follows:

Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP; specifically, (a) by failing to provide Student with an IEP on 12/01/11 that provided for services in a full-time outside of general education therapeutic setting; (b) by failing to provide Student with an IEP on 05/24/11 and 12/01/11 that accurately reflected Student's current levels of performance, needs, appropriate baseline data, and impact on performance; and (c) by failing to address Student's lack of progress on his IEP goals and how Student is expected to progress on his goals, for both the 05/24/11 and 12/01/11 IEP.²

Whether DCPS denied Student a FAPE by determining the Least Restrictive Environment for the 12/01/11 IEP without considering the harmful effects of placement (IEP services and location); by failing to carefully consider evaluative and informational data; and by failing to consider the concerns of Petitioner and other team members.

Whether DCPS denied Student a FAPE by failing to implement Student's 12/01/11 IEP; specifically, by failing to provide Student with a dedicated aide, as was required by Student's IEP.

For relief, Petitioner requested a finding of a denial of a FAPE on the issues presented; a finding that Student requires full-time specialized instruction outside of general education; DCPS to revise Student's IEP to reflect his current levels of performance, needs, appropriate baseline data, impact of disability, lack of progress on his IEP goals and how Student is expected to progress with meeting his goals; DCPS to fund Student at Foundations School; and an award of compensatory education for DCPS' failure to provide Student with an appropriate IEP since

² This issue, as stated, is a compilation of Issues #1, #2 and #3 of the complaint.

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05/24/11 and for DCPS' failure to provide Student with a full-time outside of general education IEP and location of services since 12/01/11.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

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. Student, age 8, is a resident of the District of Columbia and a special education student who has been attending _____ School ("elementary school") since November 2010.³ The elementary school follows a positive behavior intervention support school model that provides all students with all of the behavior interventions needed.⁴ Student lives with his mother right across the street from the elementary school.⁵

#2. Student began at the elementary school with an IEP dated 11/04/10 IEP that prescribed 5 hours/week of specialized instruction inside the general education setting to address weaknesses in Reading and 3 hours/week of behavioral support services outside of general education. The behavioral support services were put into place to address Student's inability to respond appropriately to situations of stress and anxiety that manifested in the school setting as oppositional behaviors, inability to follow rules, acting out in a defiant way, and use of verbal and physical aggression towards others.⁶

#3. Two months later, in January 2011, Student was removed from his home and placed in foster care.⁷ For the next 7-8 months, Student revolved through four different foster care placements, each time being removed due to his behavior. Ultimately, Student was returned to the care of his mother during the summer of 2011.⁸ For the duration of the time that Student was in foster care, Student's family received the services of a private foster care agency to help with Student's adjustment in the community, both in the foster homes and in school.⁹

#4. Removal from Student's home affected Student's behavior in school.¹⁰ Prior to being placed in foster care, Student exhibited behaviors of running around the classroom, walking out of class, yelling out in class, cursing at staff and students, hitting students and threatening staff and students. These behaviors continued with the same frequency and intensity after Student was removed from his home, except that new behaviors of being sullen and crying emerged.¹¹

³ P-8, SEC.

⁴ SEC.

⁵ SEC, Petitioner.

⁶ P-2.

⁷ P-8, SEC.

⁸ P-14, NCCF behavior specialist.

⁹ SEC, NCCF behavior specialist.

¹⁰ SEC.

¹¹ SEC, NCCF behavior specialist, Petitioner.

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#5. Student came to the elementary school with a behavior contract/chart and at least since February 2011, the elementary school developed behaviors charts and behavior contracts to address Student's non-compliance and inappropriate language. A behavior coach was used as well.¹² Ultimately, in May 2011, the elementary school conducted a Functional Behavioral Assessment ("FBA") to pinpoint the antecedents and frequency of Student's behaviors that included angry outbursts in class, walking out of class without permission, throwing objects, bringing inappropriate objects to school, and verbal aggression that consisted of profanity and threatening comments, being out of his seat, defiance, noncompliance, picking on others, talking out, poor motivation, yelling and crying; all of which occurred in all settings and at all times of day, but on an inconsistent basis and not on a daily basis.¹³ The negative ramifications of these behaviors were that they impeded Student's educational progress, impacted interpersonal relationships with adults, interfered with social interactions, and interfered with before/after school activities.¹⁴

#6. From November 2010 through March 2011, Student made progress towards meeting his academic and social/emotional/behavioral IEP goals,¹⁵ as measured by the special education teacher's observations and Student's performance on many informal tests administered to Student.¹⁶

#7. On 05/24/11, an IEP meeting was held wherein Student's behaviors were discussed. Student still exhibited an inability to stay in the classroom; however, Student's outbursts and incidences of leaving the classroom had decreased because the National Center for Children and Families ("NCCF"), the private foster care agency that had been working with Student's family, had sent a behavior specialist into the classroom to assist with Student's unacceptable behaviors in school that were threatening to disrupt his foster home placements. From May 2011 through the end of the school year, the behavioral specialist from NCCF provided behavior support services to Student in school for 1.5-2 hours/day for three days per week. The behavioral specialist assisted Student in his general education class where his behaviors consisted of profanity, explosive behaviors, storming out of the classroom, inappropriate sexualized behavior, impulsive and explosive behavior, and verbal and physical aggression towards peers and staff. The behavior specialist functioned in the role of a dedicated aide and her assistance consisted of sitting next to Student, redirecting and helping him to refocus, giving both verbal and non-verbal prompts, helping him taking breaks both in and outside of the classroom and taking short walks for Student to calm down. Student responded to these interventions successfully and Student was observed trying to exercise the learned coping skills in the general education setting; however, the interventions did not have the lasting effect as if Student had internalized the coping skills.¹⁷

#8. At the IEP meeting on 05/24/11, the team reviewed the FBA and decided to provide Student with the additional support of a dedicated aide and the more consistent services of a

¹² SEC.

¹³ P-8, SEC.

¹⁴ P-8, DCPS social worker.

¹⁵ P-3, P-4.

¹⁶ Special education teacher.

¹⁷ NCCF behavior specialist.

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school social worker; all with the goal of providing Student with supportive adults for consistency in an effort to help Student cope with the many changes occurring in Student's home life that were impacting Student's behaviors in school.¹⁸ At the meeting, a Behavior Intervention Plan ("BIP") was developed to help Student exhibit the following positive behaviors: appropriate language in the classroom/school; interaction with teachers and peers in a friendly, respectful and non-aggressive behavior; and completion of classroom assignments using best efforts.¹⁹

#9. On 05/24/11, an IEP was developed that added an additional 2 hours/week of specialized instruction inside the general education setting to address Student's weaknesses in reading and written expression, for a total of 7 hours/week of specialized instruction inside the general education setting. The IEP did not provide Student's present levels of performance in the academic area of written expression, so that Student's grade level achievement was unknown; however, baselines were provided for all areas of concern in the IEP, i.e., reading, written expression and emotional/social/behavioral development. Three hours/week of behavioral support services outside of general education remained as part of Student's IEP.²⁰ Petitioner, who was represented by counsel at the 05/24/11 IEP meeting, expressed no disagreement with the IEP either verbally or in writing.²¹

#10. The reading and written expression goals in the 05/24/11 IEP were developed by the special education teacher who worked with Student during the 2010-2011 school year and the 2011-2012 school year. The goals were developed based on then current informal academic achievement testing and assessments given by herself and the general education teacher, with consideration taken of formal assessments and input of the IEP Team members. The math, reading and written expression goals for the 12/01/11 IEP were also developed by the special education teacher and were based on then current informal testing and assessments given by herself and the general education teacher. The present levels of performance for both IEPs were based on the informal testing results administered by the special education teacher and the general education teacher and the input of the IEP team members.²²

#11. The four Reading goals on Student's 11/04/10 IEP were repeated on Student's 05/24/11 IEP; however, a fifth reading goal was added on the 05/24/11 IEP. Four of the five emotional/social/behavioral development goals on the 11/04/10 IEP were repeated on the 05/24/11 IEP; one goal from 11/04/10 IEP was dropped.²³ The reading, written expression and emotional/social/behavioral development goals on Student's 12/01/11 IEP were identical to those on his 05/24/11 IEP.²⁴ A goal will remain on an IEP for one year and it is entirely appropriate to repeat a goal on a subsequent IEP if a student is making progress towards the goal, but hasn't mastered it. Student's IEP goals were repeated for that very reason.²⁵

¹⁸ SEC, DCPS school psychologist.

¹⁹ P-7, SEC.

²⁰ P-5.

²¹ P-5, SEC.

²² Special education teacher.

²³ P-2, P-5.

²⁴ P-5, P-11.

²⁵ Special education teacher.

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#12. Student attended summer school during the summer of 2011 where he received specialized instruction in reading, written expression and behavioral support services. Student made progress towards achieving his IEP goals in all of the areas addressed by the IEP.²⁶ During summer school, the behavioral specialist from NCCF provided behavioral support services to Student three times per week with the net effect of preventing Student from being terminated from summer school due to his behavior.²⁷

#13. When the 2011-2012 school year began in August 2011, Student had resumed living with his mother. The behavioral specialist from NCCF no longer provided behavioral support services to Student in school;²⁸ however, the elementary school utilized the services of a “borrowed” dedicated aide to assist Student with behavior control since DCPS’ 05/24/11 request for a dedicated aide for Student was still pending. The “borrowed” dedicated aide worked directly and exclusively with Student from Aug – Oct 2011. Use of the dedicated aide wasn’t 100% effective, but it enabled Student to participate in more outdoor activities without fighting. Student was still walking out of class occasionally or using profanity on a daily basis, with each episode lasting between 5 and 20 minutes in his general education class.²⁹

#14. In September 2011, standardized psychological/psychoeducational testing revealed that Student did not have a Specific Learning Disorder. Rather, the results of the evaluation suggested that Student’s academic performance was most significantly impacted by a combination of his inability to manage negative emotional content, his Attention-Deficit/Hyperactivity Disorder (“ADHD”) symptomatology, his mild preference for nonverbal stimuli, as well as his stimulus seeking mannerisms.³⁰

#15. At the end of the 1st Advisory of the 2011-2012 school year, Student was below the basic skill level in English Language Arts and Mathematics, but he was at the basic skills level in Science, Social Studies, Music, Art and Health and Physical Education.³¹ Student was making progress towards achieving his IEP goals in all areas.³²

#16. On 12/01/11, the IEP team, that included Petitioner and Petitioner’s Attorney, met and discussed Student’s academics and behavior. Student’s special education service hours were revised as follows: 2 hours/week of specialized instruction inside the general education setting, 10 hours/week of specialized instruction outside of the general education setting, 1.5 hours/week of behavioral support services inside the general education setting and 1.5 hours/week of behavioral support services outside of general education. At that time, Student was still exhibiting negative behaviors of walking out of class frequently, being easily frustrated, yelling out, and experiencing difficulties with other students.³³ Student also had been unable to go on field trips due to his behavior.³⁴ The 12/01/11 IEP provided for the services of a dedicated aide

²⁶ P-10.

²⁷ P-8, NCCF behavior specialist.

²⁸ NCCF behavior specialist.

²⁹ SEC.

³⁰ P-14.

³¹

³² P-10.

³³ P-11.

³⁴ P-12.

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for six hours per school day because with additional support, Student was able to calm down and regain control after a verbal or physical acting out, and the use of a dedicated aide in the past had contributed to limited use of invasive techniques and consideration of a more restrictive setting.³⁵ On 12/01/11, it was appropriate for DCPS to try the services of a dedicated aide to manage Student's behavior in order to avoid his removal from the general education setting or from the school.³⁶ The 12/01/11 IEP gave Student's present levels of performance in the areas of reading, mathematics, written language and social/emotional/behavior, but did not provide baseline data for social/emotional/behavioral goals.³⁷

#17. By all accounts, Student was able to conduct himself appropriately in his special education classroom, but his behaviors were problematic in the general education setting.³⁸ The result of Student's misbehaviors is that he missed instruction in the general education setting; however, the work could be made up in the special education classroom.³⁹ The special education classroom was a highly structured setting of 6-8 students with 3 adults where positive reinforcement was used to increase good behavior and redirection was used to curtail negative behavior. In the special education setting, Student was able to access the curriculum, he was able to answer questions correctly and there were no incidences of misbehavior.⁴⁰ The general education classroom had the same staffing as the special education classroom, but the class size was 19-25 students and there were no consequences for Student's behavior.⁴¹

#18. From the beginning of the 2011-2012 school year until the time of the 2011 Christmas break, Student had more good days than bad days with respect to his behavior;⁴² however, when Student returned to school in January 2012 following the Christmas break, Student's behavior declined. He was surly, accusatory, more physically aggressive, and the special education coordinator was unable to talk with Student.⁴³ In January 2012, Student was involved in two episodes of disciplinary misconduct that resulted in an in-school disciplinary action and a 2-day suspension.⁴⁴

#19. Despite Student's 12/01/11 IEP prescribing the services of a dedicated aide, DCPS did not put the dedicated aide in place until 02/21/12.⁴⁵ Student had been without the assistance of a behavioral aide from November 2011 through February 21, 2012. At the resolution meeting on 02/21/12, DCPS agreed to authorize 20 hours of compensatory education, consisting of 10 hours of tutoring and 10 hours of counseling, to compensate Student for the lack of a dedicated aide.⁴⁶

³⁵ P-11, R-8-1.

³⁶ DCPS school psychologist.

³⁷ P-11.

³⁸ SEC, special education teacher, NCCF behavior specialist, educational consultant.

³⁹ SEC.

⁴⁰ SEC, Special education teacher, educational consultant.

⁴¹ SEC, NCCF behavior specialist.

⁴² DCPS social worker.

⁴³ SEC.

⁴⁴ P-19, P-20.

⁴⁵ Stipulation #1, P-11, Lyons.

⁴⁶ R-10.

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#20. On 03/08/12, DCPS determined that Student required full-time specialized instruction outside of general education, without a dedicated aide. Student's misbehaviors had escalated. Multiple suspensions began in February 2012 and culminated in a long-term suspension in March 2012.⁴⁷

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 overall purpose of the 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 and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

Free appropriate public education or FAPE means special education and related services that are provided at public expense; meet the standards of the State Education Agency; include an appropriate school; and are provided in conformity with an IEP that meets the requirements of the IDEA. 34 C.F.R. 300.17.

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).

"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. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate IEP; specifically, (a) by failing to provide Student with an IEP on 12/01/11 that provided for services in a full-time outside of general education therapeutic setting; (b) by failing to provide Student with an IEP on 05/24/11 and 12/01/11 that accurately reflected Student's current levels of performance, needs, appropriate baseline data, and impact on performance; and (c) by failing to address Student's lack of progress on his IEP goals and how Student is expected to progress on his goals, for both the 05/24/11 and 12/01/11 IEP.

DCPS is required to provide Student with an IEP that delineates the specially designed instruction necessary to address Student's unique needs and ensure him access to the general education curriculum. 34 C.F.R. 300.39, 300.320. The IEP developed on 12/01/11 was

⁴⁷ Stipulation #2, SEC.

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sufficient to satisfy the IDEA. That IEP added 10 hours/week of specialized instruction outside of general education and reduced specialized instruction services inside the general education setting from 7 to 2 hours/week. Behavior support services were revised to include 1.5 hours/week inside the general education setting and 1.5 hours/week outside the general education setting. Student had no behavioral problems in his special education classroom where he was easily able to access instruction, but he did demonstrate behavior problems in the general education setting both with and without an aide. However, with an aide, Student's behavior in the general education setting was manageable. The 12/01/11 IEP provided for a dedicated aide.

Although it became clear on 03/08/12 that Student required full-time services outside of general education, such was not the case on 12/01/11. On 12/01/11, Student had not previously had the opportunity to receive specialized instruction outside of the general education setting or the services of a dedicated aide, and it was incumbent on DCPS to comply with the LRE requirements of the IDEA by trying those services at the neighborhood school. In fact, Student subsequently performed very well academically and behaviorally in the special education classroom from December through February 2012 and he was able to access the curriculum in that setting. And, although Student was below the basic skill level in English Language Arts and Mathematics at the end of the 1st Advisory of the 2011-2012 school year, he was at the basic skills level in all other academic and non-academic subjects.

The Hearing Officer concludes that the IEP developed by DCPS on 12/01/11 was appropriate with respect to the type, amount and setting of services. At that point in time, a full-time outside of general education IEP was not warranted because DCPS had not exhausted all possible combinations of services and interventions to keep Student with his nondisabled peers in least restrictive environment at his neighborhood school.

The goals in Student's IEPs were prepared by the special education teacher in conjunction with the general education teacher; people who knew Student best and who had worked with him on a daily basis since November 2010. The testimony of the special education teacher was credible, who stated that current levels of performance, needs and baseline data, and impact on performance, found in both the 05/24/11 IEP and 12/01/11 IEP were based on current information and testing obtain through observation and assessments conducted by herself and the general education teacher. Although the 12/01/11 IEP did not contain baseline data for social/emotional/behavioral goals and the 05/24/11 IEP did not provide present levels of performance in the academic area of written expression, Petitioner failed to show any harm from these specific omissions. The goals and IEP were otherwise complete and appropriate. Petitioner failed to meet her burden of proof on this aspect of the issue.

Petitioner argued that Student's 05/24/11 IEP and 12/01/11 IEP were inappropriate because the goals had been repeated from year to year and that this repetition indicated a lack of progress towards achieving the goals, and thus the goals should have been revised since Student had not made progress towards achieving the goals. In fact, the IEP goals had been repeated from year to year; however, the special education coordinator credibly testified that the goals may be repeated from year to year if a Student has made progress towards the goals, but has not yet mastered them. There was credible evidence in the record that Student was making progress towards achieving his IEP goals in all areas, but had not yet mastered them. And, for that very

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reason, the goals had been repeated. Moreover, the IEPs were not carbon copies of each other; goals were added and deleted along the way. Furthermore, Petitioner did not express dissatisfaction with the goals at either the 05/24/11 or the 12/01/11 IEP meetings. Petitioner failed to meet her burden of proof that Student had been denied a FAPE because the IEP failed to address Student's lack of progress on his IEP goals.

The second issue to be determined is whether DCPS denied Student a FAPE by determining the Least Restrictive Environment for the 12/01/11 IEP without considering the harmful effects of placement (IEP services and location); by failing to carefully consider evaluative and informational data; and by failing to consider the concerns of Petitioner and other team members.

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 that includes the parents and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options and is made in conformity with the Least Restrictive Environment ("LRE") provisions of the IDEA that mandate that to the maximum extent possible, children shall be educated with their nondisabled peers and special classes, separate schooling, or other removal of children from the regular educational environment occurs only if the nature or severity of the disability is such that the use of supplementary aids and services cannot be achieved satisfactorily. Unless the IEP of a child with a disability requires some other arrangement, the child is to be educated in the school that he or she would attend if nondisabled. In selecting the LRE, the public agency must also ensure that consideration is given to any potential harmful effect on the child or on the quality of services that the child needs. 34 C.F.R. 300.116.

Petitioner failed to meet her burden of proof on this issue. DCPS was extremely sensitive to the needs of eight-year old Student who had many challenges in the community that affected his behaviors in school. The school wanted to provide Student with consistency in his school environment and to that end, DCPS carefully considered many competing factors when coming to the conclusion that specialized instruction outside the general education at the familiar neighborhood school plus a dedicated aide to assist with Student's behaviors in the general education setting should be tried prior to removing Student completely from the elementary school. Student was well known to the special education coordinator, the school social worker and the special education teacher and all of these professionals, who had Student's best interests at heart, clearly understood that Student needed the consistency of supportive adults in order to be successful in school and they did everything possible to ensure Student's success at the elementary school.

Previously, it had been documented that Student could be maintained in the general education setting with someone who functioned in the role of a dedicated aide. For example, on one occasion the special education teacher accompanied Student on a field trip; otherwise, he would not have been able to go because of his behavior. The presence of the behavioral aide during the 2011 summer school successfully prevented Student's termination from school due to his behavior in the general education setting. From Aug- Oct 2011, the "borrowed" dedicated aide was more effective than not in curtailing Student's inappropriate behaviors. Moreover, Student was making progressing towards mastering his IEP goals and the main source of

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Student's hindered school achievement was his behavior; it was not a learning disability. Petitioner provided her input at the 12/01/11 IEP meeting where she was represented by counsel. And, at the end of the meeting, Petitioner did not disagree with the IEP; she affixed her signature to the IEP and checked the box indicating that she agreed with the contents of the IEP. Petitioner failed to prove that DCPS had violated the IDEA and that Student had been denied a FAPE.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to implement Student's 12/01/11 IEP; specifically, by failing to provide Student with a dedicated aide as was required by Student's IEP.

As soon as possible following the development of the IEP, special education and related services must be made available to the child in accordance with the child's IEP. 34 C.F.R. 300.323(c)(2).

Student's 12/01/11 IEP specified that Student should receive the services of a dedicated aide; however, the aide was not put into place by DCPS until 02/21/12. This omission was a violation of the IDEA. The evidence was clear that without the aide, Student was unable to conduct himself accordingly in the general education setting, and Student's 12/01/11 IEP required Student to be partially educated in the general education setting. Student's behavior began to decline after October 2011 when he no longer had the services of a "borrowed" dedicated aide and his behavior seriously declined when he resumed school after the 2011 Christmas break. Student's misbehaviors led to two suspensions in January 2012. Student's maintenance in the general education environment was totally dependent on the presence of an aide. The failure to provide Student with a dedicated aide caused educational harm to Student and Student was denied a FAPE. However, when DCPS finally authorized the services of an aide on 02/21/12, DCPS also authorized 10 hours of counseling and 10 hours of tutoring to compensate Student for the missed services of the aide.

DCPS has rectified it's wrong by the authorization of 20 hours of services, which appears to be adequate to compensate Student for the missed services of an aide. Calculation of an appropriate amount of make-up services is not an exact science. As pointed out in the testimony of the special education coordinator who authorized the services, 20 hours was adequate because Student had the assistance of other adults at the school. There is no further relief to be granted by the Hearing Officer with respect to this issue.

Summary

Petitioner failed to meet her burden of proof on Issues #1 and #2. Although Petitioner met her burden of proof that Student had been denied a FAPE with respect to Issue #3, DCPS has already issued an appropriate authorization for services to compensate Student for DCPS' failure to provide Student with a dedicated aide.

Parties have already stipulated, and DCPS agrees that Student currently requires full-time specialized instruction outside of general education, without a dedicated aide.

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There is no relief that the Hearing Officer can grant on the totality of the issues in this complaint.

ORDER

The complaint is dismissed with prejudice.

IT IS SO ORDERED.

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 U.S.C. §1415(i).

Date: April 20, 2012

/s/ Virginia A. Dietrich
Hearing Officer